OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 14 March 2006 1(1)

**Joined Cases C?439/04 and C?440/04**

**Axel Kittel**

**v**

**État Belge**

**and**

**État Belge**

**v**

**Recolta Recycling SPRL**

(References for a preliminary ruling from the Cour de cassation (Belgium))

(Value added tax – Deduction of input tax – 'Carousel' fraud – Abuse of rights – Transactions effected with the sole aim of obtaining an unlawful tax advantage – Loss of the right to deduct)

## I – **Introduction**

1. The Cour de cassation (Court of Cassation) (Belgium) asks the Court of Justice about the implications for the common system of value added tax ('VAT') of national legislation which provides that contracts which have an unlawful basis, and therefore those devised to deceive the State in the administration and levy of that tax, are incurably void.

2. It asks specifically whether, in a 'carousel' fraud, that effect on the validity of a contract of sale precludes the deduction of input VAT, in two situations, according to whether the buyer acts in good faith (Case C?440/04) or participates in the scheme (Case C?439/04). (2)

3. The judgment of 12 January 2006 in *Optigen and Others* (3) provided an answer in the first situation, allowing the taxable person to deduct the VAT if he is unaware that the transaction is part of a broader stratagem to defraud the Treasury of funds.

4. In order to clarify the matter in the second situation, in which the taxable person actively participates in the scheme, the recent judgment of 21 February 2006 in *Halifax and Others* (4) offers suitable criteria for interpretation.

II – **Legal framework**

A – *Community law concerning VAT*

5. Article 2 of the First Directive provides: (5)

‘The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.

The common system of value added tax shall be applied up to and including the retail trade stage.’

6. In keeping with this legislation, the Sixth Directive (6) refers to two categories of taxable transaction: ‘supply of goods’ and ‘supply of services’, defining the former as the transfer of the right to dispose of tangible property as owner (Article 5(1)).

7. Those transactions are subject to value added tax if effected for consideration within the territory of the country by persons who independently carry out activities as producers or traders and persons supplying services or exercising liberal or similar professions (Articles 2(1) and 4(1) and (2)).

8. Article 17 provides that the right to deduct arises at the time when VAT becomes chargeable and lays down the conditions for deduction.

9. In the provisions governing exemptions (Articles 13 to 16), the Sixth Directive refers to the need to prevent ‘any possible evasion, avoidance or abuse’, an aim which justifies authorising a Member State not to apply it (Article 27(1)).

B – *Belgian law*

10. Under the Belgian Civil Code, contracts are void if they have no legal basis or have a false or unlawful basis (Article 1131); the latter group includes those which are contrary to law, morality or public policy (Article 1133).

11. On the basis of those principles, the Cour de cassation making the reference (7) has held a contract designed to evade VAT incurably void and found it sufficient that one of the parties contract for unlawful purposes, even if the other party is unaware of those purposes.

12. As a corollary, the Cour de cassation maintains that a transfer of ownership effected for that purpose is void, and that it is not necessary to classify it as a ‘supply of goods’ within the meaning of Article 10(1) of the VAT Code (8) (transposing Article 5(1) of the Sixth Directive), so that the buyer does not become entitled to deduct VAT, pursuant to Article 45(1) of the Code (transposing Article 17(2) of the Directive), even if he is unaware of the seller’s unlawful motive.

III – **The facts in the main actions**

A – *Case C?439/04*

13. Computime Belgium (‘Computime’), a company in liquidation represented by Mr Kittel,

traded wholesale in computer components, which it acquired in Belgium and exported to other States in the European Union, particularly Luxembourg.

14. The addressee in Luxembourg forwarded the parts to a third party also established in the Grand Duchy, who in turn sent them back to the neighbouring country, dispatching them to Computime's supplier. (9)

15. That supplier never paid the VAT invoiced to Computime, but systematically deducted the amount from the tax payable by him.

16. The Cour de cassation is of the opinion that Computime was aware of the scheme.

B – *Case C?440/04*

17. Mr Aillaud transferred 16 luxury cars, which he had bought from Auto Mail, to Recolta Recycling ('Recolta'), charging the corresponding VAT.

18. Recolta immediately transferred them to Auto Mail, for distribution in other Member States, a transaction which at the time was exempt from VAT under the former Article 43 of the VAT Code.

19. In fact, the vehicles never left Belgium; they were put into various chains specialising in evading tax duties. Mr Aillaud and Auto Mail therefore collaborated so that the VAT invoiced should not be paid.

20. The criminal proceedings initiated in respect of these events have been stayed in respect of the manager of Recolta.

IV – **The questions referred for a preliminary ruling**

21. The authorities refused to allow Computime and Recolta to deduct the input VAT; they both appealed against the decision, with different results, since the Tribunal de première instance (Court of First Instance), Verviers, by judgment of 28 July 1999, dismissed Computime's claim, whereas, by judgment of 1 October 1999, it allowed Recolta's claim; those decisions were upheld by the Cour d'appel (Court of Appeal), Liège, on 29 May 2002 and 9 November 2001 respectively.

22. Appeals have been brought in both cases; the Cour de cassation has stayed the proceedings and referred the following questions to the Court of Justice pursuant to Article 234 EC:

'(1) Where the recipient of a supply of goods is a taxable person who has entered into a contract in good faith without knowledge of a fraud committed by the seller, does the principle of fiscal neutrality in respect of value added tax mean that the fact that the contract of sale is void, by reason of a rule of domestic civil law, which renders the contract incurably void as contrary to public policy on the ground of illegal basis of the contract attributable to the seller, cannot cause that taxable person to lose his right to deduct that tax?

(2) Is the answer different where the contract is incurably void for fraudulent evasion of VAT itself?

(3) Is the answer different where the unlawful basis of the contract of sale which renders it incurably void under domestic law is a fraudulent evasion of value added tax known to both parties to the contract?'

23. The first two questions are common to the present cases, whereas the third is raised in respect of Case C?439/04 *Kittel*.

## V – **Procedure before the Court of Justice**

24. By order of 28 January 2005, the President of the Court of Justice joined Case C?439/04 and Case?440/04, since they concern the same subject-matter.

25. Written observations have been submitted, within the time-limit prescribed for that purpose by Article 23 of the Statute of the Court of Justice, by Mr Kittel, Recolta, the Commission and the Belgian and Italian Governments.

26. All the parties concerned, with the exception of the Italian Government, presented oral argument at the hearing held on 9 February 2006.

## VI – **The operation of a carousel fraud**

27. It appears that intra?Community trade is fertile ground for VAT evasion, which may work in various ways, but always in a ‘chain’ formation.

28. In its simplest form, it works as follows: (10)

– A (‘conduit company’) makes an exempt supply to B (‘carousel trader’ or ‘missing trader’), from Member State X to Member State Y;

– B, which has acquired the goods without paying VAT, transfers them, within Member State Y, to C (‘broker’), from whom it collects VAT, disappearing shortly afterwards without paying it to the Treasury; (11)

– C deducts the VAT on its purchases from B and distributes the goods on the market in country Y, collecting VAT.

29. The loss to the public purse equals the VAT paid by C to B, who does not pay it in.

30. Sometimes, one or more D companies (‘intermediary companies’ or ‘buffers’) are used to conceal the relationship between B and C.

31. The ‘chain’ becomes a ‘carousel’ when the broker C, instead of confining its activities to the territory of Y, makes an exempt supply to a company established in the State from which the goods originated, X, which might even be the conduit company, A. In that State, the pattern may be repeated indefinitely. The deception comes to light when C claims the refund. (12)

32. The ruse is best illustrated by this diagram:

33. In Case C?439/04, there was no intermediary, D. Computime – apparently knowingly – played the part of the broker, C, while its Belgian supplier took the role of the carousel trader, B, and the Luxembourg companies were the conduit companies, A.

34. In the other reference (C?440/04), the scheme was implemented entirely in Belgium, but the unlawful advantage was obtained by setting up an intra-Community transaction which was never meant to be carried out. The operation was made up of two circuits. In one, the simpler of the two, Auto Mail (carousel operator B) failed to pay in the VAT collected on the sale of the cars to Mr Aillaud (broker C). The vehicles had been transferred, in a VAT?exempt transaction, by Recolta (conduit company A), which was unaware of the subterfuge, to Auto Mail, with the

particular circumstance that Recolta had bought them from Mr Aillaud, paying VAT on the purchase. The other route was complicated by the presence of third parties as brokers, C, relegating Mr Aillaud to the status of intermediary, D, but in a different position from in the diagram above, as the person liable to pay VAT to the conduit company, A.

35. In reality, the methods used are as fanciful and complicated as the imaginations of the people who think them up. I therefore agree with Advocate General Poiares Maduro who, in point 8 of his Opinion in *Optigen and Others*, finds that in every case the bottom line is that an amount received in respect of VAT is not declared.

## VII – **Analysis of the questions referred for a preliminary ruling**

36. The Belgian Cour de cassation wishes to know whether taxable persons who do not operate the stratagem, (13) even though they facilitate it, (14) either on purpose or inadvertently, are entitled to deduct VAT.

### A – *The first two questions referred for a preliminary ruling (taxable persons acting in good faith)*

37. As I mentioned in the introduction to this Opinion, the solution to this dilemma is provided in the judgment in *Optigen and Others* which, in that situation, left the right to deduct intact.

38. There is little or nothing to add at this point, not only because that judgment is recent but also, fundamentally, because it is correct. Referring to the objectivity of the terms of the Sixth Directive (paragraphs 43 to 45) and to the general organisation of VAT, which is governed by the principle of neutrality and precludes any distinction as between lawful and unlawful transactions (paragraph 49), the Court of Justice held that transactions unconnected with the fraud are taxable transactions, inasmuch as they are effected by a taxable person, who does not lose his right to deduct it if, without his knowledge, those transactions form part of a chain of unlawful trade (paragraphs 51 to 54).

39. It may be inferred from this precedent that the common system of VAT does not permit that a person who, in good faith, (15) buys goods without knowledge of the scheme operated by the seller should be denied that advantage on the ground that, under the Belgian Civil Code, the agreement is incurably void.

### B – *The third question (taxable persons aware of the fraud)*

40. The solution is not so clear-cut where the buyer is aware of the ruse. In this situation, there are two possibilities: (1) he knows about it but does not participate in it or derive any benefit from it, or (2) he participates in the fraud, and profits unlawfully.

#### 1. The first possibility

41. Here the reply should not differ from the reply in respect of a taxable person who is unaware of the deceit.

42. The arguments put forward in the judgment in *Optigen and Others* are very pertinent here: an activity does not become financially unlawful because the person exercising it knows that the businessman with whom he is trading has an unlawful purpose, since that transaction, subject to VAT, gives rise to the subsequent right to deduct.

43. The neutrality which governs this tax precludes the exclusion from the scope of its rules of business transactions which are part of its subject-matter. The judgment in *Optigen and Others* reiterated that the right to deduct is exercised regardless of whether the VAT on other previous or

subsequent transactions has been paid or not (paragraph 54).

44. The conduct of the ‘disloyal’ taxpayer, who does not inform the Treasury of the stratagem, has various consequences (16) but it never causes the setting aside of a fundamental rule of the VAT scheme, which is that at each stage of the production or distribution process the tax is levied and the VAT paid at the previous stages is deducted. (17)

2. The second possibility

a) An appropriate perspective for the analysis

45. If everyone participates, the scheme in itself constitutes a fraud, since it is designed to evade tax.

46. In a situation of this kind, the Member States must take action and, if necessary, adopt special derogatory measures pursuant to Article 27(1) of the Sixth Directive, or, under Article 21(3), (18) hold them jointly and severally liable for payment of the tax, in accordance with the principles of proportionality and legal certainty. (19)

47. In any event, these measures are necessary but inadequate since, as they would be adopted in different States, they might differ and undermine the uniformity of the common system of VAT.

48. Furthermore, if a Member State fails to take action, it would be contrary to the most basic logic to tolerate the deceitful conduct and leave it free of legal penalty. (20)

49. It must therefore be established whether there is a general rule of Community law which requires a uniform reaction to situations like those in this case, where the protagonists are aware that they are unlawful.

50. Networks in which one of the participants does not pay to the public purse the VAT collected and another deducts it involve an abuse of rights, since they employ a legal rule (Article 17 of the Sixth Directive) to acquire unlawfully an advantage which is contrary to the aims of the Directive: an operation is carried out without adhering to normal trade conditions, with the aim of making an unlawful profit.

51. The crux of the matter is therefore to clarify whether the prohibition against abuse of rights also applies to VAT.

b) Abuse of rights and the common system of VAT

52. This matter was examined, specifically, in the judgment of 21 February 2006 in *Halifax and Others*; in the Opinion in that case, Advocate General Poiares Maduro examines (point 60 et seq.) various judgments of the Court of Justice, (21) and infers the rule that ‘rights conferred under Community law may not be relied on for fraudulent or abusive ends’. (22)

53. I agree with my colleague that there is nothing to prevent that maxim applying to the VAT sector. What is more, preventing tax evasion is an objective recognised and encouraged by the Sixth Directive in the articles devoted to exemptions, as was pointed out in the judgment in *Gemeente Leusden and Holin Groep* (23) and later reiterated in the judgment in *Halifax and Others* . (24) Taxable persons must not be allowed to rely on the Community VAT provisions in order to obtain an advantage which is contrary to their purposes.

54. The difficulty lies not in pointing out an abuse of rights but in establishing the criteria

according to which it must be defined. Not for nothing, in this matter, which is governed by the principle of legality, do legal certainty and one of its manifestations, the principle of legitimate expectations, play a crucial role in order that those concerned may know beforehand the precise extent of their obligations. (25) On the other hand, they are also entitled to structure their business so as to limit their tax liability, (26) making a choice, for financial reasons, between exempt transactions and taxable transactions so as to reduce the burden; (27) therefore, a taxpayer cannot be censured for taking advantage of a provision or a lacuna in the legislation in order to pay less tax. (28)

55. The above observations provide the tools for pinpointing the meaning of abuse of rights in relation to VAT. First of all, it is essential that the taxable person exercise his right to structure his business in compliance with the advantages of the VAT legal regime. In other words, he must respect the legislature's intention, which he does not do if, while ostensibly complying with conditions of the legislation, he seeks and obtains an outcome contrary to its provisions. (29)

56. The second element relates to the purpose of the operation, which is none other than to create the right claimed, (30) and obtain an undeserved profit. (31) It appears to be essential that the person claiming the discount be both aware of the fraud and in agreement with the other participants, so that the contract, having no independent financial content, is simply a smokescreen for the profit.

57. It is for the national court to establish the existence of those elements in a specific case, in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined, (32) In that investigation, the legal, commercial and personal links of the operators involved must be taken into account; (33) two factors are especially pertinent: one is the unlawful profit of the person claiming the right to deduct; the other is his position in the stratagem, because the closer he is to the false transaction, the greater the suspicion that he has participated in the fraud.

c) The right to deduct in a carousel fraud

58. Deduction lies at the heart of the common system of VAT; it releases the trader from the burden of the levy, which he receives and pays in the course of his activity, by charging it to the consumer. It observes the principle of neutrality, since it enables the intermediate links to deduct from their own taxable amount the sums paid by each to his own supplier in respect of VAT and thus pass on to the tax authorities the part of the VAT representing the difference between their sale and purchase prices. (34)

59. These digressions support the conclusion that the aforementioned right to deduct arises at the time when VAT is paid on the transfer of the goods and services used for the purposes of the taxable transactions (Article 17(1) and (2) of the Sixth Directive). Where, on the other hand, they are connected with operations which are not subject to VAT or, if they are, are exempt, there is no levy and no reason for a discount, which is warranted only when there is a tax liability to which it applies. If there is no tax liability, because a stratagem has been created for the sole purpose of creating the right artificially, there is no need to compensate for a tax which, in fact, has not been paid. These considerations explain why the Court of Justice recognises the possibility that a right, even if it has arisen, may not be acquired, since, apart from it being subject to adjustments which may be made in accordance with the conditions laid down in Article 20 of the Sixth Directive, it is necessary that there be no fraud or abuse. (35)

60. Thus, given the pivotal role attributed to that right, to deny it to a taxable person who is part of a chain in which, without his cooperation and without his consent, another of the persons concerned does not pay in the tax collected, would break the chain and remove the objectivity of

the tax, thereby thwarting the objective professed since the First Directive of applying to trade a general tax on consumption. In those circumstances, there are no artifices contrived in order to evade payment, but ordinary transactions and, consequently, economic activities within the meaning of the Sixth Directive, into which fraudulent conduct is introduced. For this reason, where the taxable person is unaware that he is immersed in a broader scheme, intended to avoid the tax liability, or where he is aware of it, but keeps out of the unlawful agreement, his right to deduct is unaffected. As we have seen, that was the approach taken by the Court of Justice in the judgment in *Optigen*, which I am following in this Opinion.

61. At the other extreme, the same distortion would mean that the right to deduct would be exercised by a person who knowingly participates in carousel schemes, which are fictitious transactions designed to reduce the tax liability without good reason. I have already pointed out that, on occasions, the stratagem is arranged simply by moving invoices around, with no actual transfer of goods. However, although their financial significance is clear, from a legal point of view they are without substance. The Belgian Government rightly asserts that stratagems of this kind do not have the characteristics of the taxable transaction defined in Article 5 of the Sixth Directive, because they are not part of the trader's commercial activities.

62. In short, the First and Sixth VAT Directives not only authorise, but demand that the holder lose this right if he knowingly participates in fraudulent chains of this kind, for the assessment of which the criteria set out above must be followed. On these lines, the judgment in *Fini H* (36) held that it is a matter for the national court to refuse to allow the right to deduct where it is established that that right is being relied on for unlawful ends (paragraph 34).

## VIII – **Conclusion**

63. On those grounds, I suggest that the Court of Justice give the following reply to the questions raised by the Belgian Cour de cassation:

(1) It is contrary to First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, and to Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, to deny a taxable person who buys goods without knowledge of the fraud perpetrated by the seller, the right to deduct VAT, on the ground that under domestic civil law that contract is incurably void.

(2) The answer is the same where the taxable person is aware of the fraud, but neither participates in it nor derives a financial advantage from it.

(3) If he knowingly participates in an operation of that kind, planned for the sole purpose of reducing the tax burden, thus committing an abuse of rights, the aforementioned common system requires that he lose the right to deduct.

1 – Original language: Spanish.

2 – The Belgian Cour de cassation has made two further orders for reference (Case C?42/05 *Ring Occasions and Fortis Banque* and Case C?378/05 *Samotor*) on the same lines as those being considered here.

3 – Joined cases C?354/03, C?355/03 and C?484/03 [2006] ECR I?483.

4 – Joined cases C?255/02, C?419/02 and C?223/02 [2006] ECR I?1609.

5 – First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of

Member States concerning turnover taxes OJ, English Special Edition 1967 (I), p. 14).

6 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

7 – Judgment of 12 October 2000 in Case No C.99.0136.F (Bull., I, No 543).

8 – Code de la taxe sur la valeur ajoutée, approved by the Law of 3 July 1969 (*Moniteur belge,* 17 July 1969) and amended by the Law of 28 December 1992 (*Moniteur belge*, 31 December 1992).

9 – The inspectors found that, within a short period of time (from 10 January to 30 June 1997), Computime traded repeatedly with the same packages of Pentium Intel CPU microprocessors. Of 3290 transactions, 736 were found to have been effected in boxes transferred again and again, some of them as many as six times.

10– Report from the Commission to the Council and the European Parliament on the use of administrative cooperation arrangements in the fight against VAT fraud, Brussels, 16 April 2004, COM/2004/0260 final, pp. 6 and 7.

11 – This fact suggests that B be given the nickname ‘eel’, because it is so slippery.

12 – In the so-called ‘documentary carousel fraud’, there are not even any goods; instead invoices are simply passed around.

13 – The loss to the Treasury is personified by the carousel trader.

14 – As conduit company, broker or merely an intermediary.

15 – This point, which is subjective, must be ascertained according to the rules of evidence of each national legal code, subject to observance of Community provisions (see point 57 of this Opinion).

16 – For example, he may be made liable for the payment which has been evaded (see point 46 of this Opinion).

17 – In point 58 et seq. of this Opinion, I analyse the crucial role played by this right in the VAT structure.

18 – Council Directive 2000/65/EC of 17 October 2000 amending Directive 77/388/EEC as regards the determination of the person liable for payment of value added tax (OJ 2000 L 269, p. 44) revised Article 21, adding paragraph 3.

19 – In his Opinion delivered on 7 December 2005 in Case C?384/04 *Federation of Technological Industries* [2006] ECR I-4191, Advocate General Poiares Maduro suggests that the Court of Justice declare that, in light of Article 21(3) and of those principles, Member States may hold a person jointly and severally liable for payment of VAT when, at the time he effected a transaction in a carousel, he knew or ought to have known that the tax would go unpaid (point 39(1), second subparagraph)

20 – Advocate General Poiares Maduro warned of this risk in point 76 of his Opinion delivered on 7 April 2005 in *Halifax and Others*.

21 – Community case-law has considered abuse of rights in the following sectors: (a) fundamental

freedoms (judgments in Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 13; Case 115/78 *Knoors* [1979] ECR 399, paragraph 25; and Case C?212/97 *Centros* [1999] ECR I?1459, paragraph 24); (b) social security (judgment in Case C?206/94 *Palletta* [1996] ECR I?2357, paragraph 24); (c) common agricultural policy (judgments in Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21; and Case C?8/92 *General Milk Products* [1993] ECR I?779, paragraph 21); (d) company law (judgments in Case C?367/96 *Kefalas and Others* [1998] ECR I?2843, paragraphs 20 and 28; and Case C?373/97 *Diamantis* [2000] ECR I?1705, paragraph 33).

22 – These are the words of Advocate General La Pergola in his Opinion in *Centros*, point 20.

23 – Joined Cases C?487/01 and C?7/02 [2004] ECR I?5337, paragraph 76.

24 – Paragraph 71.

25– The judgment in Case C?17/01 *Sudholz* [2004] ECR I?4243, referring to a previous judgment, stated this in paragraph 34.

26 – For example, in the Opinion in Case C?23/98 *Heerma* [2000] ECR I?419, to which the Commission referred in its written observations, Advocate General Cosmas stressed that any natural person has the right to set up partnerships and there is nothing to prevent those natural persons or partnerships from supplying goods or services to the associated persons and simultaneously being classified as taxable persons with respect to VAT (point 28).

27 – Judgments in Case C?4/94 *BLP Group* [1995] ECR I?983, paragraph 26; and Case C?108/99 *Cantor Fitzgerald International* [2001] ECR I?7257, paragraph 33. Advocate General Poiares Maduro, in his Opinion in *Halifax and Others*, speaks eloquently on this point, saying that there is no legal obligation to run a business in such a way as to maximise tax revenue for the State.

28 – This was stated in the judgment in *Gemeente Leusden and Holin Groep*, paragraph 79.

29 – Advocate General Poiares Maduro says it is a question of comparing the purpose of the rules with the results achieved by the activity; there is no abuse if those results are the consequence of a choice between lawful alternatives (opinion in *Halifax and Others*, point 88).

30 – If another explanation is given, there is no abuse of rights. In such circumstances, to interpret a legal provision as not conferring such an advantage on the basis of an unwritten general principle would grant an excessively broad discretion to tax authorities in deciding which of the purposes of a given transaction ought to be considered predominant (opinion in *Halifax and Others* , point 89), to the detriment of unrelinquishable legal certainty.

31 – These two parameters, applied in Case C?110/99 *Emsland-Stärke* [2000] ECR I?11569, which allowed an exporter to be deprived of his right to a refund even though the formal requirements had been met (paragraphs 52 and 53), have been taken into account in *Halifax and Others* (paragraphs 74 and 75).

32 – *Emsland-Stärke*, paragraph 54; also Case C?515/03 *Eichsfelder Schlachbetrieb* [2005] ECR I?7355, paragraph 40; and *Halifax and Others*, paragraph 76.

33 – *Emsland-Stärke*, paragraph 58, and *Halifax and Others*, paragraph 81.

34 – This was the line taken in Case C?317/94 *Elida Gibbs* [1996] ECR I?5339, paragraph 33; Case C?427/98 *Commission* v *Germany* [2002] ECR I?8315, paragraph 42; and Case C?152/02 *Terra Baubedarf-Handel* [2004] ECR I?5583, paragraph 36.

35 – Case C?400/98 *Breitsohl* [2000] ECR I-4321, paragraph 41, and Case C?396/98 *Schlosstraße* [2000] ECR I?4279, paragraph 42, took this approach, as did the aforementioned judgment in *Halifax and Others*, paragraph 84.

36 – Case C?32/03 *Fini H* [2005] ECR I-1599.