

Case C-384/04

Commissioners of Customs & Excise and Attorney General

v

Federation of Technological Industries and Others

(Reference for a preliminary ruling from the Court of Appeal

(England and Wales) (Civil Division))

Analyste:GTiLien vers les indicateurs de l'arrêt C-0384/2004(Sixth VAT Directive – Articles 21(3) and 22(8) – National measures to combat fraud – Joint and several liability for the payment of VAT – Provision of security for VAT payable by another trader)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Persons liable for the tax*

(Council Directive 77/388, Art. 21(3))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Obligations of persons liable for the tax*

(Council Directive 77/388, Arts 21(3) and 22(8))

1. Article 21(3) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directives 2000/65 and 2001/115, permits Member States to enact measures under which a person is to be jointly and severally liable to pay a sum in respect of value added tax payable by another person made liable by one of the provisions of Article 21(1) and (2).

R?f?rence exacte: C-384/04 Arr_point 18 : {Cette disposition doit ?tre // ... // redevable, d'acquitter cette taxe. }

That provision is to be interpreted as allowing a Member State to enact legislation which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that tax.

R?f?rence exacte: : {Toutefois, une telle r?glementation // ... // juridique et de proportionnalit? }

Such legislation must, however, comply with the general principles of law which form part of the Community legal order and which include, in particular, the principles of legal certainty and proportionality. In particular, while Article 21(3) of the Sixth Directive allows reliance to be placed on presumptions that the person concerned knew or should have known that the tax would go unpaid, such presumptions may not be formulated in such a way as to make it practically impossible or excessively difficult for that person to rebut them with evidence to the contrary.

(see paras 28, 32, 35, operative part 1)

2. Article 22(8) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directives 2000/65 and 2001/115, is to be interpreted as not allowing a Member State to enact either legislation which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that tax, or legislation which provides that a taxable person may be required to provide security for the payment of that tax which is or could become payable by the taxable person to whom he supplies those goods or services or by whom they are supplied to him.

By contrast, that provision does not preclude a national measure which imposes on any person who is, pursuant to a national measure adopted on the basis of Article 21(3) of the Sixth Directive, jointly and severally liable for payment of the tax, a requirement to provide security for the payment of that tax which is due.

(see paras 47-48, operative part 2)

JUDGMENT OF THE COURT (Third Chamber)

11 May 2006 (*)

(Sixth VAT Directive – Articles 21(3) and 22(8) – National measures to combat fraud – Joint and several liability for the payment of VAT – Provision of security for VAT payable by another trader)

In Case C-384/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 30 July 2004, received at the Court on 4 September 2004, in the proceedings

Commissioners of Customs & Excise,

Attorney General

v

Federation of Technological Industries and Others,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissechet, S. von Bahr (Rapporteur), U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 5 October 2005,

after considering the observations submitted on behalf of:

- the Federation of Technological Industries and Others, by A. Young, Barrister, and D. Waelbroeck, avocat,
- the United Kingdom Government, by C. Jackson, acting as Agent, and by J. Peacock QC and T. Ward, Barrister,
- the German Government, by C. Schulze-Bahr, acting as Agent,
- Ireland, by D.J. O'Hagan, acting as Agent, and by G. Clohessy SC and B. Conway, Barrister-at-Law,
- the Cypriot Government, by N. Charalampidou, acting as Agent,
- the Netherlands Government, by H.G. Sevenster and C.A.H.M. ten Dam, acting as Agents,
- the Portuguese Government, by L.I. Fernandes, acting as Agent,
- the Commission of the European Communities, by R. Lyal, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 21(3) and 22(8) of 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), as amended by Council Directives 2000/65/EC of 17 October 2000 (OJ 2000 L 269, p. 44) and 2001/115/EC of 20 December 2001 (OJ 2002 L 15, p. 24), ('the Sixth Directive').

2 The reference has been made in the course of an application for judicial review in proceedings between, on the one hand, 53 traders in mobile telephones and computer processing units and their trade body, the Federation of Technological Industries ('the Federation'), and, on the other hand, the Commissioners of Customs & Excise and the Attorney General ('the Commissioners') regarding the compatibility with Community law of the provisions of sections 17 and 18 of the Finance Act 2003, which were enacted to deal with the fraudulent abuse of the system of value added tax ('VAT').

Legal framework

Community legislation

3 Article 21 of the Sixth Directive provides:

1. Under the internal system, the following shall be liable to pay value added tax:

(a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b) and (c).

Where the taxable supply of goods or of services is effected by a taxable person who is not established within the territory of the country, Member States may, under conditions determined by them, lay down that the person liable to pay tax is the person for whom the taxable supply of goods or of services is carried out;

(b) taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for value added tax purposes within the territory of the country to whom services covered by Article 28b(C), (D), (E) and (F) are supplied, if the services are carried out by a taxable person not established within the territory of the country;

(c) the person to whom the supply of goods is made when the following conditions are met:

– the taxable operation is a supply of goods made under the conditions laid down in Article 28c(E)(3),

– the person to whom the supply of goods is made is another taxable person or a non-taxable legal person identified for the purposes of value added tax within the territory of the country,

– the invoice issued by the taxable person not established within the territory of the country conforms to Article 22(3).

However, Member States may provide a derogation from this obligation, where the taxable person who is not established within the territory of the country has appointed a tax representative in that country;

(d) any person who mentions the value added tax on an invoice or other document serving as invoice;

(e) any person effecting a taxable intra-Community acquisition of goods.

2. By way of derogation from the provisions of paragraph 1:

(a) where the person liable to pay tax in accordance with the provisions of paragraph 1 is a taxable person who is not established within the territory of the country, Member States may allow him to appoint a tax representative as the person liable to pay tax. This option shall be subject to conditions and procedures laid down by each Member State;

(b) where the taxable transaction is effected by a taxable person who is not established within the territory of the country and no legal instrument exists, with the country in which that taxable person is established or has his seat, relating to mutual assistance similar in scope to that laid down by Directives 76/308/EEC and 77/799/EEC and by Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT), Member States may take steps to provide that the person liable for payment of the tax shall be a tax representative appointed by the non-established taxable person.

3. In the situations referred to in paragraphs 1 and 2, Member States may provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax.
4. On importation, value added tax shall be payable by the person or persons designated or accepted as being liable by the Member State into which the goods are imported.'
- 4 In the words of Article 22(7) and (8) of the Sixth Directive:
- '7. Member States shall take the measures necessary to ensure that those persons who, in accordance with Article 21(1) and (2), are considered to be liable to pay the tax instead of a taxable person not established within the territory of the country comply with the obligations relating to declaration and payment set out in this Article; they shall also take the measures necessary to ensure that those persons who, in accordance with Article 21(3), are held to be jointly and severally liable for payment of the tax comply with the obligations relating to payment set out in this Article.
8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

...'

National legislation

5 Paragraph 4 of Schedule 11 to the Value Added Tax Act 1994 ('the VAT Act 1994'), as amended by section 17 of the Finance Act 2003, reads as follows:

- '(1) The Commissioners may, as a condition of allowing or repaying input tax to any person, require the production of such evidence relating to VAT as they may specify.
- (1A) If they think it necessary for the protection of the revenue, the Commissioners may require, as a condition of making any VAT credit, the giving of such security for the amount of the payment as appears to them appropriate.
- (2) If they think it necessary for the protection of the revenue, the Commissioners may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due from –
- (a) the taxable person, or
- (b) any person by or to whom relevant goods or services are supplied.
- (3) In subparagraph (2) above "relevant goods or services" means goods or services supplied by or to the taxable person.
- (4) Security under subparagraph (2) above shall be of such amount, and shall be given in such manner, as the Commissioners may determine.
- (5) The powers conferred on the Commissioners by subparagraph (2) above are without

prejudice to their powers under section 48(7).'

6 Section 77A of the VAT Act 1994, which was inserted by section 18 of the Finance Act 2003, provides:

'Joint and several liability of traders in supply chain where tax unpaid

(1) This section applies to goods of any of the following descriptions –

- (a) telephones and any other equipment, including parts and accessories, made or adapted for use in connection with telephones or telecommunication;
- (b) computers and any other equipment, including parts, accessories and software, made or adapted for use in connection with computers or computer systems.

(2) Where –

- (a) a taxable supply of goods to which this section applies has been made to a taxable person, and
- (b) at the time of the supply the person knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid,

the Commissioners may serve on him a notice specifying the amount of the VAT so payable that is unpaid, and stating the effect of the notice.

(3) The effect of a notice under this section is that –

- (a) the person served with the notice, and
 - (b) the person liable, apart from this section, for the amount specified in the notice,
- are jointly and severally liable to the Commissioners for that amount.

(4) For the purposes of subsection (2) above the amount of VAT that is payable in respect of a supply is the lesser of –

- (a) the amount chargeable on the supply, and
- (b) the amount shown as due on the supplier's return for the prescribed accounting period in question (if he has made one) together with any amount assessed as due from him for that period (subject to any appeal by him).

(5) The reference in subsection (4)(b) above to assessing an amount as due from a person includes a reference to the case where, because it is impracticable to do so, the amount is not notified to him.

(6) For the purposes of subsection (2) above, a person shall be presumed to have reasonable grounds for suspecting matters to be as mentioned in paragraph (b) of that subsection if the price payable by him for the goods in question –

- (a) was less than the lowest price that might reasonably be expected to be payable for them on the open market, or

- (b) was less than the price payable on any previous supply of those goods.
- (7) The presumption provided for by subsection (6) above is rebuttable on proof that the low price payable for the goods was due to circumstances unconnected with failure to pay VAT.
- (8) Subsection (6) above is without prejudice to any other way of establishing reasonable grounds for suspicion.
- (9) The Treasury may by order amend subsection (1) above; and any such order may make such incidental, supplemental, consequential or transitional provision as the Treasury think fit.
- (10) For the purposes of this section –
 - (a) “goods” includes services;
 - (b) an amount of VAT counts as unpaid only to the extent that it exceeds the amount of any refund due.’

The main proceedings and the questions referred for a preliminary ruling

7 Sections 17 and 18 of the Finance Act 2003 were enacted to combat ‘missing trader’ intra-Community fraud, including ‘carousel’ fraud, in the field of VAT.

8 The Federation lodged an application for judicial review of those provisions, claiming in particular that they are not authorised by Community law.

9 That application was first considered by the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court), and then, on appeal, by the Court of Appeal (England and Wales) (Civil Division).

10 The Court of Appeal observes that, according to the Commissioners, the type of fraud in question normally falls into one of the two categories mentioned in paragraph 7 above.

11 The first category is what the Commissioners term ‘acquisition fraud’. In essence, a business which is registered in the United Kingdom for VAT purposes – the ‘missing trader’ – imports goods from a European Union supplier and sells them on, generally, into the United Kingdom retail market either directly or through a wholesaler. The ‘missing trader’ then fails to pay the Commissioners the VAT due on its onward supply. This category may also cover the case of a trader purporting to represent an existing VAT-registered business, but which has no connection with the business in question (such a trader is often referred to as a trader using a ‘hijacked’ VAT number).

12 The second category is known as ‘carousel fraud’. This category takes its name from the way in which the same goods travel within the Union from one Member State to another and back again, without reaching an end-user. In its simplest form, such fraud requires three VAT-registered traders in two different Member States, although, generally, there will be at least six or seven in two or more Member States.

13 The first part of this fraud functions in the same way as that described in paragraph 11 above. The ‘missing trader’ then sells the goods at a loss onto a buffer business which subsequently claims the VAT paid back from the Commissioners. This buffer business in turn resells the goods to another buffer business at a profit and finally – possibly after further sales and purchases – the goods reach a business which sells them to a VAT-registered trader in another

Member State, sometimes even to the original supplier in the first Member State. This last sale is exempt with a right to deduct the input VAT, which the exporting business then attempts to recover from the Commissioners.

14 This type of fraud costs the United Kingdom's public revenue in excess of GBP 1 500 million per annum.

15 According to the order for reference, the Commissioners submit that the power to enact sections 17 and 18 of the Finance Act 2003 stems from Articles 21(3) and 22(8) respectively of the Sixth Directive.

16 The Federation submits that neither Article 21(3) nor Article 22(8) of the Sixth Directive gives Member States the power to adopt provisions such as the said sections 17 and 18.

17 It was on this basis that the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to request that the Court deliver a preliminary ruling on the following questions:

'(1) Does Article 21(3) of [Sixth Directive 77/388], as amended by [Directive 2000/65], permit Member States to provide that any person may be made jointly and severally liable for payment of tax with any person who is made so liable by Article 21(1) or 21(2), subject only to the general principles of Community law, namely that such a measure must be objectively justifiable, rational, proportionate and legally certain?

(2) Does Article 22(8) of [Sixth] Directive [77/388, as amended,] permit Member States to provide that any person may be made so liable or to provide that one person may be required to provide security for tax due from another subject only to the aforesaid general principles?

(3) If the answer to the first question is no, what limits, other than those imposed by the aforesaid general principles, are there on the power conferred by Article 21(3)?

(4) If the answer to the second question is no, what limits, other than those imposed by the aforesaid general principles, are there on the power conferred by Article 22(8)?

(5) Are Member States precluded by [Sixth] Directive [77/388], as amended, from providing for joint and several liability of taxpayers or from requiring one taxpayer to provide security for tax due from another in order to prevent abuse of the VAT system and protect revenues properly due under that system, if such measures comply with the aforesaid general principles?'

The first and third questions referred

18 By its first and third questions, which it is appropriate to consider together, the referring court is asking, in essence, whether Article 21(3) of the Sixth Directive is to be interpreted as allowing a Member State to enact legislation, such as that in issue in the main proceedings, which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that VAT.

Observations submitted to the Court

19 In reply to the first and third questions, the Federation submits that Article 21(3) of the Sixth Directive permits Member States to adopt legislation which provides that a person may be made jointly and severally liable for payment of VAT, with any person who is so liable, only in the

situations referred to in Article 21(1)(a), second subparagraph, Article 21(1)(c), Article 21(2)(a) or Article 21(2)(b). The imposition of such joint and several liability is subject to the general principles of Community law.

20 According to the Federation, those general principles prevent Member States from adopting measures implementing Article 21 of the Sixth Directive which impose on purchasers joint and several liability for the payment of VAT with other individuals or undertakings in the same supply chain on the basis of presumptions related to the price paid for goods or services.

21 The United Kingdom and German Governments, Ireland, the Cypriot and Portuguese Governments and the Commission of the European Communities submit that Article 21(3) of the Sixth Directive allows Member States to provide that any person may be made jointly and severally liable for payment of VAT with any person who is made liable for payment under paragraph 1 or 2 of that article, subject only to the general principles of Community law.

22 The Netherlands Government submits that a measure such as that provided for in section 18 of the Finance Act 2003 does not fall within the scope of the Sixth Directive and it is not, therefore, necessary for such a measure to be based thereon. The measure in question does not, it argues, concern the levying of VAT but rather its collection. The Court has established that there is no provision in the Sixth Directive relating to collection and that, generally, it is for Member States to specify the conditions under which VAT may be collected by the national exchequer after the event, whilst remaining within the limits imposed by Community law (see judgment in Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paragraph 43, and order in Case C-395/02 *Transport Service* [2004] ECR I-1991, paragraphs 27 to 29).

23 If, however, the Court should take the view that the measure in question in the main proceedings does come within the scope of the Sixth Directive, the Netherlands Government submits that the basis for that measure is to be found in Article 21(3) or Article 22(8) of the Sixth Directive.

Findings of the Court

24 It must at the outset be noted that, contrary to the Netherlands Government's submission, a national provision, such as that established by section 18 of the Finance Act 2003, which lays down the rules on the basis of which a taxable person may be made jointly and severally liable to pay a sum in respect of VAT due from another taxpayer, relates to the determination of the person who may be made liable for the payment of that VAT to the public exchequer, and not to its collection. It follows that that provision comes within the scope of Article 21 of the Sixth Directive.

25 Next, it must be pointed out that Article 21(3) of the Sixth Directive authorises Member States, in the situations referred to in Article 21(1) and (2), to provide that a person other than the person actually liable be made jointly and severally liable to pay the VAT.

26 Contrary to the Federation's submission, there is nothing in the wording of Article 21(3) of the Sixth Directive, nor in that of Article 21(1) and (2), to indicate that the application of paragraph 3 is limited to only some of the situations referred to in the two preceding paragraphs. On the contrary, it follows from the clear and unambiguous terms of Article 21(3) that that provision is applicable in all of the situations referred to in the two preceding paragraphs.

27 That being so, the Federation's argument that, before the amendment of Article 21 of the Sixth Directive by Directive 2000/65, the power to hold a third party jointly and severally liable for payment of VAT was more limited and that, in its submission, the new version was not intended to

extend that power cannot be accepted.

28 Article 21(3) of the Sixth Directive therefore permits, as a rule, Member States to enact measures under which a person is to be jointly and severally liable to pay a sum in respect of VAT payable by another person made liable by one of the provisions of Article 21(1) and (2).

29 However, when they exercise the powers conferred on them by Community directives, Member States must comply with the general principles of law which form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality (see, to that effect, Case C-396/98 *Schloßstraße* [2000] ECR I-4279, paragraph 44, and Case C-376/02 '*Goed Wonen*' [2005] ECR I-3445, paragraph 32).

30 With more particular regard to the principle of proportionality, it must be pointed out that, whilst it is legitimate for the measures adopted by the Member State, on the basis of Article 21(3) of the Sixth Directive, to seek to preserve the rights of the public exchequer as effectively as possible, such measures must not go further than is necessary for that purpose (see, to that effect, *Molenheide and Others*, paragraph 47).

31 In that regard, the national measures at issue in the main proceedings provide that a taxable person other than the person who is liable can be made jointly and severally liable to pay the VAT with the latter person if, at the time of the supply to him, the former knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or of any previous or subsequent supply of those goods, would go unpaid. A person is presumed to have reasonable grounds for suspecting that such is the case if the price payable by that person was less than the lowest price that might reasonably be expected to be payable for those goods on the market, or was less than the price payable on any previous supply of those goods. That presumption is rebuttable on proof that the low price payable for the goods was attributable to circumstances unconnected with failure to pay VAT.

32 While Article 21(3) of the Sixth Directive allows a Member State to make a person jointly and severally liable for the payment of VAT if, at the time of the supply, that person knew or had reasonable grounds to suspect that the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, and to rely on presumptions in that regard, it is none the less true that such presumptions may not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary. As the Advocate General observed in point 27 of his Opinion, those presumptions would, de facto, bring about a system of strict liability, going beyond what is necessary to preserve the public exchequer's rights.

33 Traders who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain which includes a transaction vitiated by VAT fraud must be able to rely on the legality of those transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person (see, to that effect, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-0000, paragraph 52).

34 It is for the national court to determine whether the national legislation at issue in the main proceedings complies with the general principles of Community law.

35 Therefore, the reply to the first and third questions must be that Article 21(3) of the Sixth Directive is to be interpreted as allowing a Member State to enact legislation, such as that in issue in the main proceedings, which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of

the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that VAT. Such legislation must, however, comply with the general principles of law which form part of the Community legal order and which include, in particular, the principles of legal certainty and proportionality.

The second and fourth questions

36 By its second and fourth questions, which it is appropriate to examine together, the national court is asking, in essence, whether Article 22(8) of the Sixth Directive is to be interpreted as allowing a Member State to enact legislation, such as that in issue in the main proceedings, which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that VAT and/or legislation which provides that a taxable person may be required to provide security for the payment of the VAT which is or could become payable by the taxable person to whom he supplies those goods or services or by whom they are supplied to him.

Observations submitted to the Court

37 In reply to the second and fourth questions referred, the Federation maintains that Article 22(8) of the Sixth Directive does not permit Member States to introduce measures imposing obligations on any person other than the taxable person as defined in accordance with Article 21 of that directive.

38 The United Kingdom Government submits that Article 22(8) of the Sixth Directive permits Member States to provide that any person may be made jointly and severally liable for payment of VAT with any other person who is made so liable under Article 21(1) or (2) of the Sixth Directive, or to provide that any one person may be required to provide security for the VAT due from another, on condition that the provisions in question are deemed necessary for the proper collection of VAT and for the prevention of evasion and are subject to the general principles of Community law.

39 Ireland and the Cypriot Government take the view that Article 22(8) of the Sixth Directive permits Member States to provide that any person may be required to provide security for the VAT due from another, subject to the abovementioned general principles.

40 The Portuguese Government takes the view that Article 22(8) of the Sixth Directive must be interpreted as allowing Member States to provide, within the limits established by that provision, that any person may be made liable for the payment of VAT or, in order to ensure the collection of VAT and to combat fraud and tax evasion, to impose other obligations on the person made liable for payment of that tax, on the person jointly and severally liable or on third parties, as long as, in both cases, those obligations are imposed in compliance with Community law and, in particular, with the general principles governing it.

41 The Commission submits that Article 22(8) of the Sixth Directive does not permit Member States to extend liability for payment of VAT to persons who are not so liable, or not jointly and severally liable, under Article 21 of that directive. Nor does Article 22(8) permit Member States to provide that one person may be required to provide security for the VAT payable by another. However, once joint and several liability has been established pursuant to a measure adopted on the basis of Article 21(3) of the Sixth Directive, Article 22(8), in conjunction with Article 22(7) of that directive, makes it possible to impose on any person made jointly and severally liable for payment

of VAT the obligation to provide security for the sums due, subject to the general principles of Community law.

Findings of the Court

42 It must, at the outset, be noted that in accordance with its title, as it appears in Article 28h of the Sixth Directive, Article 22 thereof deals only with the obligations of persons liable for payment of the tax and does not govern the determination of who they are, this being a matter covered by Article 21 of that directive.

43 Article 22(8) of the Sixth Directive permits Member States to impose on persons liable for VAT, and on persons declared jointly and severally liable to pay it, determined under Article 21 of that directive, obligations, other than those provided for in the preceding paragraphs of Article 22, such as that of providing security for the payment of the VAT due, which they deem necessary for the collection of that tax and for the prevention of evasion.

44 It follows, first, that the imposition of joint and several liability to pay VAT cannot be based on Article 22(8) of the Sixth Directive and, second, that that provision also does not permit Member States to require a person, who is neither liable for payment of VAT nor jointly and severally liable to pay it, under Article 21 of the Sixth Directive, to provide security for the payment of VAT due from a third party.

45 It must, however, be recalled that, as follows from the reply to the first and third questions, Member States may, within the limits imposed by the general principles of Community law, rely on Article 21(3) of the Sixth Directive to introduce joint and several liability for the payment of VAT.

46 Consequently, persons who are, pursuant to a national measure adopted on the basis of Article 21(3) of the Sixth Directive, declared jointly and severally liable for the payment of VAT can be required by the Member States, under Article 22(8) of that directive, to provide security for the payment of the VAT due.

47 It follows that the reply to the second and fourth questions must be that Article 22(8) of the Sixth Directive is to be interpreted as not allowing a Member State to enact either legislation, such as that in issue in the main proceedings, which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that VAT, or legislation which provides that a taxable person may be required to provide security for the payment of the VAT which is or could become payable by the taxable person to whom he supplies those goods or services or by whom they are supplied to him.

48 By contrast, that provision does not preclude a national measure which imposes on any person who is, pursuant to a national measure adopted on the basis of Article 21(3) of the Sixth Directive, jointly and severally liable for payment of VAT, a requirement to provide security for the payment of the VAT due.

The fifth question

49 In the light of the replies to the first four questions, it is unnecessary to reply to the fifth question.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action

pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 21(3) of 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, as amended by Council Directives 2000/65/EC of 17 October 2000 and 2001/115/EC of 20 December 2001, is to be interpreted as allowing a Member State to enact legislation, such as that in issue in the main proceedings, which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that tax. Such legislation must, however, comply with the general principles of law which form part of the Community legal order and which include, in particular, the principles of legal certainty and proportionality.

2. Article 22(8) of Sixth Directive 77/388, as amended by Directives 2000/65 and 2001/115, is to be interpreted as not allowing a Member State to enact either legislation, such as that in issue in the main proceedings, which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that tax, or legislation which provides that a taxable person may be required to provide security for the payment of that tax which is or could become payable by the taxable person to whom he supplies those goods or services or by whom they are supplied to him.

By contrast, that provision does not preclude a national measure which imposes on any person who is, pursuant to a national measure adopted on the basis of Article 21(3) of Sixth Directive 77/388, jointly and severally liable for payment of value added tax, a requirement to provide security for the payment of that tax which is due.

[Signatures]

* Language of the case: English.