

JUDGMENT OF THE COURT (Second Chamber)

26 January 2006\*

In Case C-533/03,

ACTION for annulment under Article 230 EC, brought on 19 December 2003,

**Commission of the European Communities**, represented by R. Lyal, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Council of the European Union**, represented by A.-M. Colaert and E. Karlsson, acting as Agents,

defendant,

\* Language of the case: English.

supported by:

**Ireland**, represented by D. O'Hagan, acting as Agent, and by A. Collins SC, with an address for service in Luxembourg,

**Portuguese Republic**, represented by L. Fernandes, acting as Agent,

**United Kingdom of Great Britain and Northern Ireland**, represented by R. Caudwell, acting as Agent, and by D. Wyatt QC, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: J. Kokott,  
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2005,

gives the following

### **Judgment**

- 1 By its application, the Commission of the European Communities is asking the Court, first, to declare that Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1), and Council Directive 2003/93/EC of 7 October 2003 amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 2003 L 264, p. 23; hereinafter collectively referred to as 'the contested measures') are void and, second, to maintain the effects of these measures until the entry into force of legislation adopted on the correct legal basis.
  
- 2 By order of the President of the Court of 8 June 2004, Ireland, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council of the European Union, which asks the Court to dismiss the application.

## Facts of the case and legal context

- 3 Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxation of insurance premiums (OJ 1977 L 336, p. 15) provides, in accordance with Article 1(1) thereof, for the exchange between the competent authorities of the Member States of any information that may enable them to effect a correct assessment of taxes on income and on capital. Under Articles 2 to 4 of that directive that information is exchanged on request, automatically or spontaneously, according to the circumstances. However, under Article 8 of the directive, there is no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes.
  
- 4 Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) (OJ 1992 L 24, p. 1), lays down procedures for the exchange of information between the tax authorities of the Member States on intra-Community transactions, in order to reduce the risk of fraud as a result of the abolition of fiscal controls at internal frontiers.
  
- 5 On 18 June 2001, the Commission submitted to the Council a proposal for a Regulation of the European Parliament and of the Council on administrative cooperation in the field of value added tax (OJ 2001 C 270 E, p. 87) and a proposal for a directive of the European Parliament and of the Council amending Council Directive 77/799 (OJ 2001 C 270 E, p. 96). Those proposals, which were intended to consolidate and strengthen the provisions on administrative cooperation in the field

of value added tax ('VAT') in that directive and in Regulation No 218/92, to exclude VAT from the scope of that directive and include in its scope the taxation of insurance premiums, were based on Article 95 EC.

- 6 On 6 February 2002, the European Parliament gave a favourable opinion at first reading on the proposal for a regulation, subject to a slight amendment (OJ 2002 C 284, p. 178).
  
- 7 The Council made amendments to the proposals and decided to alter their legal basis on the ground that they concerned tax matters and could therefore be adopted only on the basis of Articles 93 EC and 94 EC. The Parliament was therefore re-consulted. By a resolution of 2 September 2003, it confirmed its view that the correct legal basis for the adoption of those two acts was Article 95 EC.
  
- 8 On 7 October 2003, the Council adopted Regulation No 1798/2003 on the basis of Article 93 EC and Directive 2003/93 on the basis of Articles 93 EC and 94 EC.
  
- 9 Following the adoption of that regulation, the Commission had a declaration incorporated in the minutes of the meeting of the Council of that date stating that it 'notes the unanimous adoption by the Council of a text for a Regulation on administrative co-operation in the field of VAT based on Article 93 and for a Directive on mutual assistance in the field of direct and indirect taxation based on Articles 93 and 94 of the Treaty. It reaffirms its position, in line with its original proposal, that the legal basis should be Article 95 of the Treaty. The Commission recalls that the principal objective of this Regulation and this Directive is not the harmonisation of fiscal provisions, but to provide for the exchange of information between Member States'.

10 The first five recitals in the preamble to Regulation No 1798/2003 read as follows:

- (1) Tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of the conditions of competition. They therefore affect the operation of the internal market.
  
- (2) Combating value added tax (VAT) evasion calls for close cooperation between the administrative authorities in each Member State responsible for the application of the provisions in that field.
  
- (3) The tax harmonisation measures taken to complete the internal market should therefore include the establishment of a common system for the exchange of information between the Member States whereby the Member States' administrative authorities are to assist each other and cooperate with the Commission in order to ensure the proper application of VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods.
  
- (4) Electronic storage and transmission of certain data for VAT control purposes is indispensable for the proper functioning of the VAT system.
  
- (5) The conditions for the exchange of, and direct access of Member States to, electronically stored data in each Member State should be clearly defined. Operators should have access to certain of such data where required for the fulfilment of their obligations.'

11 Article 1 of Regulation No 1798/2003 provides:

‘1. This Regulation lays down the conditions under which the administrative authorities in the Member States responsible for the application of the laws on VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods are to cooperate with each other and with the Commission to ensure compliance with those laws.

To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help them to effect a correct assessment of VAT.

This Regulation also lays down rules and procedures for the exchange of certain information by electronic means, in particular as regards VAT on intra-Community transactions.

For the period provided for in Article 4 of Directive 2002/38/EC ..., it also lays down rules and procedures for the exchange by electronic means of value added tax information on services supplied electronically in accordance with the special scheme provided for in Article 26c of Directive 77/388/EEC, and also for any subsequent exchange of information and, as far as services covered by that special scheme are concerned, for the transfer of money between Member States’ competent authorities.

2. This Regulation shall not affect the application in the Member States of the rules on mutual assistance in criminal matters.’

12 Under Article 5 of the regulation:

‘1. At the request of the requesting authority, the requested authority shall communicate the information referred to in Article 1, including any information relating to a specific case or cases.

2. For the purpose of forwarding the information referred to in paragraph 1, the requested authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information.

3. The request referred to in paragraph 1 may contain a reasoned request for a specific administrative enquiry. If the Member State takes the view that no administrative enquiry is necessary, it shall immediately inform the requesting authority of the reasons thereof.

4. In order to obtain the information sought or to conduct the administrative enquiry requested, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own Member State.’

13 Article 11(1) and (2) of the regulation provides:

‘1. By agreement between the requesting authority and the requested authority and in accordance with the arrangements laid down by the latter, officials authorised by the requesting authority may, with a view to exchanging the information referred to in Article 1, be present in the offices where the administrative authorities of the



Member State in which the requested authority is established carry out their duties. Where the requested information is contained in documentation to which the officials of the requested authority have access, the officials of the requesting authority shall be given copies of the documentation containing the requested information.

2. By agreement between the requesting authority and the requested authority, and in accordance with the arrangements laid down by the latter, officials designated by the requesting authority may, with a view to exchanging the information referred to in Article 1, be present during the administrative enquiries. Administrative enquiries shall be carried out exclusively by the officials of the requested authority. The requesting authority's officials shall not exercise the powers of inspection conferred on officials of the requested authority. They may, however, have access to the same premises and documents as the latter, through their intermediary and for the sole purpose of the administrative enquiry being carried out.'

<sup>14</sup> Article 17 of Regulation No 1798/2003 provides:

'Without prejudice to the provisions of Chapters V and VI, the competent authority of each Member State shall, by automatic or structured automatic exchange, forward the information referred to in Article 1 to the competent authority of any other Member State concerned, in the following cases:

- (1) where taxation is deemed to take place in the Member State of destination and the effectiveness of the control system necessarily depends on the information provided by the Member State of origin;
- (2) where a Member State has grounds to believe that a breach of VAT legislation has been committed or is likely to have been committed in the other Member State;

(3) where there is a risk of tax loss in the other Member State.’

15 Article 22(1) of that regulation provides:

‘Each Member State shall maintain an electronic database in which it shall store and process the information that it collects in accordance with Article 22(6)(b) in the version given in Article 28h of Directive 77/388/EEC.

To enable that information to be used in the procedures provided for in this Regulation, the information shall be stored for at least five years from the end of the calendar year in which access to the information is to be granted.’

16 Article 23 of that regulation is worded as follows:

‘On the basis of the data stored in accordance with Article 22, the competent authority of a Member State shall have communicated to it automatically and without delay by any other Member State the following information, to which it may also have direct access:

(1) VAT identification numbers issued by the Member State receiving the information;

- (2) the total value of all intra-Community supplies of goods to persons holding a VAT identification number by all operators identified for the purposes of VAT in the Member State providing the information.

The values referred to in point 2 shall be expressed in the currency of the Member State providing the information and shall relate to calendar quarters.'

17 Under Article 24 of Regulation No 1798/2003:

'On the basis of the data stored in accordance with Article 22 and solely in order to prevent a breach of VAT legislation, the competent authority of a Member State shall, wherever it considers it necessary for the control of intra-Community acquisitions of goods, obtain directly and without delay, or have direct access to by electronic means, any of the following information:

- (1) the VAT identification numbers of the persons who effected the supplies referred to in point 2 of Article 23; and
- (2) the total value of such supplies from each such person to each person holding a VAT identification number referred to in point 1 of Article 23.

The values referred to in point 2 shall be expressed in the currency of the Member State providing the information and shall relate to calendar quarters.'

18 Article 27(1) to (3) of that regulation provides:

‘1. Each Member State shall maintain an electronic database containing a register of persons to whom VAT identification numbers have been issued in that Member State.

2. At any time the competent authority of a Member State may obtain directly or have communicated to it, from the data stored in accordance with Article 22, confirmation of the validity of the VAT identification number under which a person has effected or received an intra-Community supply of goods or services.

On specific request, the requested authority shall also communicate the date of issue and, where appropriate, the expiry date of the VAT identification number.

3. On request, the competent authority shall also provide without delay the name and address of the person to whom the number has been issued, provided that such information is not stored by the requesting authority with a view to possible use at some future time.’

19 Under Article 41(5) of that regulation:

‘Member States shall, for the purpose of the correct application of this Regulation, restrict the scope of the obligations and rights provided for in Article 10, Article 11(1), Articles 12 and 21 of Directive 95/46/EC [of the European Parliament and of

the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31)] to the extent required in order to safeguard the interests referred to in Article 13(e) of that directive.'

- 20 According to the recitals in the preamble to and Article 1(1) of Directive 2003/93, the directive extends the scope of Directive 77/799 to cover the taxation of insurance premiums referred to in Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties (OJ 1976 L 73, p. 18).
- 21 Directive 2003/93 also replaces the original wording of Article 7(1) of Directive 77/799 by the following:

'All information made known to a Member State under this Directive shall be kept secret in that State in the same manner as information received under its national legislation. In any case, such information:

- may be made available only to the persons directly involved in the assessment of the tax or in the administrative control of this assessment,
- may be made known only in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or relating to, the making or reviewing [of] the tax assessment and only to persons who are directly involved in such proceedings; such information may, however,

be disclosed during public hearings or in judgements if the competent authority of the Member State supplying the information raises no objection,

- shall in no circumstances be used other than for taxation purposes or in connection with judicial proceedings or administrative proceedings involving sanctions undertaken with a view to, or in relation to, the making or reviewing of the tax assessment.

In addition, Member States may provide for the information referred to in the first subparagraph to be used for assessment of other levies, duties and taxes covered by Article 2 of Directive 76/308/EEC.’

- <sup>22</sup> Taking the view that the contested measures should have been adopted on the basis of Article 95 EC, the Commission brought this action.

## **The action**

### *Arguments of the parties*

- <sup>23</sup> The Commission submits that Articles 93 EC and 94 EC are not the correct legal basis for the adoption of the contested measures. It argues that the correct basis is Article 95(1) EC, as it is only inappropriate to take that article as the legal basis where the provisions of the contested measures constitute ‘fiscal provisions’ within the meaning of Article 95(2) EC.

24 In that connection, the Commission observes that Article 100a of the EC Treaty (now, after amendment, Article 95 EC) was adopted with the purpose of facilitating the adoption of the legislation necessary for the completion of the internal market by the end of 1992. Only certain matters which were particularly sensitive and closely bound up with the sovereignty of the Member States were excluded from the scope of the procedure set up by Article 95 EC. Those matters include fiscal provisions, it being thought that the approximation of tax legislation should continue to be subject to a requirement of unanimity. However, this exception should be construed narrowly, inasmuch as it excludes certain measures from what is to be regarded as the 'normal' legislative procedure for the adoption of measures aimed at completing the internal market.

25 While the exception applies to provisions concerning rules on taxable persons, taxable events, basis of taxation, rates and exemptions, along with the detailed rules on assessment and enforcement, it does not apply to mutual assistance by the authorities in tax matters. Measures of cooperation, verification and information whose purpose is to facilitate the elimination of frontiers without affecting the substance of Member States' own tax rules do not encroach on the tax jurisdiction of Member States. Legislation governing such assistance does not harmonise the tax rules themselves, but seeks merely to facilitate the application by each Member State of its own legislation.

26 Regulation No 1798/2003 itself does not effect a harmonisation or approximation of national tax rules as it is concerned solely with facilitating the exchange of information in relation to intra-Community transactions in order to enable the competent authorities of the various Member States to cooperate with each other and with the Commission. The regulation does not affect any rules which are properly to be regarded as 'fiscal provisions' within the meaning of Article 95(2) EC or 'legislation concerning turnover taxes' within the meaning of Article 93 EC.

27 Directive 2003/93, for its part, amends Directive 77/799 solely to the extent of removing VAT from its scope and including the taxation of insurance premiums. It does not in any way affect the nature of that directive, which concerns the exchange of information and does not constitute the harmonisation of 'fiscal provisions' within the meaning of Article 95(2) EC.

28 It follows that the correct legal basis for the adoption of the contested measures is Article 95 EC. Accordingly, they have been adopted on an incorrect legal basis and in order to uphold the institutional balance laid down in the Treaty, both measures should be annulled.

29 However, in view of the beneficial effects the contested measures have had on the establishment of the common market, the Commission takes the view that, in the event of annulment, the effects of those measures should be maintained until they have been replaced by new measures adopted on the correct legal basis.

30 The Council observes, first, that, since the insertion of Article 100a into the Treaty by the Single European Act, a large number of measures concerning mutual assistance in tax matters have been adopted on a legal basis other than that constituted by that article.

31 Second, it observes that, according to settled case-law, the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. These factors include, in particular, the aim and content of the measure (Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraph 7).



- 32 As regards, first, the aim of the contested measures, the Council observes that, according to the recitals in the preamble to and Article 1 of Regulation No 1798/2003, its aim is to combat tax evasion and avoidance and to ensure compliance with the laws on VAT, to the benefit of the national budgets and of the operation of the internal market. The aim of Directive 2003/93, too, is to combat tax evasion, so as to protect the financial interests of the Member States and the neutrality of the internal market. It reinforces Directive 77/799 which is intended to ensure the correct determination of the taxable amount for the calculation of direct and indirect taxes. Provisions whose objective is to ensure that the taxable amount is correctly established, it is argued, pursue a fiscal aim.
- 33 Second, as regards the content of the contested measures, the Council contends that a detailed study of Regulation No 1798/2003 reveals that it ensures enforcement of tax provisions and the combating of tax evasion through the harmonisation of the rules and procedures for the collection and exchange of information across borders when information is necessary in order to establish the taxable amount for the purposes of VAT. The regulation thus has a direct impact on the rights of taxable persons and on the determination of the taxable amount, as well as on the tax revenue of the Member States.
- 34 As regards Directive 2003/93, according to Article 1(2) and (3) thereof, first, it extends the scope of Directive 77/799 to taxation of insurance premiums and excludes VAT from that scope, and, second, it enables the authorities of the Member States to use the information obtained for the calculation of the taxes and levies listed in Article 2 of Directive 76/308. Since Directive 2003/93 is intended to combat tax evasion by harmonising the rules and procedures for the collection of information across borders, it should be considered to relate to the harmonisation of tax provisions. Since it concerns both direct taxes and indirect taxes, it was correctly adopted on the combined basis of Articles 93 EC and 94 EC.

- 35 According to the Council, there is thus no doubt that the contested measures lay down provisions for the 'harmonisation of legislation concerning turnover taxes' which is 'necessary to ensure the establishment and the functioning of the internal market' within the meaning of Article 93 EC. In addition to the fact that it is not possible, contrary to the submission of the Commission, to speak of a 'normal' legislative procedure, the position adopted by that institution does not take account of the fact that Articles 93 EC and 94 EC constitute more specific legal bases for the adoption of provisions such as those appearing in the contested measures and Article 95 EC does not restrict the scope of those articles.
- 36 In the alternative, the Council contends that the interpretation of Article 95(2) EC proposed by the Commission is too restrictive. No distinction can be made on the basis of the substantial nature or otherwise of the rule to be harmonised as there is no justification for such a distinction either in the wording of the Treaty or in the laws of the Member States.
- 37 Moreover, the teleological argument put forward by the Commission is not borne out by the actual wording of Article 95(2) EC and cannot, therefore, be upheld. Furthermore, classification as a 'fiscal provision' within the meaning of Article 95(2) cannot depend on whether a provision impinges on the tax sovereignty of the Member States or whether it affects the substance of their tax rules, as otherwise the identification of the correct legal basis would be dependent on a political assessment.
- 38 In the further alternative and in the event that the Court annuls the contested measures, the Council asks the Court to maintain their effects until they have been replaced by measures adopted on the correct legal basis.
- 39 According to the United Kingdom Government, it is clear from the aim and content of the contested measures that they harmonise legislation concerning indirect taxes. For instance, Regulation No 1798/2003, which is intended to combat tax evasion

and tax avoidance, guarantees the effectiveness of national fiscal provisions for the assessment and collection of VAT. That regulation, and Article 30 thereof in particular, thus clearly affects the rights and obligations of taxable persons and it is artificial to suggest that such measures do not amount to harmonisation of national legislation on indirect taxation.

40 As regards Directive 2003/93, the United Kingdom Government contends that it makes it possible for Member States to obtain information from beyond their own borders to enable them to assess the tax payable and enforce claims in relation to their own taxable persons. Like Regulation No 1798/2003, the directive thus harmonises national legislation concerning direct and indirect taxes.

41 Ireland submits that, according to the case-law of the Court and the judgment in Case C-338/01 *Commission v Council* [2004] ECR I-4829 in particular, Articles 93 EC and 94 EC are the correct legal basis for the adoption of the contested measures which, as is clear from the recitals in their preambles and their provisions, harmonise VAT legislation by providing for uniform procedures for collecting and communicating data relating to taxable persons, in order to ensure the proper application of the legislative provisions concerning the administration, assessment and collection of VAT.

42 The Portuguese Government considers that perusal of the contested measures demonstrates that certain of their provisions fix time-limits and others, such as Article 41(5) of Regulation No 1798/2003, impinge directly on taxpayers' rights. Moreover, Article 7(1) of Directive 77/799, as amended by Directive 2003/93, governs substantive aspects of tax law. Those provisions, which directly regulate taxpayers' rights by limiting them, are to be regarded as 'fiscal provisions' within the meaning of Article 95(2) EC.

*Findings of the Court*

- 43 It is settled case-law that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure (see, inter alia, Case C-300/89 *Commission v Council* ('Titanium dioxide') [1991] ECR I-2867; paragraph 10, Case C-269/97 *Commission v Council* [2000] ECR I-2257, paragraph 43; Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 38; and Case C-338/01 *Commission v Council*, paragraph 54).
- 44 So far as concerns the scope of Article 95 EC, which the Commission argues ought to have been used as the legal basis for the adoption of the contested measures, it must be pointed out that it is clear from the very wording of Article 95(1) EC that that article applies only if the Treaty does not provide otherwise.
- 45 It follows that, as the Court held in paragraph 60 of its judgment in Case C-338/01, if the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, that measure must be founded on such provision. That is, in particular, the case with regard to Article 93 EC so far as concerns the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation.
- 46 It must also be pointed out that Article 95(2) EC expressly excludes certain areas from the scope of that article. This is in particular the case with regard to 'fiscal provisions', the approximation of which cannot therefore take place on the basis of that article (Case C-338/01, paragraph 61).

47 As regards, more specifically, the interpretation of the words 'fiscal provisions' in Article 95(2) EC, it should be borne in mind that, in paragraph 63 of its judgment in Case C-338/01, the Court held that, by reason of their general character, those words cover not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural rules.

48 Since, in the present case, it is not disputed that the contested measures are necessary for the operation of the internal market, it is sufficient to determine whether their sole or main purpose is to approximate the laws, regulations and administrative provisions of the Member States in tax matters.

#### Regulation No 1798/2003

49 First, it can be seen from the first two recitals in the preamble to Regulation No 1798/2003 that its purpose is to combat tax evasion and tax avoidance and to ensure compliance with the laws on VAT, to the benefit of the national budgets and of the sound operation of the internal market.

50 According to the third recital in the preamble to that regulation, in order to ensure the effectiveness of the tax harmonisation measures taken to complete the internal market, they 'should ... include the establishment of a common system for the exchange of information between the Member States whereby [their] administrative authorities are to assist each other and cooperate with the Commission ...'.

- 51 In the light of these recitals in the preamble to Regulation No 1798/2003, it thus appears that its aim is to establish a system for the exchange of information in order to ensure the proper application of VAT as part of the tax harmonisation measures taken to complete the internal market.
- 52 The exchange of information thus set up is justified solely by the purpose of correctly assessing the VAT owed by taxable persons in order to ensure more efficient collection of the tax.
- 53 That finding is borne out by the wording of Article 1(1) of Regulation No 1798/2003, according to which that regulation lays down the conditions under which the administrative authorities responsible in the Member States for the application of the laws on VAT are to cooperate with each other and with the Commission to ensure compliance with those laws. Further, according to the second subparagraph of Article 1(1), the rules and procedures thus laid down are intended to enable a correct assessment of VAT to be effected in the various Member States.
- 54 Secondly, as regards the content of Regulation No 1798/2003, it must be observed first of all that, in accordance with Article 5 thereof, the authorities of a Member State are required to communicate, at the request of the authorities of another Member State, all the information that may facilitate a correct assessment of VAT in the Member State of the requesting authorities and must, to that end, make any necessary administrative enquiries to obtain such information.
- 55 In that regard, it must be held that, as the Advocate General observed in point 67 of her Opinion, whilst it is true that the information thus conveyed is generally subject in the Member State of the requesting authority to the same guarantees as regards

confidentiality as in the Member State of the requested authority, the fact remains that Regulation No 1798/2003 requires the Member States to extend the circle of those who have access to such information, which is often subject to specific protection provided for by the tax legislation, and thus imposes on them an obligation to amend their national legislation as necessary.

56 It must then be observed that Article 17 of Regulation No 1798/2003 provides that the competent authorities of the Member States are, in certain specified cases, by automatic or structured automatic exchange, to forward the information referred to in Article 1 of that regulation to the competent authorities of the other Member States. That provision thus imposes an obligation on Member States which they cannot evade.

57 It must, moreover, be pointed out that a reading of Articles 22 to 24 and 27 of that regulation in combination indicates that the Member States are under an obligation to maintain and keep up to date an electronic database in which they store and process the information relating to persons to whom VAT identification numbers have been issued, the VAT identification numbers and the total value of the intra-Community supplies made by the persons and for the benefit of the persons holding such numbers, the competent authorities of the other Member States having direct access to that database.

58 In that regard, it must be pointed out that it is undeniable that direct access to those databases enables the competent authorities of the Member States to determine the taxable amount of a taxable person, or even to assess the tax payable by that person, and is thus liable to affect the particular confidentiality to which certain tax information is subject in many Member States. Accordingly, the circle of persons having access to the information held by the competent authorities of a Member State is thus considerably widened, which, as is clear from paragraph 55 of this

judgment, necessitates the amendment of national tax legislation where appropriate. That is all the more true as, pursuant to Article 41(5) of Regulation No 1798/2003, the Member States must restrict the scope of the data protection provided for by certain provisions of Directive 95/46 where those data contain information which may enable a correct assessment of VAT.

59 Finally, it must be observed that, according to Article 11(1) and (2) of Regulation No 1798/2003, the requested authorities may authorise officials of the requesting authority to be present in the offices where the administrative authorities of the Member State of the requested authorities carry out their duties and to be present during the administrative enquiries.

60 As the Advocate General pointed out in point 73 of her Opinion, that provision, as well as obliging many Member States to amend their legislation on procedures in tax matters, has significant repercussions on the rights of taxable persons. In many Member States such persons could object to the presence of officials of the administration of another Member State during an enquiry. However, under Article 11(1) and (2) of Regulation No 1798/2003, taxable persons no longer have such a right to object.

61 Accordingly, the provisions of Regulation No 1798/2003 are liable to contribute to the approximation of national procedural provisions in tax matters.



62 In the light of those considerations, it must be concluded that the aim and content of Regulation No 1798/2003 is the approximation of procedural provisions in tax matters in order to facilitate the collection of VAT and thus increase the revenue of the Member States from that tax.

63 As pointed out in paragraph 47 of this judgment, in order for Article 95(2) EC to apply, procedural rules on tax matters must be considered to be 'fiscal provisions' within the meaning of that provision.

64 Accordingly, it cannot be validly argued that Article 95(1) EC constitutes the correct legal basis for the adoption of Regulation No 1798/2003.

65 Therefore, the Commission's application must be dismissed in so far as it seeks the annulment of that regulation.

#### Directive 2003/93

66 First, it must be pointed out that the purpose of Directive 2003/93 is, according to the first recital in its preamble, to strengthen cooperation between the tax administrations of the Member States in order better to combat VAT evasion and, according to the third recital, better to protect the financial interests of the Member States and the neutrality of the internal market by extending the scope of Directive 77/799 to taxation of the insurance premiums referred to in Directive 76/308.

67 Second, suffice it to note that the content of Directive 2003/93 is limited in the main to the insertion of the amendments necessary to extend the scope of Directive 77/799 to the taxation of insurance premiums and the replacement of the original version of Article 7(1) thereof by a new version of that provision.

68 The new version of Article 7(1) differs from the old version chiefly in that it allows the Member States the option of using the information collected pursuant to that directive to assess other levies, duties and taxes falling within Article 2 of Directive 76/308.

69 Given that Directive 2003/93 thus essentially has the purpose of extending the scope of Directive 77/799 to the taxation of insurance premiums, it must be considered whether that directive is intended to approximate the laws, regulations and administrative provisions of the Member States in tax matters.

70 According to the first, fourth and sixth recitals in the preamble to Directive 77/799, its purpose is to combat tax evasion and tax avoidance extending across the frontiers of Member States, by strengthening collaboration between the tax administrations of Member States so as to enable them to make a more correct assessment of taxes on income and on capital.

71 In order to achieve that objective, Article 1(1) of Directive 77/799 requires the competent authorities of the Member States to exchange all information that may enable them to effect a correct assessment of those taxes. As pointed out in paragraph 3 of this judgment, that directive also lays down, in Articles 2 to 4, the

detailed rules for the exchange of such information, which can be on request, automatic or spontaneous.

72 Although the obligation to have enquiries carried out and provide the information in question is not unlimited, since Article 8(1) of Directive 77/799 provides that there is no such obligation on the competent authorities if the Member State concerned would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes, the fact remains that, as a result of this obligation, the circle of persons having access to such information is significantly widened in order to allow the correct assessment of tax on income and capital.

73 It must, therefore, be held that the aims and content of Directive 77/799 are, to a large extent, comparable or even identical to those of Regulation No 1798/2003 and that, in the light of its characteristics, that directive falls within the scope of Article 95(2) EC.

74 It follows that Directive 2003/93 also falls within the scope of Article 95(2) EC and that it cannot be validly argued that it should have been adopted on the basis of Article 95(1) EC.

75 Therefore, the Commission's application must also be dismissed in so far as it seeks the annulment of Directive 2003/93.

76 Accordingly, the Commission's application must be dismissed in its entirety and, therefore, there is no need for the Court to rule on the application for maintenance of the effects of the contested measures.

## **Costs**

77 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Council has asked for the Commission to be ordered to pay the costs and the Commission has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of those rules, Ireland, the Portuguese Republic and the United Kingdom, which have intervened, are to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the Commission of the European Communities to pay the costs;**
- 3. Orders Ireland, the Portuguese Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]