

(viii) a claim, where ACT has been paid but subsequently reclaimed under the provisions described in Question 4, for loss of use of money between the date of payment of the ACT and the date on which it was reclaimed;

(ix) a claim for compensation where the resident company elected to reclaim the ACT under the arrangements described in Question 4 and compensated its shareholders for the inability to receive a tax credit by increasing the amount of the dividend,

in respect of each of those claims set out above, is it to be regarded as:

a claim for repayment of sums unduly levied which arise as a consequence of, and adjunct to, the breach of the above-mentioned Community provisions; or

a claim for compensation or damages such that the conditions set out in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur* and *Factortame* must be satisfied; or

a claim for payment of an amount representing a benefit unduly denied?

7. In the event that the answer to any part of Question 6 is that the claim is a claim for payment of an amount representing a benefit unduly denied:

(a) is such a claim a consequence of, and an adjunct to, the right conferred by the abovementioned Community provisions; or

(b) must the conditions for recovery laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur* and *Factortame* be satisfied; or

(c) must some other conditions be met?

8. Does it make any difference to the answers to Questions 6 or 7 whether as a matter of domestic law the claims referred to in Question 6 are brought as restitutionary claims or are brought or have to be brought as claims for damages?

9. What guidance, if any, does the Court of Justice think it appropriate to provide in the present case as to which circumstances the national court ought to take into consideration when it comes to determine whether there is a sufficiently serious breach within the meaning of the judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur* and *Factortame*, in particular as to whether, given the state of the case law of the Court of Justice on the interpretation of the relevant Community provisions, the breach was excusable or as to whether in any particular case there is a suffi-

cient causal link to constitute a 'direct causal link' within the meaning of that judgment?

(<sup>1</sup>) Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 225, 20.8.1990, p. 6).

**Reference for a preliminary ruling by the Verwaltungsgericht, Frankfurt am Main by order of that court of 11 October 2004 in the case of Fidium Finanz AG against Bundesanstalt für Finanzdienstleistungsaufsicht**

(Case C-452/04)

(2005/C 6/52)

(Language of the case: German)

Reference has been made to the Court of Justice of the European Communities by order of the Verwaltungsgericht (Administrative Court), Frankfurt am Main (Germany) of 11 October 2004 received at the Court Registry on 27 October 2004, for a preliminary ruling in the case of Fidium Finanz AG against Bundesanstalt für Finanzdienstleistungsaufsicht on the following questions:

1. Can an undertaking having its registered office in a country outside the European Union, in this case Switzerland, rely on the freedom of movement of capital under Article 56 EC in respect of the commercial grant of credit to residents of a Member State of the European Union, in this case the Federal Republic of Germany, as against that Member State and the measures taken by its authorities or courts, or are the preparation, provision and performance of such financial services covered solely by the freedom to provide services under Article 49 et seq. EC?

2. Can an undertaking having its registered office in a country outside the European Union rely on the freedom of movement of capital under Article 56 EC where it grants loans commercially or predominantly to residents domiciled within the European Union and has its registered office in a country in which it is not subject, in relation to the taking up and conduct of that business activity, to the requirement of prior authorisation by a State authority of that country or the requirement of regular supervision of its business activity in a manner which is customary in respect of credit institutions within the European Union, and in this particular case within the Federal Republic of Germany, or does reliance on freedom of movement of capital in such a case constitute misuse of the law?

Can such an undertaking be treated, in relation to the law of the European Union, in the same way as persons and undertakings established in the territory of the relevant Member State as regards the obligation to obtain authorisation even though it does not have its registered office in that Member State and also does not maintain a branch there?

3. Do rules which make the commercial grant of credit by an undertaking having its registered office in a country outside the European Union to residents within the European Union subject to authorisation being obtained beforehand from an authority of the relevant Member State of the European Union in which the borrower is domiciled interfere with the freedom of movement of capital under Article 56 EC?

In this respect is it relevant whether the unauthorised commercial grant of credit constitutes a criminal offence or merely an administrative one?

4. Is the prior authorisation requirement referred to in Question 3 justified by Article 58(1)(b) EC, in particular as regards

— protecting borrowers from contractual and financial obligations towards persons whose reliability has not been checked beforehand,

— protecting this category of persons from undertakings or persons operating improperly with regard to their book-keeping and their obligation under general rules to provide customers with advice and information,

— protecting this category of persons from inappropriate or improper advertising,

— ensuring that the lending undertaking has adequate financial resources,

— protecting the capital market from the unmonitored grant of large-scale credits, and

— protecting the capital market and society as a whole from criminal practices as covered in particular by the provisions on combating money laundering and terrorism?

5. Does Article 58(1)(b) EC cover the formulation of an authorisation requirement permissible per se under Community law – in the sense of Question 3 – to obtain which it is mandatory for the undertaking to have its central administration or at least a branch in the Member State concerned to be granted authorisation, in particular in order to

— enable business processes and transactions to be genuinely and effectively monitored, that is to say even with little or no notice, by the bodies of the Member State concerned,

— render business processes and transactions completely intelligible by means of the documents available or to be submitted in the Member State,

— have access to those personally responsible for the undertaking in the territory of the Member State, and

— ensure, or at least facilitate, payment of the claims of the undertaking's customers within the Member State?

**Reference for a preliminary ruling by the Landgericht Berlin by decision of that court of 31 August 2004 in the commercial register matter of innoventif Limited, intervener: Die Innoventif Limited**

(Case C-453/04)

(2005/C 6/53)

(Language of the case: German)

Reference has been made to the Court of Justice of the European Communities by order of the Landgericht Berlin (Regional Court) (Berlin) of 31 August 2004 received at the Court Registry on 28 October 2004, for a preliminary ruling in the commercial register matter of innoventif Limited, intervener: Die innoventif Limited on the following question:

Is it consistent with the freedom of establishment for companies provided for by Article 43 EC and Article 48 EC for the registration of a branch set up in the Federal Republic of Germany of a share company which has its registered office in the United Kingdom to be made subject to the payment of an advance calculated on the basis of the anticipated cost of the publication of the objects of the company as set out in the relevant articles of the Memorandum of Association?