OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 24 October 1989 *

Mr President,
Members of the Court,

1. These questions for a preliminary ruling are the result of the incomplete state of the harmonization of tax legislation within the Community. Although the First, Second and Sixth Directives [1] introduced the bases and general principles for a harmonized system of value-added tax, the express provision of temporary derogations and the existence of sectors which have not been fully harmonized mean that the Court is required to resolve discrepancies arising out of the conflict between the requirement that the general principles must be observed and the lack of any common rules to govern significant parts of the system.

The case with which I am dealing today is a typical example. Whereas it is a fundamental principle of the common system of value-added tax — consistently referred to in the judgments of the Court — that there should be no tax cumulation, the absence of common rules on the taxation of second-hand goods means that this principle is not observed in a case such as that pending before the national court. Consequently, it is necessary to assess whether or not the failure to observe the principle that double taxation must be eliminated is compatible with Community law.

2. Let me examine briefly the facts of the case pending before the national court, the Gerechtshof (Regional Court of Appeal), Amsterdam, between the plaintiffs, ORO Amsterdam Beheer BV and Concerto BV, and the Inspecteur der Omzetbelastingen (Inspector of Turnover Taxes), the defendant.

After duly paying to the Netherlands tax authorities the difference between the amount of VAT resulting from the sale of new and second-hand goods and the amount of turnover tax paid as input tax, the plaintiffs claimed the repayment of a certain amount in respect of the VAT still contained in the price of second-hand goods purchased with a view to their resale. The Netherlands tax authorities refused that request.

The national court, finding that there was no provision of national law which permitted the total or partial deduction of the VAT which was still contained in the price of second-hand goods and that the resulting legal situation raised a problem of the interpretation of Community law, and in particular Article 32 of the Sixth Directive, referred to the Court the following questions for a preliminary ruling:

* Original language Italian

1 — First and Second Council Directives of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, pp. 14 and 16)
Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (77/388/EEC, OJ L 145, 13 6 1977, p. 1)

'(1) Is it in conformity with Community law, and in particular with the provisions of the Treaty establishing the European Economic Community and of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (77/388/EEC), for a Member State to have charged, in December 1986, turnover tax at the full rate on the supply of second-hand goods without taking any account whatsoever of the fact that those goods were bought from individuals, in view of the fact that in the Sixth Directive the Council of the European Communities committed itself to, and gave notice of, the adoption before 31 December 1977 of a Community taxation system applicable to trade in second-hand goods but has so far taken no action in that regard?

(2) If the first question is answered in the negative, how is account to be taken, in the determination of the turnover tax payable on the supply of second-hand goods, of the fact that the goods were bought from individuals?'

3. The arguments of the parties are set out in the Report for the Hearing and did not substantially change at the hearing. There is therefore no need for me to recall them.

4. I would state at the outset that it is clear both from the written observations and the argument at the hearing that in this case the parties are agreed as to the analysis of the tax position. It is common ground that, by not permitting the total or partial deduction of the VAT contained in the price of second-hand goods sold by a private individual to a taxable person on the subsequent sale of those goods by the taxable person, Netherlands legislation gives rise to double taxation (tax cumulation).

As I shall show, the central issue is whether such double taxation can be justified on the basis of Article 32 of the Sixth Directive [2] or whether the Member States should not have made up for the Council's failure to act by introducing in their tax legislation provisions to avoid tax cumulation.

5. The first question submitted by the national court requires an examination of Article 32 of the Sixth Directive in order to ascertain whether, in view of the Council's failure to act by not adopting before 31 December 1977 a Community taxation system to be applied to second-hand goods, the Member States may retain the special system which they applied before the entry into force of the Sixth Directive.

6. In this regard the Government of the Netherlands claimed that Article 32 should be interpreted as prohibiting the modifi-

2 — Article 32 provides as follows:
'The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977 a Community taxation system to be applied to used goods, works of art, antiques and collectors' items.
Until this Community system becomes applicable, Member States applying a special system to these items at the time this directive comes into force may retain that system'.

cation of special systems which existed prior to the entry into force of the Sixth Directive until the Council has adopted a Community system.

That view is rejected by the Commission and by the plaintiffs in the main proceedings.

7. It seems to me clear that the Netherlands Government's interpretation of the second paragraph of Article 32 cannot be accepted. I do not see how it can be thought that a provision authorizing the Member States to continue to apply a special system can change so radically as to prohibit them from amending such a system. Apart from any doubt as to the interpretation of the text, I need only state that the Court itself, in its judgment of 10 July 1985 in Case 16/84 *Commission* v *The Netherlands* [1985] ECR 2355, replying on an incidental point to the Commission, which was then arguing — curiously enough — that Article 32 'prohibits any amendment of existing national systems', stated that 'that cannot apply to adjustments whose sole objective is to ensure that a national system entirely conforms to that article'.

8. Consequently, I do not feel able to accept the view put forward by the Netherlands Government. The standstill provided for in the second paragraph of Article 32 must in my view be interpreted in such a way that Member States wishing to introduce into their legislation a taxation system for second-hand goods to avoid double taxation are entitled to amend the special taxation system for second-hand goods which existed prior to the entry into force of the Sixth Directive. By so doing, they would not infringe the second paragraph of Article 32. The argument of a technical nature that amendment of existing legislation would make harmonization throughout the Community more difficult does not seem to me to be convincing; the aim in view must, of course, even if the means are different in each Member State, be to attain an objective in accordance with the general principles of the system of VAT, and in particular the principle that double taxation must be eliminated.

9. It is clear that this first conclusion does not resolve the problem submitted by the national court. It is apparent both from the terms of the first question and from the observations submitted to the Court by the plaintiffs and the Commission that the true question is not whether a Member State has the *power* to amend its taxation system but rather whether it is *obliged*, in the light of the Council's failure to act, to adopt national measures to avoid double taxation.

10. In this regard I have to state that at first sight it does seem strange that, in spite of the express provision in the first paragraph of Article 32, the Council has not yet, 13 years after the prescribed date, adopted a Community taxation system in a sector as important as that of second-hand goods.

11. However, I do not consider that this situation can impose an obligation on the Member States to adopt national measures to make up for the Council's failure to act.

12. First of all, I agree with the Netherlands Government that the *ratio decidendi* of the judgment of the Court of 5 May 1982 in Case 15/81 *Schul* v *Invoerrechten en Accijnzen* [1982] ECR 1409, does not apply in this case. That case related to the infringement of a specific provision of the Treaty, namely Article 95, which is not applicable in this case.

In strictly legal terms, the Council's failure consists in its not having satisfied an obligation to lay down rules within a prescribed period which it *imposed upon itself* and which was not prescribed by a specific provision of the Treaty. Applying the theory of the hierarchy of norms, one could even be tempted to argue that the Council has not infringed any higher-ranking norm and has merely failed by its own inaction to comply with a procedural rule which it imposed upon itself and in which the peremptory nature of the time-limit remains entirely open.

To claim that such a failure to comply with a time-limit which is clearly procedural must impose an obligation on all the Member States to introduce into their own national law rules having the same effects as those which the Council should have adopted but has not adopted is in practice tantamount to denying that the Council has a discretionary power in the field of tax harmonization.

I therefore do not consider that the failure to comply with the prescribed time-limit imposes an obligation on Member States to 'anticipate' a Community decision which the Council for reasons of its own has been unable to adopt.

13. I would add that the terms of Article 32 do not themselves seem to me to support the Commission's argument. If the legislature had intended that the authorization given to Member States to continue to apply a special system should be limited in time solely to the period up to 31 December 1977, it would not have chosen to use in the second paragraph the words 'until this Community system becomes applicable'. It would have been simpler and more straightforward to use the expression 'until 31 December 1977'.

In this regard I would point out that this is the interpretation put forward by Mr Advocate General Darmon in his Opinion in Case 16/84 *Commission* v *The Netherlands*, cited above. With reference to Article 32, he stated as follows: 'That provision allows on a transitional basis *pending complete harmonization in the sphere of VAT*, derogation from the common system established by the Sixth Directive . . . ' (emphasis added).

14. I do not think that this conclusion may be challenged, as the Commission seeks to do, on the basis of the judgments of the Court of 28 March 1984 in Joined Cases 47 and 48/83 *Pluimveeslachterij Midden-Nederland and Van Miert* [1984] ECR 1721 and of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045. According to the Commission it is clear from those judgments that in principle, where the Council has failed to act, there can be no objection to a Member State's retaining or introducing, pursuant to the duty to cooperate imposed by Article 5 of the Treaty, national measures designed to attain the objectives to be achieved by Community rules.

15. The Commission's argument does not bear critical examination. It is clear that the *ratio decidendi* of the aforesaid judgments is totally different from that put forward by the Commission. The tenor of the judgments does not raise the slightest doubt: they merely recognize that the Member States have a *power,* where the Council has failed to act, to 'retain or introduce' national rules. There is an enormous difference between recognizing that there is a *power* and alleging the existence of an *obligation,* which not even the Court's reference to the fulfilment of an obligation to cooperate under Article 5 of the EEC Treaty can bridge. The argument based on Article 5, which reappears in the aforesaid judgment in Case 804/79 *Commission* v *United Kingdom,* performs a function that is wholly different from the one which the Commission seeks to attribute to it. In other words, the Court did not state that, because there is an obligation to cooperate under Article 5, the Member States are bound to remedy the failure on the part of the Community legislature. Instead it had recourse to the argument based on Article 5 with a view to limiting the power of Member States to legislate in a sector governed by a common organization of the market. It clearly states, in paragraph 23 of its judgment in Joined Cases 47 and 48/83 *Pluimveeslachterij Midden-Nederland and Van Miert,* as follows: 'However, . . . , such measures must not be regarded as involving the exercise of the Member State's own powers'.

Lastly, it is clear from the remainder of the judgment (paragraph 25) that it is always a matter of a 'power' ('provisions adopted or maintained by Member States in the circumstances described above are *permissible*') and not of an obligation imposed on Member States. Finally I would state, so far as is necessary, that it is clear from the opinion of Mrs Advocate General Rozès that we are concerned here with a 'substitutive' power of the Member States (see in particular [1984] ECR 1745) and not an obligation to adopt legislation in place of the Council in the event of its failure to act. That would, moreover, raise another problem which I would prefer merely to mention without considering it in detail, as to the purpose of the action for failure to act under Article 175 if it were accepted that the Council's inaction gave rise to an obligation to act on the part of the Member States.

16. For the sake of completeness I would mention, even though the Commission has not used such an argument, that an obligation on the part of the Member States in the event of the Council's failure to act cannot be inferred either from the fact that the Commission has repeatedly submitted proposals for directives in order to implement the first paragraph of Article 32. In its judgment of 16 December 1981 in Case 269/80 *Regina* v *Tymen* [1981] ECR 3079, the Court clearly stated that:

'It is to be remarked in this connection that a proposal submitted by the Commission to the Council with a view to taking concerted Community action cannot be considered as constituting in itself approval of a unilateral national measure, even of one having the same content, which is adopted in a sphere coming within the powers of the Community. To accept the reasoning of the British Government would amount to recognizing the lawfulness of national measures adopted in a sphere within which the powers of the Community apply solely by reason of the existence of a Community proposal which is identical in principle. That would not only be contrary to legal certainty but would lead to a distortion of the division of powers between the

Community and the Member States and would thus adversely affect the essential balances establishing the Treaty.'

17. Since the first question has been answered in the negative, it is unnecessary to reply to the second question.

18. In conclusion, I propose that the Court should rule, in reply to the question submitted by the national court, that in the present state of Community law the fact that a Member State imposes turnover tax on the sale of second-hand goods without providing for any reduction and without taking account of the fact that these goods were purchased from private persons is not incompatible with the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes, and in particular with Article 32 thereof.