In Case 324/82

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, David Gilmour, and Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

KINGDOM OF BELGIUM, represented by the Minister for Foreign Relations, 2 Rue Quatre-Bras, 1000 Brussels, in the person of Robert Hoebaer, Director at the Ministry of Foreign Affairs, Foreign Trade and Co-operation with Developing Countries, and Frans J. Wauters, Adviser at the Ministry of Finance, acting as Agents, with an address for service in Luxembourg at the Belgian Embassy, Résidence Champagne, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by failing to comply with the provisions of Articles 11 and 27 of the Sixth Council Directive (77/388/EEC) 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 — (Official Journal, L 145, 13. 6. 1977) as regards the calculation of the basis for charging tax on cars, the Kingdom of Belgium has failed to fulfil its obligations under Community law,

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Legal background to the dispute and summary of the facts

A — Legal background

1. National legislation

Pursuant to Article 35 of the Belgian Code on Value-Added Tax the Kingdom of Belgium established a minimum basis for charging VAT on sales of new motor cars and *voitures de direction* [cars appropriated by manufacturers or dealers for their own use].

(a) As regards new cars, Articles 1 and 2 of Royal Decree No 17 of 20 July 1970, laying down a minimim basis for charging VAT on motor cars, provide as follows:

"Article 1

There shall be a minimum basis for charging value-added tax on motor cars supplied to users within the country or imported by users.

For the purposes of this decree, any person who uses a motor car for his own private use or for business activities other than the sale of motor cars shall be considered to be a user.

Article 2

(1) Tax shall be charged, in the case of new cars, on an amount which is not less than the catalogue price in force at the time when the tax is payable.

(2) The catalogue price is the price fixed by the manufacturer for the sale to the user of new motor cars of the same type together with their equipment and accessories.

The manufacturer shall be considered to be the person who has been accorded that status by the Minister for Transport or by his deputy in accordance with Article 5 of the Royal Decree of 15 March 1968 laying down general rules on the technical requirements to be satisfied by motor vehicles and their trailers.

If the manufacturer is established in a foreign country, the price shall be fixed by the authorized agent referred to in Article 5 (2) (4) of the Royal Decree of 15 March 1968."

The catalogue price is fixed freely by the manufacturers or their authorized agents, who may adjust it as they wish without any intervention on the part of the tax administration. However, Article 4 (1) requires the manufacturers and authorized agents referred to in Article 2 (2) to notify the Director General of the Tax Administration of the catalogue prices of the motor cars which they manufacture or import and all changes in those prices. The entry into force of a catalogue price and changes in catalogue price must be notified within five days together with all necessary details.

(b) As regards *voitures de direction*, the Belgian administration applies special rules under which the VAT charged varies according to the length of the period for which they are appropriated by a manufacturer or dealer for his own use. Those rules are set out in Circular No 4 of 12 January 1971 and Circular No 74 of 11 June 1972. They distinguish between three different stages of sale:

(i) If the appropriated new car is sold within six months from the date when it was first used, no tax is demanded in respect of its use. However, under Royal Decree No 17 of 27 July 1970, the appropriated vehicle is deemed to be a new car at the time of its sale and is therefore then subject to VAT on a basis equal to the catalogue price in force for a new vehicle.

(ii) If the appropriated new car is sold more than six months and less than 18 months after it was first used, tax is charged on an amount equal to the difference between the catalogue price in force at the time of sale and the price at which the car is sold. Only 50% of the VAT payable in respect of the appropriation is deductible (Article 45 (2) of the VAT Code). As far as the sale of the car is concerned, the rules governing the taxation of second-hand cars apply.

(iii) If the appropriated new car is not sold within 18 months after it was first used, tax is charged according to the ordinary rules laid down in Article 12 (1) of the VAT Code, either in accordance with paragraph (3) if the vehicle was appropriated for private use, or in accordance with subparagraph (4) if the vehicle was appropriated for the internal needs of the undertaking. In that case, the VAT payable in respect of the appropriation is calculated on the basis of the purchase price or the cost price of the appropriated new car at the rate of 25% or 33% applicable to motor cars (Article 33 of the VAT Code). Under Article 45 (2) of the Code no more than 50% of the tax calculated and charged in that way is deductible even if the vehicle was appropriated exclusively for the needs of the undertaking. Tax is not deductible if the vehicle was appropriated exclusively for private purposes.

Those rules were applicable on 1 January 1977. However, under the rules in force prior to 1 July 1980, a transitional restriction on the right to deduct VAT on capital goods had to be applied in conjunction with the specific restriction on the right to deduct VAT on motor cars. Now that that transitional provision has been abolished (Article 100 of the VAT Code) only the 50% limit must still be taken into account. The special rules for *voitures de direction* were consequently amended for cars appropriated in the circumstances described in paragraphs (ii) and (iii) above, but were not amended for cars appropriated for less than six months. The special rules are optional unlike the ordinary rules mentioned in paragraph (iii) above, but have decisive advantages.

The provisions of Belgian law set out above were notified to the Commission by letter dated 23 December 1977 pursuant to Article 27 (5) of Directive 77/388/EEC (hereinafter referred to as "the Sixth Directive").

2. Community legislation

Paragraphs (1) and (5) of Article 27 of the Sixth Directive read as follows:

"(1) The Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

. . .

(5) Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph (1) above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirements laid down in paragraph (1) above."

Article 11 A is concerned with harmonizing the definition of "taxable amount". It provides that, within the territory of the country, the taxable amount shall be:

"(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies."

The taxable amount is not to include:

"price discounts and rebates allowed to the customer and accounted for at the time of the supply."

As regards the importation of goods, the taxable amount is:

"(a) the price paid or to be paid by the importer, where this price is the sole consideration defined in A. 1 (a);

(b) the open market value, where no price is paid or where the price paid or to be paid is not the sole consideration for the imported goods.

'Open market value' of imported goods shall mean the amount which an importer at the marketing stage at which the importation takes place would have to pay to a supplier at arm's length in the country from which the goods are exported at the time when the tax becomes chargeable under the conditions of fair competition to obtain the goods in question."

According to Article 11 B. 2, Member States may adopt as the taxable amount the value defined in Regulation (EEC) No 803/68 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170).

B — Procedure prior to the commencement of legal proceedings

By letter dated 21 November 1979 the Commission informed the Belgian Government that in its opinion the provisions of Belgian law described above were not compatible with those of the Sixth Directive, in particular Article 11 thereof concerning the basis of the charge to VAT, and that it could not accept Belgium's claim, based on the derogations provided for by Article 27 (5) of the directive, that the Belgian provisions were measures designed to prevent the evasion of VAT on new or imported vehicles and to simplify the charging of VAT on *voitures de direction.*

The Belgian Government replied by letter dated 10 June 1980 sent by Belgium's Permanent Representation to the European Communities, to which was annexed a letter from the Ministry of Finance. It is clear from that letter that the Belgian Government does not dispute that the Belgian legislation is at variance with Article 11 of the Sixth Directive. In its view, however, the exception provided for in Article 27 (5) of the directive is applicable in this case.

The arguments put forward by the Belgian Government in its letter did not convince the Commission and, by a letter dated 20 March 1981, it commenced the infringement procedure provided for by Article 169 of the EEC Treaty and requested the Belgian Government to submit to it any observations which it might wish to make within a period of two months starting from the date of receipt of its letter.

In its reply of 10 June 1981 forwarded by Belgium's Permanent Representation, the Belgian Government adhered to its view stressing in particular that its legislation came within Article 27 (5) of the Sixth Dircetive.

After re-examining the arguments the Commission decided that it had no cause to change its view that the Belgian VAT rules in question were contrary to the Sixth Directive and on 15 April 1982 it consequently sent Belgium a reasoned opinion, requesting it to adopt the measures needed to comply with that opinion within two months of its notification. Having received no reply to its reasoned opinion, the Commission lodged this application, which was received at the Court Registry on 20 December 1982.

II — Written procedure and conclusions.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

The *Commission* claims that the Court should:

1. Declare that, by retaining special rules governing the basis for charging VAT on new cars, either sold within the country or imported, and on *voitures de direction* contrary to the specific provisions in the matter laid down by Article 11 of Directive 77/388/EEC, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty;

2. Order the defendant to pay the costs.

The *Kingdom of Belgium* contends that the Court should:

1. Declare the Commission's application inadmissible or alternatively unfounded;

2. Order the Commission to pay the costs.

III — Submissions and arguments of the parties

In its application the *Commission* contends first of all that the Belgian rules are not compatible with Article 11 since its effect is to tax systematically supplies or imports of new cars on the basis of a value generally higher than the consideration actually received by the suppliers or the price paid by the private importer. As regards supplies on the national market, the Belgian rules impose VAT on the value of all price discounts or rebates, which is contrary to Article 11 A. 3 (b). As far as car imports are concerned, the Belgian rules do not take account of the price actually paid. The Commission also points out that Belgium has already admitted that its provisions are incompatible with Article 11 and that it merely relies upon the provisos contained in Article 27(5).

As regards that provision, the Commission rejects the argument that the Belgian measures are justified on the grounds of the prevention of tax evasion or avoidance. Belgium wrongly refers, as a means of justifying its legislation, to the existence of widespread tax evasion in the car sector. The essential question is the extent to which Article 27 (5) authorizes Member States to retain any system whatever or lay down any exception whatever to the very principles of the Sixth Directive. The crucial point of law in this case is therefore the scope of Article 27 (5).

Member States are not absolved, even under Article 27, from observing the *essential principles* of the Sixth Directive, especially those laid down in Article 11, which is the key provision of the entire harmonization system since it was that provision which introduced the uniform basis of assessment for VAT. Even pre-existing measures must be compatible with Article 11 in so far as they must be consistent with the "scheme" of the Sixth Directive.

Moreover, the concession contained in Article 27 (5) is subject to the principle of proportionality and the Belgian measures are clearly disproportionate to the problem to be dealt with.

The Commission defines its legal position on new imported cars and *voitures de direction* as follows:

(a) New cars

As regards new imported cars, the Belgian VAT rules are not compatible with Article 11 A. 1 (a), A. 3 (b) and B. 1 and 2 of the Sixth Directive. They render purposeless practically the whole of Article 11 in an important sector of the economy and thus introduce a taxation system substantially different from that envisaged by the directive. Measures of that scale are not justified at all by the problem to be dealt with, namely the risk of false invoices and exaggerated assessments of the value of cars accepted in part-exchange for new vehicles. Both risks can be controlled by cross-checking stocks of cars, either new or accepted in part-exchange by dealers, with dealers' sales. The retention of a minimum taxable base of a general and systematic character therefore goes well beyond the limits laid down by Article 27.

Moreover, cars are normally accepted in part-exchange on the basis of a fixed scale, and an exaggerated assessment of the value of a car accepted in part-exchange does not *per se* make tax evasion or avoidance possible. In view of the provisions of Article 11 A. 1 (a) of the Sixth Directive, VAT must be paid on the total price agreed between the parties. The value accorded to the goods accepted in part-exchange has nothing to do with that price. The sole result of the Belgian measures is to include in the basis of assessment certain elements such as price discounts and rebates which Article 11 A. 3 (b) of the directive excludes.

(b) Voitures de direction

In the Commission's view, the contested Belgian rules are contrary to Article 11 A. 1 (b) and (c) of the Sixth Directive. They do not involve simplification measures or measures concerning the charging of VAT as such. In particular, the fact that VAT is not charged at the time of the appropriation of the car is incompatible with the directive. Under the Belgian rules a taxable person may immediately deduct all the VAT paid on a *voiture de direction* which he has used for his own personal needs just as if the vehicle were intended to be sold normally and not used partly for private purposes. Nor does the Commission consider compatible with the directive the rules which provide that VAT is to be charged in respect of the sale of *voitures de direction* on the basis of, or with reference to, the catalogue price in force at the time when the tax becomes payable.

(i) As regards the question whether the Belgian measures result in *simplification*, the Commission maintains that the measures which concern the sale of *voitures de direction* within six months of their appropriation are incompatible with the Sixth Directive, because the VAT payable on account of the private use of such vehicles is not charged at the time of their appropriation and because the taxable amount at the time of their sale is the catalogue price, which leads to a higher tax charge.

(ii) As to the fact that there is *no charge to tax* at the time when the car is appropriated, the Commission maintains that the use of the vehicle must be considered a service provided for consideration; therefore, under Article 11 A. (c), the taxable amount is the full cost to the taxable person of providing the service. Even if Belgium had been entitled to treat the transaction as a supply of goods, the Commission could not accept a system arranged on that basis.

Article 10 (1) (a) is the relevant provision as regards the charging of VAT on goods appropriated by an undertaking for its own use and used partly for private purposes. As regards the "chargeable event", it is clear from that article that VAT becomes chargeable when the vehicle is first appropriated for such purposes. The taxable amount is the purchase price of the goods (Article 11 A. 1 (b)) or, if the appropriation of the car is treated as a supply of services, the full cost to the taxable person of providing the services (Article 11 A. 1 (c)). Under the Belgian rules, however, no tax is payable at that stage.

(iii) As regards the *charging of tax* at the later stage, the Commission takes the view that a former *voiture de direction* is in fact a second-hand car and should consequently be taxed as such and not as a new car on the basis of the catalogue price. All these measures — involving no tax charge on the supply of services or an excessive tax charge on the sale of *voitures de direction* — are not genuine simplification measures. In fact the system established by the Belgian legislation is more complex than the rules contained in the Sixth Directive. Moreover, in order for simplification measures to come within the proviso in Article 27, they must adapt the system laid down by the Sixth Directive and not the pre-existing national system.

In any case, the Belgian measures are not measures for simplifying the charging of tax at all but concern the basis for its assessment.

The *Belgian Government* contends, on the other hand, that the application is wholly inadmissible on two grounds and furthermore that the part of the application dealing with new cars is inadmissible on a third ground.

The first ground is that, in the view of the Belgian Government, the Commission's reaction to the notification given by Belgium pursuant to Article 27 (5) of the Sixth Directive was extremely slow and caused legal uncertainty prejudical to its legitimate interests. The Belgian rules were already in existence when the Second Directive on VAT was adopted. Article 27 (5) of the Sixth Directive is merely a continuation of Point 12 of Annex A to the Second Directive. The Commission, which was fully acquainted with the Belgian rules, never disputed its conformity with the Community legislation.

The Belgian Government also relies upon the minutes of the Council meeting of 25 March 1977 at which the draft Sixth Directive was considered (Council Document No R/716/77 of 25. 3. 1977, p. 11). In the context of the discussion of Article 27, there is a clear reference in the minutes to "provisions designed to prevent a decrease in the taxable base which the Member State considers unwarranted".

The Belgian Government does not challenge the Commission's power to examine derogating measures already existing at the time of the entry into force of the Sixth Directive and notified under Article 27 (5). However, it considers that, since that article does not expressly stipulate any period in which the Commission must raise any objections which it may have, the Member State concerned should be informed of its reaction within a reasonable period since, if the Court eventually gave judgment against it, it would cause the Member State administrative and budgetary problems which would be made worse by the Commission's late intervention and the delayed judgment of the Court. The Belgian Government refers in this context to the rules regarding the examination of new derogating measures laid down in Article 27 (5), which require the Commission to respond within a strict period of three months in order to have the matter referred to the Council, and states that it would clearly be disproportionate if the Commission had several years to react to measures already in existence.

The second ground of inadmissibility pleaded by the Belgian Government is that the Commission was wrong to base its case on Article 11 of the Sixth Directive, especially since it has never disputed that the rules in question are at variance with the provisions of that article. The real issue is whether the Belgian legislation is compatible with Article 27 (5) of the directive, and therefore the Commission ought to have referred to that article in the conclusions set out in its application, identifying it as the subject-matter of the dispute.

Thirdly, the Belgian Government considers the Commission's application inadmissible on the ground that the submissions which it put forward contesting the Belgian rules applicable to new cars during the proceedings before the Court and those which it put forward during the earlier administrative procedure were not the same. The Commission's argument is based essentially on the principle of proportionality; it referred to that principle for the first time, however, in its application to the Court.

As regards the substance, the Belgian Government contends that the Commission's submissions are unfounded, both as regards the rules applicable to new cars and as regards those applicable to *voitures de direction.*

(a) New cars

Whilst admitting that the method of taxing sales of new cars derogates from Article 11 of the Sixth Directive, the Belgian Government asserts that the derogation is lawful because it has a legal basis in Article 27 (5) of the directive. The scheme of that article is based on the distinction between new derogating measures and those in existence before the directive entered into force. A second distinction concerns the nature of the derogating measures, which are designed either to prevent tax evasion or to simplify the procedure for charging tax. Simplification measures, both new and pre-existing, must meet one requirement, namely that they must not affect the amount of tax due at the final consumption stage except to a negligible extent. However, the directive lays down no limitation for national provisions designed to prevent tax evasion. The Commission's role is therefore simply to verify whether the provision of national law actually constitutes a measure having as its exclusive purpose the prevention of tax evasion. Consequently, the considerations set out by the Commission in its application go beyond the bounds laid down by Article 27 (5). Similarly, in invoking the principle of proportionality, the Commission is adding to that article a requirement which it does not contain. Finally, by excluding from the ambit of the derogations certain provisions which it considers essential to the directive, the Commission is acting contrary to the wishes expressed by the Member States and usurping their role in assessing a provision in a manner going beyond its letter and spirit.

As regards the scope of the derogation provided for in Article 27 (5), the Belgian Government contends that nothing in the wording of that article suggests that the scope of the exception is to be limited to certain articles of the directive. Otherwise, it would be vitiated in its entirety. Consequently, in order to prevent tax evasion, a Member State may even derogate from the taxable bases laid down by Article 11. However, the Belgian rules, which guarantee a minimum taxable base with a small risk of slight over-taxation, cannot constitute more than a minor departure from Article 11; on the contrary, it is in keeping with its underlying purpose, namely to charge tax fairly despite the risk of tax evasion.

In particular, the Belgian Government challenges the Commission's reference to the principle of proportionality. Although that principle is expressly mentioned in paragraph (1) of Article 27, that does not apply to paragraph (5). When that provision was adopted the Council accepted that the prevention of tax evasion was more important than considerations of proportionality; that fact is quite clear from the entry concerning Article 27 contained in the minutes of the Council meeting at which the Sixth Directive was adopted (Council Document No R/716/77 of 25. 3. 1977). There it was stated that "the Council and the Commission agree that the measures to prevent tax evasion or avoidance and the simplification measures referred to in Article 27 may take various forms. For example, they may consist in a suspension of tax at one or more stages at which the tax, if it had been charged, would in any case have been deductible in full by the buyer or customer, or in provisions designed to prevent a decrease in the taxable amount which the Member State considers unjustified".

The Belgian Government also observes that there is a basic similarity between the provisions which could be introduced after the entry into force of the Sixth Directive on the basis of paragraph (1) of Article 27 and the provisions which could be retained under paragraph (5) of that article. Despite those similiarities, the Commission showed a surprising difference in attitude towards the minimum taxable base since it did not draw the Council's attention to derogating measures of the same type introduced by Belgium, the Netherlands and Germany on the basis of Article 27 (1) and (2).

However, the principle of a minimum taxable base was expressly accepted in the Second Directive (Article 8 and Point 12 of Annex A) and was applied by Belgium in the seven years following the introduction of VAT in Belgium and preceding the entry into force of the Sixth Directive without any objection from the Commission.

Even if the principle of proportionality applies to the present case, the context is not at all the same as that of Article 36 of the Treaty, since this case does not involve an exception to a basic principle of the Treaty but solely a derogating measure, based on an undisputed ground of public policy, namely the prevention of tax evasion. In any case, the contested Belgian provision meets the requirement of proportionality, having regard to the scale of the tax evasion and the importance of preventing it. A Member State has full power and sole responsibility for adopting the measures which it considers the most appropriate and effective for combating tax evasion.

The Belgian Government describes in detail the large-scale fraud in the car sector and in particular the various methods of tax evasion discovered by the Belgian authorities since the end of the Second World War, both within the country and upon the importation of cars.

It further observes that the system of charging VAT on the catalogue price can work effectively only with respect to goods whose sale is readily identifiable in accounts, which explains why it is only applied to sales of cars in Belgium and not to other goods, like electrical household goods, for example.

Finally, the Belgian Government maintains that it wished to reconcile the need to prevent tax evasion with the need to take account of the actual price of the transaction and that under the Belgian system the catalogue price comes as near as possible to the actual price since it corresponds to the normal commercial price. The system is, moreover, by no means rigid and even takes account of promotional campaigns. The Belgian Government concludes that the problem raised by the Commission is not a genuine problem.

(b) Voitures de direction

On the question of *voitures de direction*, the Belgian Government contends that the Belgian rules constitute a measure simplifying the rules recommended by the Community, coupled with a measure to prevent fraud. It agrees with the Commission that, as far as *voitures de direction* are concerned, the Community provisions governing the supply of services are more in keeping with reality than those governing sales. Nevertheless, in order to apply those provisions, certain facts must be ascertained. This can only be done on a standard and approximate basis and necessitates simplification measures. Difficulties also occur in determining the price actually agreed for a *voiture de direction* which is sold after being appropriated for a period of less than six months. Fraudulent practices are particularly widespread or likely in this area.

Finally, the Belgian Government contends that the departure from the rules governing the taxable amount is more apparent than real. The catalogue price imposed on the sale of a *voiture de direction* is approximately equal to the sum of the vehicle's sale price and the amount taxable by reason of its appropriatation, so that the Belgian system, by charging tax only at the time of sale, has practically the same result as the Community system of charging tax at the time of both the appropriation and the sale. The Belgian Government also challenges the Commission's view that the Belgian system does not constitute a measure for simplifying the procedure for charging VAT because if affects the taxable amount. There are no grounds for giving such a narrow interpretation to the term "charging" and for restricting it to "method of payment". The charging of the tax encompasses all the elements by which it is established as well as paid and covers in particular the determination of the basis of assessment.

In its reply the *Commission* rejects the Belgian Government's submission that the application to the Court is inadmissible because it was slow in taking action. In its view the procedure for establishing an infringement, as laid down in Article 155 of the Treaty, imposes upon it an obligation unlimited in time. The Commission did not consider it appropriate to take proceedings against any infringements of the Sixth Dirctive whilst the directive had not been implemented in all the Member States.

As regards the alleged error in its conclusions, the Commission considers that it was right to charge Belgium with infringing Article 11 and not Article 27 (5), which, in its view, is more in the nature of a procedural rule.

Although the submissions and grounds relied upon in the three stages of the infringement procedure must be the same in order to ensure that the State concerned has the opportunity to prepare its defence, the Commission, in stressing the requirement of proportionality, did not introduce into its application a new complaint or submission but merely elaborated its arguments.

On the question of the substance, the Commission, in a general introductory section, does not dispute that steps must be taken to prevent tax evasion. However, this cannot be done by any means whatsoever, but only by means consistent with the scheme of the Sixth Directive. Article 27 (5) therefore not only imposes on Member States a strict obligation to give notice of such measures but also implies basic limits as regards the measures which may be retained. Above all, Member States must observe those provisions which are essential for achieving the harmonization sought, which is the case with the basis of assessment to VAT. The Commission considers that it has a duty to verify whether the measures in question are consistent with those provisions.

As with all derogating measures, the derogation in Article 27 (5) must be interpreted narrowly. In the words of that provision, national measures must therefore be "special" and be aimed only at "certain types" of tax evasion. All general measures which, instead of being directed against certain types of practices, tend systematically to disregard an economic fact are excluded from its scope. Contrary to the view held by the Belgian Government, even the Council cannot authorize such measures. To derogate from Article 11 by establishing a notional basis for the charging of VAT is contrary to the very essence of the directive. The actual effect to the Belgian system is to increase systematically the basis of assessment. The Commission acknowledges that by using that system the Belgian State suppresses very effectively all tax evasion or avoidance, but it is nevertheless totally disproportionate to the aim in view.

As regards the technical details set out in the defence, the Commission makes the following supplementary observations:

(a) New and imported cars

In conformity with the minutes of the meeting of the Council held on 25 March 1977 cited by the Belgian Government, the Commission acknowledges that measures designed to combat tax evasion may take various forms in order to prevent the taxable amount from being reduced; however, it rejects measures which are expressly prohibited and which have the opposite effect and cause overtaxation.

As far as the evaluation of other measures adopted by Belgium, the Netherlands and Germany are concerned, the Commission states that it has always applied the same criteria in all the cases in which Article 27 is applied and refers in this regard to Annex IV to the reply.

As regards the extent of tax evasion in the case of part-exchange sales, the Commission argues that this type of tax evasion occurs only in isolated cases and therefore cannot warrant the adoption of a general measure applying to all sales and imports of new cars contrary to the rules of the Sixth Directive, especially as adequate checks can be carried out by examining accounting records.

As far as imported cars are concerned, the Commission maintains that the Belgian measure is not a measure designed to prevent tax evasion, since it is not intended to stop particular instances of evasion, but is a measure designed to guarantee the Belgian State a minimum revenue from taxation. Furthermore, by requiring VAT to be paid on an amount other than the agreed price, the Belgian system reduces contractual freedom.

(b) Voitures de direction

The Commission finds it unacceptable that no proportion of the use of a *voiture de direction* is attributed to the undertaking and that all the VAT payable in respect thereof is borne by the buyer of the car. In both respects the practice infringes the Sixth Directive.

Moreover, Belgium's argument that its system is a measure to prevent evasion was put forward for the first time in its defence. There is, however, a contradiction between that argument and the grounds advanced in the letter of notification.

The Commission also disputes that the Belgian measures simplify the procedure for charging VAT, since they treat cars in three different ways depending on their age, which is a rather complicated device.

Finally, the Commission maintains that the term "charging" appearing in Article 27 (5) does not include the common basis for assessing VAT, even if reference is made to other provisions of the directive distinguishing between the charging of the tax and its collection.

In its rejoinder the *Belgian Government* again makes the point that the Commission ought to have examined the Belgian measures within a "reasonable period", which was recognized by the Court in the judgment which it delivered on 11 December 1973 in Case 120/73 ([1973] ECR 1481). Moreover, notwithstanding the Commission's observations on the entry into force of the Sixth Directive, the period laid down in Article 27 (5) was not altered by the Ninth Directive of the Council of 26 June 1978 (Official Journal L 194, p. 16), so that the Commission could and ought to have protested to Belgium earlier. As regards the preparatory documents relating to the Sixth Directive, the Belgian Government refers to Article 12.C.2 of the draft presented by the Commission, according to which, the possibility of introducing and retaining standard or minimum bases of assessment for certain transactions as a measure for preventing evasion or simplifying the calculation and collection of tax were not excluded. That provision was not formally accepted by the Council but is embodied in Articles 24 and 27.

(a) New cars

The Belgian Government acknowledges that, as regards existing derogating measures, the Commission has a right of appraisal the exercise of which is subject to review by the Court. However, that function is limited by the particular context of that article and, despite the differences in the procedure for existing measures which are to be retained and the procedure for new measures which are to be introduced, it must be identical to the power expressly conferred upon the Commission by Article 27 (1) in relation to new measures, namely to present a proposal to the Council. Therefore the Commission's general power under Article 155 of the Treaty is restricted to investigating whether the conditions placed on the retention or introduction of derogating measures are being complied with, that is to say whether or not the measure in question is justified by the need to prevent tax evasion and, if so, whether or not the derogation is a special measure. The Belgian Government explains in detail how those conditions are fulfilled in this case. Besides the classic tax frauds, VAT is the subject of specific fraudulent practices. However, the Belgian measures to combat such practices are very specific in so far as they are restricted to a particular area and concern only one type of fraud. In any case, Article 27 is pointless unless it allows systematic and effective measures to be applied in limited areas in order to detect certain types of tax evasion.

The Belgian Government also refers to the measure adopted with the agreement of the Commission and Council in the construction industry, which is a relevant example of the form which a measure designed to prevent evasion of VAT must take.

The Belgian Government further considers that the Community shares the Members States' interest in making the tax effective, if only to ensure indirectly that its own resources are not reduced by tax evasion in Member States, and that the directive also contains many other fundamental derogations, in particular Article 4 (3), Article 11 B. 2, Article 13 A. (m) and (n), Article 13 B. (d) (6), Article 13 C. and Article 20 (4), which all restrict the scope of the harmonization.

By referring to the actual price, Article 11 is aimed at preventing any reduction in that price; a slight increase on the other hand, is less serious. During the Council discussions the representatives of the Belgian Government never concealed their intention to retain a minimum basis of assessment.

(b) Voitures de direction

Finally, the Belgian Government states that it was so difficult, when a *voiture de direction* was sold, to assess the value to be placed on the private use of the vehicle that that complication and the risk of fraud in such cases had to be obviated by referring, when it was sold, to the catalogue price of the vehicle.

IV — Oral procedure

At the sitting on 22 November 1983 the Commission of the European Communities, represented by its Legal Adviser, D. Gilmour, acting as Agent, and the Belgian Government, represented by R. Hoebaer, and F. J. Wauters, acting as Agents, presented oral argument.

In a reply to a question from the President of the Court, the Commission and the defendant stated that under Council Regulation No 1224/80/EEC (Official Journal 1980, L 134, p. 1) tax may be charged primarily on the invoice value or alternatively on an amount virtually equivalent to the open market value in the country of exportation.

The Advocate General delivered his opinion at the sitting on 24 January 1984.

Decision

1 By application lodged at the Court Registry on 20 December 1982, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by retaining special rules governing the basis for charging value-added tax (hereinafter referred to as "VAT") on new cars, either sold within the country or imported, and on so-called "*voitures de direction*" contrary to Article 11 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 — (Directive 77/388/EEC, Official Journal 1977, L 145, p. 1), the Kingdom of Belgium had failed to fulfil its obligations under the EEC Treaty.

2 Those special rules were laid down primarily by Royal Decree No 17 of 20 July 1970 (Moniteur Belge of 31 July 1970) and in Circulars No 4 of

12 January 1971 and No 74 of 11 July 1972, which were both adopted on the basis of Article 35 of the Belgian VAT Code, and are also based on various other provisions of that Code.

3 For new cars, Article 1 of Royal Decree No 17 lays down a minimum basis for charging VAT on cars supplied to users within the country or imported by users, which, according to Article 2 of the decree, may not be lower than the catalogue price in force at the time when the tax is payable.

4 For *voitures de direction*, that is to say cars appropriated by manufacturers or dealers for their own use, Circulars Nos 4 and 74 make provision for a special optional scheme under which the VAT charged varies according to the duration of the appropriation as follows:

If the appropriated new car is sold within six months from the date when it was first used, no tax is demanded in respect of its appropriation, but under Article 2 (3) of Royal Decree No 17 the appropriated car is deemed to be new at the time of its sale and is therefore then subject to a VAT charge based on the catalogue price in force for a new car.

If the appropriated new car is sold more than six months and less than 18 months after it was first used, the VAT payable on account of its appropriation is based on an amount equal to the difference between the catalogue price in force at the time of sale and the actual sale price. The sale of the car is subject to the rules governing the taxation of second-hand cars.

If the appropriated new car is not sold within 18 months after it was first used, VAT is charged according to the ordinary rules laid down in Article 12 (1) of the Belgium VAT Code; in that case the VAT payable on account of the appropriation of the car is calculated on the basis of the purchase price or the cost price of the appropriated new car.

5 According to Article 2 (3) of Royal Decree No 17, new cars are cars manufactured within the country "which are supplied for the first time to a user, even if they have been used by the manufacturer or by a motor-car dealer established in Belgium for a period not exceeding six months" as well as imported cars "where there is no evidence that they have been used for six months before the time when the tax falls due".

6 Article 2 (2) of Royal Decree No 17 defines the catalogue price as the price freely fixed by the manufacturer for the sale to the user of new cars of the same type, including their equipment and accessories, or, if the manufacturer is established abroad, by the authorized agent empowered to fix that price.

7 Article 4 of the decree provides that the catalogue price and any changes made to it must be notified to the director general of the competent administration.

8 By letter dated 23 December 1977 the Belgian Government notified the Commission, in accordance with Article 27 (5) of the Sixth Directive and within the period laid down by that article, of the above mentioned provisions as special measures already in existence when the Sixth Directive entered into force.

9 The Commission first disclosed its objections to the Belgian rules in a letter dated 21 November 1979 and, by a letter dated 20 March 1981, commenced against the Kingdom of Belgium the infringement procedure provided for by Article 169 of the EEC Treaty, which led it to bring this action.

Admissibility

10 The Belgian Government first raises three objections of inadmissibility against the action.

11 It submits first of all that the Commission was slow in reacting to the notfication of the Belgian legislation and that this caused legal uncertainty prejudicial to its legitimate interests. Since Article 27 (5) of the Sixth

Directive does not expressly lay down a period within which objections must be raised, the Commission must act within a reasonable period as in the case of the procedures provided for by paragraphs (3) and (4) of Article 27 and Article 93 (3) of the EEC Treaty, as interpreted by the Court in its judgment of 11 December 1973 in Case 120/72 *(Lorenz* v *Germany,* [1973] ECR 1471, at p. 1481).

12 That submission cannot be accepted. The period referred to in Article 27 (2) and (3) of the directive and the period resulting from the Court's interpretation of Article 93 of the EEC Treaty concern very specific situtions. The first case involves the examination of an application to derogate from the provisions of the directive and the second a procedure which in part derogates expressly from the procedure laid down in Article 169 of the Treaty. In the absence of such a derogation for measures retained under Article 27 (5) of the directive, the rules contained in Article 169 of the Treaty must be applied and the Commission is not obliged to act within a specific period. The Commission has explained that in the present case, exercising the discretion accorded to it by Article 169 of the Treaty, it decided that it should postpone examining the compatibility of the Belgian measures in question until the directive was in force in all the Member States. In so doing it did not exercise its discretion in a manner contrary to the Treaty.

13 The Belgian Government's second submission is that the Commission was wrong to base its action on Article 11 of the Sixth Directive, as the real issue in whether the Belgian legislation is compatible with Article 27 (5) of the directive, which is the provision which the Commission ought to have mentioned as the subject-matter of the dispute in the conclusions set out in its application.

14 That submission must also be rejected. In the formal notice provided for by Article 169 which was sent to the Belgian Government on 20 March 1981 and later in its reasoned opinion, the Commission clearly indicated that in its view the Belgian measures were contrary to Article 11 of the directive because the Commission "could not allow recourse to be had to Article 27

(5) of the directive"; consequently, the Belgian Government could not have been under any misapprehension concerning the true scope of the dispute.

15 Finally, the Belgian Government maintains that the submissions contesting the Belgian rules on new cars advanced by the Commission in the course of the preliminary procedure and during the proceedings before the Court are not identical, as they are required to be, in so far as the Commission did not invoke the principle of proportionality until it made its application to the Court.

16 That submission rests on a misunderstanding of the legal impact of the Commission's argument. In its application the Commission argues that "the right contained in Article 27 (5) of the Sixth Directive is subject to the principle of proportionalitiy like any provision of that type" and that "the Belgian measures are clearly disproportionate to the problem to be dealt with". That submission repeats exactly the argument which the Commission advanced throughout the preliminary procedure, namely that Article 27 (5) does not have the scope which the Belgian Government attributes to it and does not cover national measures as general as those at issue in this case.

17 Since those submissions must be rejected, the substance of the case must now be examined.

The substance

18 In support of its application the Commission argues that, by retaining special rules governing the basis for charging VAT on new cars, either supplied within the country or imported into Belgium, and on *voitures de direction*, the Kingdom of Belgium has infringed Article 11 of the Sixth Directive.

19 It is common ground that the Belgian rules in question are at variance with Article 11 of the directive, which fixes the taxable amount. As regards supplies of goods and services within the country, that amount is principally composed of the consideration which has been or is to be obtained having regard *inter alia* to price discounts and rebates allowed to the customer and accounted for at the time of the supply. As regards the importation of goods,

it is composed of the price paid or to be paid by the importer or, if that price is not the sole consideration for the imported goods, the open market value or, if Member States wish, the customs value as defined in the Community regulations.

20 The dispute concerns the question whether the Belgian rules may derogate from Article 11 of the directive as "special measures" within the meaning of paragraphs (1) and (5) of Article 27.

21 Paragraph (5) of that article is worded as follows:

"Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph (1) above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph (1) above."

Paragraph (1) of Article 27, to which paragraph (5) refers, provides that:

"The Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage."

22 The Commission contends that the national measures in question are not covered by Article 27 (5) because they are too general in character. It argues in particular that, in so far as they apply to new cars, they render the system laid down in Article 11 practically purposeless in the market sector in question and are therefore disproportionate to the aim in view; even when Article 27 (5) of the Sixth Directive is applied, Member States are obliged to observe the fundamental principles and scheme of the directive as well as general principles of Community law, such as the principle of proportionality.

23 Furthermore, the Commission disputes that the provisions at issue are justified by the desire to prevent tax evasion or avoidance or that they constitute genuine measures for simplifying the procedure for charging the tax. It argues that, as far as most taxable persons are concerned, those aims can in any case be achieved by less coercive measures, for example by carrying out cross-checks between stocks of cars, either new or accepted in part-exchange by dealers, and dealers' sales.

24 It is argued by the Belgian Government, on the other hand, that the derogation from Article 11 is lawful because it is based on Article 27 (5); in so far as the derogations relate to the simplification of the procedure for charging the tax, they must meet the criterion laid down in paragraph (1) of Article 27, that is to say, they may not affect the amount of tax due at the final consumption stage except to a negligible extent; however, the directive does not lay down any limitation as regards national provisions designed to prevent tax evasion or avoidance, so that departures from any of the provisions of the directive are permissible, including those concerning the taxable amount contained in Article 11; what is more, neither the principle of proportionality nor any other particular requirement can be invoked in that regard.

25 The Belgian Government maintains, however, that the rules in question do in fact satisfy the requirements of proportionality because there is widespread tax evasion in the motor trade. The practices in question consist *inter alia* in sellers' giving a false declaration of the price of new cars, expecially when accepting used cars in part-exchange, and in buyers' deducting unpaid input tax; such practices play a considerable part in the budgetary deficit and also distort competition.

26 The Belgian Government also refers to the declaration contained in the minutes of the meeting of the Council at which the Sixth Directive was adopted, which expressly cites as a derogating measure which may be retained pursuant to Article 27 (5) a provision providing for the application of a minimum taxable amount. That declaration is worded as follows:

"The Council and the Commission agree that the measures for preventing tax evasion or avoidance and the simplification measures referred to in Article 27 may take various forms. For example, they may consist in a suspension of the tax at one or more stages at which the tax, if it had been charged, would in any case have been deductible in full by the buyer or customer or in provisions designed to prevent a decrease in the taxable amount which the Member State considers unjustified."

The measures designed to prevent the evasion or avoidance of tax on both new cars and *voitures de direction*

27 As a preliminary point, it must be observed that the Belgian legislation governing the basis for charging VAT on new cars and *voitures de direction* was in existence before the national provisions in this sphere were harmonized by the adoption of the Sixth Directive. Consequently, the legislation did not take account of the principles of the common system of value-added tax.

28 For the retention of such measures, Article 27 (5) lays down the procedural requirement that Member States must notify them to the Commission. That requirement was duly satisfied by the Kingdom of Belgium.

29 It should, however, be noted that the measures notified must be of such a nature as to prevent tax evasion or avoidance and that in principle they may not derogate from the basis for charging VAT laid down in Article 11, except within the limits strictly necessary for achieving that aim.

30 It is not disputed that the Belgian Government was justified in taking the view that there was a real risk of tax evasion or avoidance in the motor trade which justified the adoption of measures of the kind which Article 27 of the Sixth Directive allows to be retained. Such measures may, where appropriate, entail the application of standard amounts, provided that the special measures do not derogate from the rules laid down by Article 11 further than is necessary to avoid the risk of tax evasion or avoidance.

31 However, by applying to all new cars the catalogue prices notified to the Belgian authorities, the Belgian legislation entails such a complete and general amendment of the basis of assessment that it is impossible to accept

that it contains only the derogations needed to avoid the risk of tax evasion or avoidance. In particular, it has not been proved that, in order to attain the aim in view, it is necessary that the taxable amount should be fixed on the basis of the Belgian catalogue price or that the taking into account of any form of price discount or rebate should be excluded in such a comprehensive manner.

32 It follows that the measures at issue are disproportionate to the aim in view in so far as they depart in a general and systematic way from the rules laid down in Article 11 by covering sales and imports of all new cars, either leaving the factory or already used for a period of less than six months.

33 As regards the Belgian Government's argument that the application of a minimum taxable amount is contemplated by a declaration contained in the minutes of the meeting of the Council, it need merely be stated that the declaration does not contain any precise statement capable of supporting its argument.

34 Consequently, it must be decided that, by retaining the catalogue price as the minimum basis for charging VAT on new cars, either supplied within the country or imported, as a special measure derogating from Article 11 of the Sixth Directive, when the requirements laid down in Article 27 (5) of the directive are not fulfilled, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty.

The measures intended to simplify the procedure for charging VAT on *voitures de direction*

35 In so far as the measures in question provide that the catalogue price is also to be the basis for charging VAT on *voitures de direction* sold within six months after they are first used, a different finding is not justified by the need to simplify the procedure for charging the tax. As regards the Belgian system for taxing the use of *voitures de direction* appropriated by the taxable person for his own private needs, the Commission has not offered sufficient evidence that it is not a genuine simplification measure or that it may affect the amount of tax due at the final consumption stage to an extent which is more than negligible.

Costs

36 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has failed in its main submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by retaining the catalogue price as the basis for charging VAT on cars, as a special measure derogating from Article 11 of the Sixth Directive, when the requirements laid down in Article 27 (5) of the directive are not fulfilled, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty;**

2. **Dismisses the remainder of the application;**

3. **Orders the Kingdom of Belgium to pay the costs.**

Mertens de Wilmars | Koopmans | Bahlmann

Galmot | Pescatore | Mackenzie Stuart | O'Keeffe

Bosco | Due | Everling | Kakouris

Delivered in open court in Luxembourg on 10 April 1984.

P. Heim
Registrar

J. Mertens de Wilmars
President