OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 27 February 1997 *

1. By this question referred for a preliminary ruling, the VAT and Duties Tribunal, Manchester Tribunal Centre, asks the Court to give an interpretation clarifying the right to derogate provided for in Article 11C(1) of the Sixth VAT Directive [1] ('the Sixth Directive') governing the reduction of the taxable amount in cases of total or partial non-payment for the supply after the transaction which is subject to VAT has been completed. More particularly, the Court is asked to rule on the compatibility of rules implementing the legislation, such as the United Kingdom legislature has adopted, which allow the benefit of a tax refund in respect of sales transactions in which the consideration is paid in money and, by contrast, exclude it in respect of those transactions in which the consideration consists of something other than money.

I — Facts

2. The facts of this case involve two companies: Goldsmiths (Jewellers) Ltd ('Goldsmiths'), a manufacturer and supplier of jewellery, and RRI Limited ('RRI'), a specialist barter exchange company. The two companies negotiated the conclusion of a contract under which Goldsmiths undertook to supply RRI with jewellery which it had been unable to sell and in exchange RRI undertook to supply advertising services.

3. In pursuance of the agreement, Goldsmiths delivered to RRI jewels to the value of £202 809.47 (including VAT of £30 205.67 declared by Goldsmiths in its VAT return for the period concerned and actually paid). For its part, RRI undertook to supply Goldsmiths with advertising services to the same value as the jewels.

4. After providing the first part of the advertising services which it was contracted to supply — to the value of £68 678.03 (including VAT of £9 335) — RRI became insolvent and was wound up. The value of the services

* Original language: Italian.

1 — 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 (OJ 1977 L 145, p. 1).

not performed therefore amounted to £135 162.12, including VAT of £20 130.53.

5. As a result of that insolvency, Goldsmiths took the view that the outstanding advertising debts could not be recovered and adjusted its VAT return for the period ending on 28 February 1993. It accordingly reduced the net amount of VAT by an amount equivalent to the sum owed by way of VAT on the services owed by RRI, and thenceforth irrecoverable.

6. The Commissioners of Customs and Excise ('the Commissioners') refused to allow Goldsmiths the tax relief thus calculated. On 1 June 1993 they issued an assessment of VAT to Goldsmiths in the sum of £20 130 plus interest.

7. The administration reached that decision on the basis of section 11(1) of the Finance Act 1990. As the national court acknowledges, [2] in cases of total or partial non-payment that provision of national law restricts the right to a refund of VAT owed exclusively for a supply of goods or services 'for a consideration in money': having regard to the letter of the law, a supply in kind such as that which RRI was required to make could not be covered by the provision. [3]

8. Goldsmiths considered that on the contrary they were entitled to tax relief on the consideration which they had not received and appealed to the national court, claiming that the national legislation was contrary to the Sixth Directive, and in particular Article 11(C)1 which provides:

'In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

However, in the case of total or partial non-payment, *Member States may derogate from this rule*' (emphasis added).

2 — Order for reference, point 11.

3 — Section 11(2) of the Finance Act 1990 (the provision then applicable, subsequently re-enacted as section 36 of the VAT Act 1994) provides for a right to refund of VAT owed. Under section 11(2), the relief applies where:
'(a) On or after 1 April 1989 a person has supplied goods or services for a consideration in money and has accounted for and paid tax on the supply,
(b) The whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and
(c) A period of one year (beginning with the date of the supply) has elapsed.'

In the light of that provision, in Goldsmiths' view the national rules should not have been limited to providing for tax relief only in the case of non-payment of the consideration in money in contracts for sale but should have included the case of consideration in kind. What the Community legislature has conferred on the Member States is what Goldsmiths describes as an 'all or nothing' power to derogate. This prevents the conditions on which tax relief is granted from being chosen on a selective, not impartial basis. In its view, the fact that the United Kingdom has applied the basic measure to sales transactions implies that there is no power to derogate in relation to different sorts of supply. [4]

9. Faced with that question of interpretation, the Manchester Tribunal Centre referred the following question to the Court for a preliminary ruling:

'Is the derogation contained in Article 11C(1) of the EC 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) ("the Sixth Directive") to be interpreted as permitting a Member State which enacts provisions for the refund of tax in the case of bad debts to exclude relief where the consideration lost consists of something other than money?'

Legal assessment

10. The question raised by the Manchester Tribunal Centre turns, in essence, on the Member States' *scope* to exercise the right conferred on them by the directive to derogate from the principle that the taxable amount is to be 'reduced accordingly', laid down in Article 11C(1) of the Community legislation.

11. We are dealing with the rules laid down in the Finance Act of the United Kingdom which allow for the tax relief provided for by the Sixth Directive in respect of certain categories of transactions, supplies for a consideration in money, and not in respect of others where the consideration is in kind. For the purposes of Community law, two different kinds of problem arise which I would draw to the Court's attention in an order progressing logically from one to the other: whether or not the second question needs to be answered depends on the reply given to the first, as I shall explain below.

4 — Order for reference, point 16.

The Sixth Directive provides for reduction of the taxable amount in the series of situations listed therein: (1) cancellation, (2) refusal, (3) total or partial non-payment, (4) where the price is reduced after the supply takes place. In each case, relief is granted under conditions determined by the Member States in its own legal order. National legislatures are given the right to derogate (as is laid down in the Directive) only in the case of situation (3), that of 'total or partial non-payment'. [5] In this case, the Member State may decide not to allow the right to tax relief which it is, by contrast, required to allow and apply, according to the rules it sees fit to lay down, with regard to the other situations envisaged by the directive.

12. The first question for the Court is to consider how the power to derogate has here been conferred and conceived by the Community legislature. More particularly, this means ascertaining whether, in exercising the power to derogate, the Member State *must* exclude reduction of the taxable amount regardless in all cases of non-payment, or whether it may provide otherwise, as the United Kingdom legislature has in fact done. In the first hypothesis, the power or right to derogate is, according to the wording of the Community provision to be interpreted, conceived of as 'strict', and therefore as necessarily bound to exclude application of the uniform Community provisions *without exception* in the sphere in which it may be exercised. Following the second solution, the power to derogate is, on the contrary, doubly discretionary: the national legislature may not only decide to avail itself of the derogation, which is not disputed, but is in addition free to differentiate the provisions of the derogating measures in accordance with needs of which it is to be the judge.

13. The first view is supported by Goldsmiths' pleadings, the second, with differing arguments, by the United Kingdom and German Governments. The point which must be made clear now is that if the first of these two opposing points of view is accepted, the case before the Court is immediately settled *in radice*. The solution adopted in the United Kingdom legal order would be contrary to both the design and the sphere of operation of the derogation provided for by the Community provision. On the other hand, what would be the consequences if the second of the two arguments in the case were to be accepted? Derogation could also be subject to discretionary restrictions, in the way that I have explained. This does not imply, however, that the derogating provisions of national law are free to depart from the principles and rules of Community law, including those which the Court may infer from the *context* of the Sixth Directive and thus from the rules which it lays down and the aims which inspire it. This is the other ques-

5 — It should be noted that, unlike the English version, the Italian provides for five situations: (1) 'annullamento' (cancellation); (2) 'recesso' (refusal); (3) 'risoluzione' (termination of a contract for non-performance, because it has become impossible to perform or because the terms are excessively onerous); (4) 'non pagamento totale o parziale' (total or partial non-payment) and (5) 'riduzione del prezzo dopo che l'operazione è effettuata' (where the price is reduced after the supply takes place). Consequently, the power to derogate, which in the English version relates to No (3), in the Italian version relates to No (4).

tion, to which I referred earlier in setting out the logical order of the questions raised by this reference to the Court.

14. As regards the first question, to my mind the exercise of the power to derogate is not subject to the condition which Goldsmiths' pleadings claim is laid down or at the least implied by the Sixth Directive, namely that the national legislature is *required* to derogate from *all* the rules from which derogation is possible or else to apply *without any derogations* the reduction of the taxable amount. I do not see that that kind of automatism, which operates by drawing *en bloc* within the derogation any area for which derogation is allowed under the Sixth Directive, has any basis in logic or any textual justification.

15. The Community provision of relevance here is clear and complete: it states that the Member States *may* derogate with regard to reduction of the taxable amount, and goes on to specify the cases in which derogation is allowed. The power — or the right, if that is the preferred term — thus given to the Member State must be understood as meaning that the power to derogate falls within the legislature's sphere of competence. It is the power, in regulating a given field of relationships, to adopt rules replacing others which however retain a residual field of application. The derogating provision does not operate to abolish the provision from which it derogates. If it were otherwise, we should be speaking of repeal and not derogation. The legislature with the power to derogate establishes, however, *the field of non-application* of the rule or principle whose scope it is empowered to *circumscribe*. The power to *derogate* therefore implies the discretionary right to *differentiate* the provisions and effects of the legislation resulting from the exercise of that power. [6] The judicial interpretation of that power would be no different if it were stated — as it is in the second sentence of Article 11C(1) of the Sixth Directive in the Spanish version — that the Member State may *decide not to apply*, rather than *may derogate from*, the provision on tax relief. [7] Non-application of such a rule cannot be other than the result of a derogation, and the power to derogate remains unchanged. Let me add to those considerations that it is provided, as I have pointed out, that the taxable amount is to be reduced under conditions to be determined by the Member State. Which, to my mind, means that the Sixth Directive recognizes (it remains to be seen within what bounds) the national legislature's discretion, both in laying down rules for application of the tax relief and also in refusing the grant of such relief to the persons concerned. [8]

6 — To return to the provision under consideration in this case, some of the legal literature gives expression to this view. P. Farmer and R. Lyal, *EC Tax Law*, Oxford, 1994, p. 128, commenting on the second sentence of Article 11C(1), stated that 'the structure of the provision suggests that on this point (total or partial non-payment) the power to derogate *extends* to the principle of reduction itself' (emphasis added). To the same (in my view) effect, see also B. J. M. Terra and J. Kajius, *A Guide to the European VAT Directives*, Amsterdam, 1993, comment on Article 11, p. 95: 'Notwithstanding the imperative "shall", Member States are free to derogate from this rule (i. e. *not to grant or to partially grant a reduction*) in the case of total or partial non-payment' (emphasis added).

7 — The second sentence of Article 11C(1) in the Spanish version reads as follows: 'non obstante, en los casos de impago total o parcial, los Estados miembros *podrán no aplicar* esta regla' (emphasis added).

8 — On the other hand, as the United Kingdom points out in its observations, the Court has already been called upon to assess an unqualified alternative — 'all or nothing' — in the exercise of a derogation. This was in the *Bramhill* judgment in which the Court did not accept the claimant's interpretation of the right to derogate under Article 7(1)(d) of Directive 79/7/EEC in terms fundamentally similar to those used by Goldsmiths in this case. In *Bramhill*, the Court's reasoning was based on the need for an interpretation of the scope of the derogation which was not incompatible with the aim of progressively implementing the principle of equal treatment. See Case C-420/92 *Bramhill* v *Chief Adjudication Officer* [1994] ECR I-3191, paragraphs 20 to 22.

16. The important thing now is to ascertain the relationship between the rule in the Community provision, expressed by the Sixth Directive to permit derogation, and the provision of national law which derogates from it.

The Sixth Directive pursues the aim of harmonizing tax laws. Appropriate reduction of the taxable amount in the situations provided for is a rule of harmonization and is linked to the others which, still in the field of tax, were laid down in the Directive in order to pursue the same objective. The derogating measure adopted by the United Kingdom constitutes an exception with respect to the rules in Article 11 which are intended to harmonize the criteria used to determine the taxable amount. In this sense, derogation from the Community rule constitutes an exception to a *general principle*: that laid down in Article 11A, which provides that the taxable amount is to be 'in respect 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' (Article 11A(1)(a), emphasis added).

17. That is why the derogation has to be *justified*. And it will be justified, to my mind, only if it is made in accordance with the principles and rules of Community law relevant to the legislation in the case in point. In establishing the scope of the derogation, it should be recalled that the Court has consistently held that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also its context and the aims pursued by the legislation of which it forms part. [9]

18. What is involved is a general principle of the Community order which has found specific expression in the matter before us. The derogation — more generally, all discretion afforded to the Member States within the scheme of the Directive — must in any event be exercised within the limits and under the conditions deriving from the principles which guided the Community measure. [10] This rule is derived from the case-law of the Court, and primarily from the judgment given in *Profant*. [11] There it was held that as regards the power of the Member States to set the limits of, and detailed rules concerning, the exemptions on importation provided for in Article 14, 'the authorities of the Member States do not enjoy a completed discretion (...) for they have to observe the fundamental objectives of the harmonization of value added tax' (paragraph 25). In *Kühne*, the Court held that the use made by the Member State concerned of the derogation

9 — Case C-30/93 *AC-ATEL Electronic Vertriebs* [1994] ECR I-2305, paragraph 21.

10 — To this effect, see the Opinion of Advocate General Mayras in Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113: 'Although the autonomy enjoyed by the Member States in matters of value added tax remains complete (...), nevertheless in areas where they may make exceptions or may apply certain transitional provisions (...), they may only act with due regard to and in accordance with the provisions of the directive' (page 134).

11 — Case 249/84 *Profant* [1985] ECR 3237, paragraphs 23 to 25; see also Case 127/86 *Ledoux* [1988] ECR 3741, paragraph 11.

permitted under the second sentence of Article 6(2) was contrary to the principle of fiscal neutrality. [12] Similarly, in Case 324/82 *Commission* v *Belgium*, the Court called upon to give a decision as to the proper exercise of the power to derogate under Article 27 of the Sixth Directive, held that the defendant had failed to fulfil its obligations: 'the [national] measures at issue', it declared, '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'. [13]

19. However different the cases then under consideration are from the present case, they have at least this in common, that, in those cases as in this, the Member States were given a discretionary power to be exercised within the bounds of, and thus in keeping with, the Sixth Directive. It is clear from the case-law that Member States must use the discretion so provided in such as way as to comply with the aims of harmonization and the underlying principles of the legislation.

20. I shall directly consider this other aspect, which is crucial to resolution of the dispute. Attention must be given, from the specific angle of proportionality, to the question of whether there is any justification for the derogation introduced into the United Kingdom system which, for the purposes of tax exemption, discriminates between money transactions and barter transactions.

21. First of all, how must a supply in kind be defined for the purposes of the Sixth Directive? As the Court stated in its judgment in *Aardappelenbewaarplaats*: 'a provision of services is taxable (...) when the service is provided against payment and the basis of assessment for such a service is *everything which makes up the consideration for the provision of services; there must therefore be a direct link between the service provided and the consideration received*'. [14] The meaning of the expression 'everything which', also found, as I have said, in Article 11A(1)(a), is clarified in the *Naturally Yours* judgment. The Court was then considering a situation in which the value of the marketing service offered by the purchaser must be added to the price agreed by the vendor and the purchaser, with the result that a supply which was not originally expressed in monetary terms is converted into consideration for money. [15]

22. Returning to the Court's findings in that case and in others, it is possible to say that the transaction in question, in which there is a direct and express link between the service provided and the consideration, necessarily entails the exchange of two taxable services

12 — Case 50/88 *Kühne* [1989] ECR 1925, paragraph 17.

13 — Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 32.

14 — Case 154/80 *Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12 (emphasis added).

15 — See Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, especially paragraphs 16 and 17.

within the meaning of the Sixth Directive. [16] To argue otherwise would foster the consequences mentioned by Advocate General Vilaça: 'If any form of payment — such as, for example, services provided in exchange for the goods supplied — were to be excluded from the consideration, the door would be left open to lawful tax avoidance, frustrating the objectives of the Sixth directive and enabling part of the basis of assessment to escape taxation, and possibly creating distortions in the tax treatment of situations which are, from the economic or commercial standpoints, substantially identical'. [17]

23. That is why taxable persons who enter into the reciprocally binding undertakings to supply services which go to make up a transaction in kind are required to comply with the obligations laid down in Article 22 of the Directive. In particular, by virtue of Article 22(3)(a), every taxable person is to 'issue an invoice or other document serving as invoice in respect of all goods and services supplied by him to another taxable person, and shall keep a copy thereof'. Moreover, 'Every taxable person shall submit a return within an interval' to be determined by each Member State. According to the facts in the case, that is what was done by both Goldsmiths and, in respect of the part payment made, by RRI.

24. The United Kingdom Government justifies the solution adopted in the derogation by arguing that there was a greater risk of fraud in contracts under which payment was made in kind rather than in money. [18]

25. The solution adopted in the derogating provision is therefore claimed to be in accordance with the 17th recital in the preamble to the directive, which provides that 'the Member States should be able, *within certain limits and subject to certain conditions*, to take or retain special measures derogating from this directive in order to simplify the levying of tax or to avoid fraud or tax avoidance' (emphasis added).

26. I for one consider that this case should be considered with regard to the limits and conditions which the Member States are bound to observe in adopting derogating measures. Nor can I overlook the fact that the Court has applied the principle of proportionality, which is one of the general principles of law underlying the Community order, when defining the scope of derogating provisions. Accordingly, in *Johnston*, it held that 'That principle requires that derogations

16 — See also the Opinion of Advocate General Van Gerven in Case 126/88 *Boots Company* [1990] ECR I-1235, paragraph 6: 'It is (...) quite clear that forms of consideration other than payments in money are envisaged by Article 11A(1)(a)'.

17 — Opinion of Mr Vilaça in Case 230/87 *Naturally Yours*, section 19.

18 — According to the observations of the Government, 'the United Kingdom chose to limit relief for bad debt to cases where the supply has been made "for a consideration in money". Its purpose, in enacting that limitation, was to remove the risk of fraud: an approach which reflects the 16th recital to the Sixth Directive' (point 24).

remain within the limits of what is appropriate and necessary for achieving the aim in view'. [19]

27. Let me now apply the rule laid down in the case-law to the circumstances of this case. Even if transactions for a consideration in kind may involve greater risk of avoidance or evasion than transactions for money, that does not suffice to justify the root-and-branch decision taken by the United Kingdom legislature. [20] The provision which it adopted pursues an aim which may, theoretically, be supported; in practice, however, the difference in treatment between contracts for a consideration in kind and contracts for sale established as a derogation from the directive is incompatible with a principle which ought to have been complied with, namely *fiscal neutrality*.

28. In my view, that principle is intimately bound up with the principle of non-discrimination and, in the circumstances of this case, demands that barter transactions be treated in the same manner as money transactions. Fiscal neutrality specifically requires equal treatment for those different economic activities in order to avoid distortions of the more general Community VAT system caused by the drawing of unimportant and unjustified distinctions. [21]

29. Let me consider the approach adopted by the United Kingdom from the angle just described. The case under examination reveals the outward effects, that is to say those which have occurred as a result of derogation from the directive as provided for in that State. As the United Kingdom authorities themselves acknowledge, there is no danger of evasion in this case. [22] And yet, precisely because the United Kingdom legislature drew a distinction between the two types of transaction, Goldsmiths has suffered significant financial loss: it is not entitled to recover value added tax relating to a transaction which was performed, duly recorded and entered in accounts, but for which it did not receive the agreed consideration. It is in a worse position than it would have been in if it had entered into a contract for sale for consideration in money. And all taxable persons who realize transactions of this sort will be in the same position: they will have less protection in the event of total or partial non-payment. Let no one say that a prudent trader will prefer to conclude a contract for sale in order to avoid such consequences.

19 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 38.

20 — It is in this respect, it seems to me, that the case in point most resembles the judgment in Case 324/82 *Commission* v *Belgium*, cited above at footnote 13, for two kinds of reason. First, because in both cases the Member State adduced the prevention of tax avoidance as a reason in support of the exercise of its right to derogate. Second, because now as then, to borrow the words used by the Court on that occasion, the exercise of the right to derogate results in legislation which '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' (paragraph 31).

21 — On the other hand, this exposition of the principle seems to me to come very close to that put forward by the same United Kingdom Government in Case C-283/95 *Fischer* (action pending; see Observations of the United Kingdom Government submitted on 20 December 1995): 'The essential nature of the principle (of fiscal neutrality), as its very name indicates, is neutrality. Its force is derived from the need to ensure that economic activities are treated equally and to ensure that the common system of value added taxation is not distorted by irrelevant or illegitimate distinctions'.

22 — Observations of the United Kingdom, section 25: 'There is no suggestion of fraud in the present case'.

From the economic standpoint, as Advocate General Vilaça observed in his Opinion in *Naturally Yours*, barter transactions, like sales for money, are a means by which commercial life is carried on. [23] There is no justification for discriminating against one category as opposed to the other. Such unequal treatment results, for the purposes of the Sixth Directive and Community law, in unwarranted interference, far from neutral in tax terms, with the trader's freedom of choice and, consequently, in unjustified failure to reduce the taxable amount. [24] Especially as the general character of value added tax demands that the equal is treated equally and the unequal in proportion unequally. [25]

30. In this respect, there is textual support in the directive for the conclusion just set out, which is to be found in Article 11A(1)(a). That provision states that the taxable amount is to be in respect of the supply of goods and services, *everything which* constitutes the consideration which has been or is to be obtained by the supplier. As I have said, a broad interpretation of the formula so adopted was given in the *Naturally Yours* judgment: it includes supplies which, *lato sensu*, may be expressed in economic terms. For tax purposes, therefore, supplies in kind, if they can be assessed in monetary terms, are treated in essence in the same way as supplies for cash, and it is clear that such must lead, as a matter of principle, to the equal treatment necessary for the two types of transaction. Exceptions and derogations may be provided for, but they must have an objective basis. Derogations must observe the principles of the Sixth Directive and, moreover, must not infringe the principle of proportionality.

31. Nor, furthermore, does the reference to the 17th recital seem to me to be of the least relevance in the circumstances. The Member States may adopt measures to simplify the levying of tax or to avoid fraud or tax avoidance. The measures provided for are derogations, and the recital in question refers to the limits and conditions to which derogation is subject. What those limits and conditions are is not expressly stated. They are constraints which must be inferred from the directive

23 — In this regard it seems to me to be interesting to point out what an Italian author wrote — in a not far-distant period of high inflation — on the subject of barter contracts: 'Notice should be taken of renewed interest in this traditional institution, which is capable of maintaining the value in exchange of goods in real terms, which by contrast are adversely affected by the current major inflationary processes and the correlated extremely high money rates'; L. Ricca, 'Permuta', in *EdD*, Vol. XXXIII, p. 125, Milan, first paragraph.

24 — In this sense I shall take the liberty of disagreeing with the United Kingdom's statement at the hearing to the effect that, from an economic point of view, excluding barter transactions from qualifying for tax relief does not produce distortions in so far as the greater risk presented by distortions is internalized in the price. I take the view that this greater 'induced' risk is *in itself* liable to divert some transactions into cash sales rather than barter transactions which are more onerous in the light of the United Kingdom legislation. In essence, I mean that the reasoning of the United Kingdom Government — based, as I understand it, on an idea that the rules specifically adopted for this type of transaction are 'neutral' as regards economic decisions — would be valid if those transactions were not in 'competition' with those carried out for money.

25 — Thus B. J. M. Terra and J. Kajus, op. cit., p. 14: 'The general character of a sales tax demands that the equal is treated equally and the unequal in proportion unequally'.

itself, by interpreting its provisions and the areas in which it gives Member States freedom to derogate.

32. Let us now look at the *scheme* of the directive. It provides for two instruments which are related to the terms of the 17th recital.

First, the Member States may derogate from the provisions of the directive in order to prevent tax evasion or avoidance and to that end Article 27 provides that the Member States may maintain or adopt special measures, *subject to the authorization* of the Council. There is, therefore, a ready-made means by which the Member States may tackle and resolve the problems of tax evasion and avoidance. [26]

Second, as the Court has recognized, recourse to such instruments demands the necessary safeguards. The measures 'in principle may not derogate from the basis for charging VAT laid down in Article 11, except within the limits strictly necessary for achieving that aim'. [27] Two observations on this point. From the first angle, the United Kingdom had available to it the specific means of dealing with any problems caused by barter transactions as regards avoidance or evasion, and it did not use it. [28] That is not all: even the measure adopted *ad hoc* by the legislature is nevertheless framed, precisely with reference to Article 11 in general, as being limited by the criterion of necessity. From the first point of view, the derogating provisions at issue were adopted without going through the procedure laid down by the directive and without giving the other Member States the assurances concerning compliance with that procedure. [29] Nor, moreover, has the United Kingdom supplied any actual assessment of absolute necessity — and thus of there being no possible alternative measures — to support its decision to exclude barter transactions from entitlement to tax relief.

33. Second, the directive provides for specific exemptions to be granted subject to the conditions to be laid down 'for the purpose of (...) preventing any possible evasion, avoidance or abuse', or for 'other obligations' to be imposed by the Member States

26 — For an analysis of the objectives of the provision, I would refer to the Opinion of Advocate General Jacobs in Case C-97/90 *Lennartz* [1991] ECR I-3812: 'The general rules of the Sixth Directive (...) are intended to reconcile the interests of administrative simplicity with the objectives of the common VAT system, in particular that of neutrality. It would clearly have been difficult, if not impossible, to envisage all the technical difficulties or forms of avoidance or evasion which the tax authorities throughout the Community might encounter. (...) It was therefore appropriate to allow Member States to seek individual authorization for measures dealing with particular problems' (paragraph 71).

27 — Case 324/82 *Commission* v Belgium, cited at footnote 14, paragraph 29.

28 — It seems apposite to note in this connection that the United Kingdom is the Member State which has most often availed itself of the right under Article 27. It has notified to the Commission 12 measures to simplify procedure or combat avoidance (France and Germany have each presented five measures for the Commission's information). The information is taken from B. Terra and J. Kajus, op. cit., see commentary on Article 27, page 19.

29 — See Article 27(2), (3) and (4). The provisions require the Member state to inform the Commission of the measures to be adopted so that it may assess them; furthermore, the Commission is required to inform the other Member States and they have the right to ask the Council to examine the case.

for the prevention of fraud. [30] The provision at issue is silent on this point, which is one reason for considering that it does not lay down the derogating provisions authorized by the directive where intended for the specific purpose of preventing tax evasion and avoidance. In other words, it may be inferred from the legislature's silence on this point that considerations of this nature should be unimportant.

34. In conclusion, the United Kingdom legislature considered it necessary to depart 'in a general and systematic way' from the general rule in Article 11C(1) only with regard to barter transactions. However, not to allow reduction of the taxable amount in such cases means that the exercise of the discretionary right to derogate fails to comply with the precepts of Community law: it is contrary to the principle of fiscal neutrality which is in its turn linked to the fundamental principle of non-discrimination. [31]

35. One last brief observation. At the hearing, the United Kingdom's representative asked the Court, if it were to hold that excluding barter transactions from tax relief was unlawful, to limit the temporal effects of the judgment, on the ground that the Member States had interpreted the provision in absolute good faith and should therefore not have to suffer loss as a result of the 'very serious' problems that would be created by such a ruling.

36. I do not consider that argument to be meritorious. Limiting the effects of a judgment under Article 177 constitutes an exceptional case: interpretation of a provision of Community law in the context of a reference for a preliminary ruling explains and defines the meaning and scope of the provision as it ought to be, or ought to have been, understood since it entered into force. The provision, thus explained, may be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that the conditions enabling an action relating to the application of that provision to be brought before the courts having jurisdiction are satisfied. [32]

These are the principles. The Court has recourse to limiting the effects of a judgment only in truly exceptional circumstances. That is to say, where serious economic repercussions result in particular from the large number of legal relationships established in good

30 — See, to this effect, Articles 13B, 14 and 22(8) of the Sixth Directive.

31 — *Commission* v *Belgium*, cited above, paragraph 32.

32 — Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237, paragraph 9.

faith on the basis of a provision considered to be validly in force, and individuals and national authorities have been induced to behave in a manner inconsistent with Community legislation by reason of an objective and significant uncertainty relating to the scope of the community legislation. [33]

Thus, most recently in the *Bosman* judgment, the Court recognized the need to limit the effects of a judgment — with a sole exception in favour of persons who had already brought court proceedings or raised an equivalent claim under national law — in the light of the uncertainty existing as the compatibility of the various rules in force and applicable in respect of football transfers and the provisions of Community law. [34]

37. No such grounds appear in the circumstances of this case. The United Kingdom has said nothing about the serious financial disruption which would be caused by application of the provision interpreted in this way. [35] Nor, to my mind, have the Community institutions acted in such a manner as to lead the United Kingdom to assume that the rules it adopted in this case were lawful under Community law. [36]

38. Moreover, finally, for the reasons I have been explaining, I do not think that requirements of legal certainty can lead to limitation of the effects of the judgment. In my view, the discretion given to the Member States by the provision conferring the right to derogate could be properly exercised by reference to the principles on which the scheme of the directive is based — proportionality, fiscal neutrality, equal treatment — and which may be deduced from the judgments of the Court dealing with the question of the limits of derogations from the directive. I cannot, therefore, perceive that element of legal uncertainty which might, with reason, lead to an interpretation of the scope of the power to derogate granted to the Member States under the provision which accords with the rules in force in the United Kingdom system. [37]

33 — Opinion of Mr Tesauro in Case C-200/90 *Poulsen* [1992] ECR I-2231, section 12; see also the decisions referred to therein.

34 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 143 and 144.

35 — Moreover, as is well known merely referring to the financial consequences of a given interpretation of Community law does not justify restricting the effects of the Court's ruling, in order to avoid the paradox pointed out by Mr Tesauro in the Opinion last cited, of according 'more favourable treatment precisely for the more serious infringements' (section 12).

36 — I would note that in earlier decisions the Court took into consideration in support of the alleged reliance the fact that the Commission did not pursue the procedure for failure to fulfil obligations with regard to a practice later held to be contrary to Community law, or where it had agreed temporarily to the practice being maintained (see Case C-163/90 *Legros* [1992] ECR I-4625, paragraph 32); similarly, in *Cabanis-Issarte*, in deciding to limit the effects of the judgment, the Court took into consideration the fact that in that judgment the scope of previous judgments was also limited (Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097, paragraphs 46 to 48).

37 — As regards the condition of reasonableness, it may be argued from the judgment in *Poulsen* in which it found that 'the Danish Government has not shown that at the time when the contested levy was introduced, Community law could *reasonably* be construed as permitting such a tax' (Case C-200/90 *Poulsen*, paragraph 21, emphasis added).

For the reasons set out above, I propose the following answer to the question referred by the national court:

The second sentence of Article 11C(1) of the Sixth VAT Directive must be interpreted as meaning that it does not authorize a Member State to exclude the possibility of tax relief in respect of bad debts arising from barter transactions when, by contrast, it does allow the possibility of tax relief for debts arising from sales transactions for a consideration in money.