

OPINION OF MR ADVOCATE GENERAL
VERLOREN VAN THEMAAT
DELIVERED ON 13 DECEMBER 1983¹

*Mr President,
Members of the Court,*

1. Introduction

The plaintiff in the main action, Mrs Kloppenburg, who carries on a credit and mortgage business, claimed exemption from turnover tax for the first half of 1978 on the basis of Articles 1 and 13 B (d) 1 of the Sixth Council Directive of 17 May 1977 (Official Journal 1977, L 145, p. 1).

The Finanzamt [Tax Office] rejected the claim and, in accordance with the provisions of the Umsatzsteuergesetz [Law on Turnover Tax] 1973, which were in force until 31 December 1979, assessed the plaintiff's transactions to turnover tax at the general rate, as is clear from the order making the reference to this Court.

The plaintiff relied on the judgments of the Court in Case 8/81 *Becker* [1982] ECR 53 and in Case 255/81 *Grendel* [1982] ECR 2301. In those judgments the Court ruled that as from 1 January 1979 it was possible for a credit negotiator to rely upon the relevant article of the Sixth Directive, in the absence of the implementation of that directive, provided that he had not passed on the tax. Moreover, it was expressly stated that in those circumstances the State could not claim as against the individual that the directive had not been implemented.

The difficulty in the present case does not therefore lie in the question whether the relevant article may be relied upon

before the national court since the Court of Justice has already answered that question in the affirmative. This time the question is whether the plaintiff could, in contrast to the position in the *Becker* and *Grendel* cases, rely on that article in the first half of 1978.

The relevance of that difference in time between this case and those earlier judgments lies in the adoption of the so-called Ninth Council Directive of 26 June 1978. According to the Sixth Council Directive of 17 May 1977, the period within which the directive was to be implemented by the Member States was to expire on 1 January 1978. However, none of the Member States, with the exception of the United Kingdom and Belgium, was able to implement the directive within the prescribed period. Accordingly, pressure was exerted on the Commission to submit a proposal setting a new date for implementation. The Commission finally submitted a proposal to that effect (Official Journal 1978, C 141, p. 3).

On 26 June 1978 the Council subsequently adopted the Ninth Directive, 78/583/EEC, (Official Journal 1978, L 194, p. 16) authorizing Denmark, France, Germany, Ireland, Italy, Luxembourg and the Netherlands to implement the Sixth Directive by 1 January 1979 at the latest.

It is clear from the documents before the Court that the directive was notified to the Member States concerned on 30 June 1978.

In the cases mentioned earlier, the Court was expressly requested to answer the

1 — Translated from the Dutch.

question submitted by reference to the legal position after 1 January 1979, on the assumption that the Member State concerned had not implemented the directive by that date.

In the present case the question submitted by the national court is whether the plaintiff in the main action was able, in the absence of the implementation of the directive, to rely on the relevant provision between 1 January 1978 and 30 June 1978 "even though under Article 1 of the Ninth Council Directive ... of 26 June 1978 ... the Member States referred to in that article were authorized to implement Directive 77/388/EEC by 1 January 1979 at the latest."

2. Submissions of the parties

It is clear from all the observations submitted to the Court that decisive importance is attached to the question whether the extension of the period for implementation also covers the period prior to the adoption of the Ninth Directive or only the period following its adoption. That is considered important because a credit negotiator is permitted to rely on Article 13 B (d) 1 of the Sixth Directive only in so far as the Member State has not complied with its obligation to implement the directive within the prescribed period. An extension of the period for implementation, however, would preclude reliance on that provision.

The plaintiff in the main action contends that her position during the period in question cannot be adversely affected by the Ninth Directive since the retroactive effect of the directive would prejudice her rights, contrary to certain fundamental legal principles.

The Italian Government, like the defendant in the main action, contends that, as a result of the requirement that the Ninth Directive must be effective, the extension also applies to the period prior to the adoption of the directive. Moreover, it follows from such an interpretation that a citizen cannot rely on the directive during the relevant period, except in so far as that is specifically provided for by special rules. That is not the case here.

The argument developed by the Commission is striking. The Commission too contends that a meaningful interpretation of the Ninth Directive leads to the conclusion that the latter is also applicable to the period prior to its adoption.

The possibility of relying on a directive where a Member State fails to implement it within the prescribed period does not, in the Commission's view, give rise to a subjective right but merely to a legal expectation or a so-called indirect right. The extension of the period for implementation automatically nullifies an individual's right to rely on the directive. Accordingly, the Commission maintains that such an extension in principle retroactively nullifies individual rights, such as those at issue in the present case, unless such rights are expressly reserved. In its view, that is the case here since at the time of the adoption of the directive the Council included in the minutes a declaration which it interprets in that sense. At the hearing, the Commission once again expressly reaffirmed its view that the question submitted for a preliminary ruling can be answered in the affirmative only on the basis of the declaration contained in the minutes. I cannot share the Commission's opinion for reasons which will become apparent. In my view, the Commission has wrongly applied the case-law of the Court concerning the permissibility of retro-

active effect in Community law. Moreover, in an appraisal of the question whether the Ninth Directive is to be regarded as having retroactive effect, it is necessary to proceed on the basis of the text of the directive itself. Declarations contained in the minutes of a Council meeting are in principle confidential and for that reason should not be taken into account for purposes of interpretation. On that point I would refer to the Opinion of Advocate General Sir Gordon Slynn in Case 255/81 *Grendel* [1982] ECR 2315 which was referred to several times at the hearing.

3. Assessment of the question submitted for a preliminary ruling

As far as my own opinion regarding the question is concerned, I would observe that the practice followed by the Council in extending the period for implementation by the adoption of a new directive where the Member States were clearly unable to complete the process of implementation within the period initially prescribed is permissible according to the case-law of the Court (see Case 52/75 *Commission v Italy* [1976] ECR 277).

The Ninth Directive was adopted on 26 June 1978 and on 30 June 1978 it was notified, as I have stated, to the Member States to which it was addressed.

According to the second paragraph of Article 191 of the EEC Treaty, directives are to take effect upon notification. The Ninth Directive accordingly took effect on 30 June 1978. If the purpose of the directive is that its content, that is to say the extension of the period for implementation, should also be applicable to the first half of 1978, then it may be said to take effect before its entry into force, in other words retroactively.

According to the case-law of the Court, the principle of legal certainty as a rule militates against the view that a Community measure takes effect even before it is published. However, it is possible to derogate from that principle in exceptional cases if such an effect is necessary for the achievement of the objective in view and the proper account is taken of legitimate expectations of those concerned. In that connection I would refer, *inter alia*, to Cases 98/78 *Racke* [1979] ECR 80, Case 99/78 *Decker* [1979] ECR 108, Joined Cases 212 to 217/80 *Salumi* [1981] ECR 2748, Case 108/81 *Amylum* [1982] ECR 3129, Case 110/81 *Roquette* [1982] ECR 3177 and Case 114/81 *Tunnel Refineries* [1982] ECR 3205.

In the light of that case-law it is necessary to ascertain first of all whether the directive is clearly intended to take effect even before it enters into force and, secondly, whether such an effect harms legitimate expectations in the sense referred to by the Court in the *Isoglucose* cases, namely that it "frustrates a legitimate expectation" on the part of those concerned, in this case their expectation that after 1 January 1978 there would be exemption from turnover tax.

4. Effect of the directive in time

It is clear from the principles laid down in that case-law concerning retroactive effect that the Court regards such an effect as an exception to the rule, and one in relation to which a number of other conditions are of importance. Such an exception must be strictly interpreted and, as a rule, clearly established. Thus in the *Salumi* cases, to which reference has been made, the Court held in paragraph 12 of the decision that provisions may not be accorded retroactive effect in the absence of sufficiently clear indications to the contrary.

In the first place therefore it is necessary to examine the text of the Ninth Directive which consists of the following two articles.

"Article 1

By way of derogation from Article 1 of Directive 77/388/EEC, Denmark, Germany, France, Ireland, Italy, Luxembourg and the Netherlands are hereby authorized to implement the said directive by 1 January 1979 at the latest.

Article 2

This directive is addressed to Denmark, Germany, France, Ireland, Italy, Luxembourg and the Netherlands.

Done at Luxembourg, 26 June 1978."

It is not apparent from that wording that the directive was intended to produce effects before it entered into force. Nor is it at all apparent from the statement of the reasons on which the directive is based that such was the intention. A prudent legislator would have made express provision to that effect. Since there are no clear points of reference in the directive itself, the opinion was expressed by various parties during the proceedings that the requirement that the directive must be effective none the less entails such retroactive effect. The extension of the period for implementation was intended to follow on from the expiry of the period initially prescribed. Although in practical terms that view is not devoid of merit, I still do not think that it can be accepted. In that connection I would refer once again to the case-law of the Court mentioned earlier according to which there must be clear indications of such exceptional retroactive effect, in order to ensure respect for the principles of legal certainty and the protection of legitimate expectations, "by virtue of which the effect of Community legislation must be clear and predictable for those who are

subject to it" (*Salumi*). Against that background it is then necessary to consider, in the light of the principles laid down by the Court, whether, where reliance is placed on a provision of a directive which has not been implemented by a Member State within the prescribed period, there can be said to be a legal position which merits protection.

5. Legitimate expectation

In its judgment in Case 8/81 *Becker*, the Court set out the legal position regarding Article 13 B (d) 1 of the Sixth Directive where a Member State fails to implement the directive within the prescribed period. The Court held that in those circumstances an individual was entitled to rely directly on that article.

The reason for this, as the Court explained at length, is that a Member State cannot hide behind its infringement of the Treaty. The Court expressly stated, *inter alia*, that "this minimum guarantee for persons adversely affected by the failure to implement the directive is a consequence of the binding nature of the obligation imposed on the Member States by the third paragraph of Article 189 of the Treaty ..." (paragraph 29 of the decision).

It follows from this that the legal position of the individual is that he is entitled, upon the expiry of the period prescribed for implementation, to rely upon the intended effect of the directive, either on the basis of national law where the directive is implemented within the prescribed period, or on the basis of the directive itself where the latter is not implemented within that period.

The legal position in my opinion unquestionably falls within the scope of the principle of legitimate expectation

which is recognized by the Court and of which proper account must be taken if a provision is to be accorded retroactive effect.

That interpretation of Article 13 B, which is consistent with the judgment of the Court in the *Becker* case, applies not only to the time after the expiry on 1 January 1979 of the second period for implementation, but indisputably also to the period between the expiry on 1 January 1978 of the period initially prescribed for implementation and the establishment on 30 June 1978 of the second period for implementation.

Moreover, practical considerations concerning the effectiveness of the directive extending the period for implementation cannot in my opinion justify a different conclusion.

In the *first* place, the representative of the Finanzamt made it clear, in reply to a question from the Court, that the number of cases in which taxpayers relied on the directive during the relevant period was extremely small.

Secondly, serious consideration must in my opinion be given to the fact that a different conclusion would adversely affect taxpayers who relied on the directive in good faith and refrained from passing on any tax to their customers and who are of course unable to pass the tax on to them now.

Thirdly, the Member States concerned should certainly have been able to foresee earlier that it would not be possible for them to implement the directive in question within the period prescribed therein. Had they urged the Commission sooner to extend the period for implementation, they could have spared themselves the problems which have now arisen and which, as I have said, appear to be very minor in scope.

Finally, it must be borne in mind that should any Member State need a second

extension of the period for implementing the directive, a second directive to that effect could in circumstances such as those of the present case, combined with the *Becker* judgment, give rise to a state of legal chaos for which there would be scarcely any solution. Repeated extensions of that kind have regularly occurred in the past precisely in the case of the directives on turnover tax.

6. Conclusion

On the basis of the foregoing considerations I have come to the conclusion that, in the first place, the Ninth Directive cannot be regarded as producing effects before it entered into force since there is no clear provision or objective showing an intention to endow it with retroactive effect.

Secondly, the possibility of relying on the directive where a Member State fails to implement it within the prescribed period constitutes a legal position on which an individual must be able to rely and which, according to the principle of legitimate expectation, is worthy of protection.

For those reasons I propose that the Court answer the question submitted by the national court in the affirmative.

Before I conclude my opinion, I would like to raise a question which did not arise in the proceedings, namely how long could an individual rely on the contested provision of the directive. Could he do so until the date of notification of the Ninth Directive to the Member States (30 June 1978) or until the date on which he was able to make himself acquainted with it as a result of its publication in the Official Journal (19 July 1978)?

I am of course aware that under the second paragraph of Article 191 of the EEC Treaty a directive takes effect upon

notification to those to whom it is addressed and publication is not a precondition for its entry into force, in contrast to the position with regard to regulations. Therefore the question which I would like to put before the Court for the sake of completeness is not when did the Ninth Directive enter into force, but rather when can a Member State, following the period in which it infringed the Treaty by failing to implement the directive within the prescribed period, rely on the extension of the period for implementation and, accordingly, on the cessation of the infringement, as against an individual.

After all, "a fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it", as the Court held in the *Rasche* and *Decker* judgments, referred to earlier. In that connection I would also refer to Case 76/79 *Könecke* [1980] ECR 676.

It follows, in my opinion, that an individual was, as a general rule, entitled to rely on the relevant provision of the Sixth Directive until the Ninth Directive was published.

Since the question referred to this Court by the national court is expressly concerned with the period between 1 January 1978 and 30 June 1978 and the problem which I have just considered was not on the whole dealt with in the proceedings, I would, however, propose that the question be answered as follows:

"In the case of transactions carried out between 1 January 1978 and 30 June 1978 it was possible for the provision concerning the exemption from turnover tax of the negotiation of credit contained in Article 13 B (d) 1 of the Sixth Council Directive to be relied upon by a credit negotiator, in the absence of the implementation of the directive by the Member State, where he had refrained from passing that tax on to persons following him in the chain of supply".