Judgment of the Court, Becker, Case 8/81 (19 January 1982)

Caption: It emerges from the judgment of the Court of Justice of 19 January 1982, in Case 8/81, Becker, that, even though a directive as a whole has not been implemented, individuals may not for that reason be denied the right to rely on any of its provisions which, owing to their particular subject matter, are capable of being severed from the general body of provisions and applied separately.

Source: Reports of Cases before the Court. 1982. [s.l.].

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Judgment of the Court 19 January 1982 (1)
Ursula Becker v Finanzamt Münster-Innenstadt (reference for a preliminary ruling from the Finanzgericht Münster)

(Effect of directives)

Case 8/81

1. Measures adopted by institutions — Directives — Effect — Non-implementation by a Member State — Right of individuals to rely upon the directive — Conditions
(EEC Treaty, Art 189)

2. Measures adopted by institutions — Directives — Directive conferring a margin of discretion on the Member States — Provisions which are severable and may be relied upon by individuals
(EEC Treaty, Art 189; Council Directive 77/388)

3. Tax provisions — Harmonization of laws — Turnover tax — Common system of value-added tax — Exemptions conferred by the Sixth Directive — Taxable persons' right of option — Implementation — Powers of the Member States — Limits
(Council Directive 77/388, Art 13 B and C)

4. Tax provisions — Harmonization of laws — Turnover tax — Common system of value-added tax — Exemptions conferred by the Sixth Directive — Effects within the system of value-added tax
(Council Directive 77/388)

5. Tax provisions — Harmonization of laws — Turnover tax — Common system of value-added tax — Exemptions conferred by the Sixth Directive — Exemption of transactions consisting of the negotiation of credit — Possibility of individuals' relying upon the relevant provision where the directive has not been implemented — Conditions
(Council Directive 77/388, Art 13 B (d) 1)

1. It would be incompatible with the binding effect which Article 189 of the EEC Treaty ascribes to directives to exclude in principle the possibility of the obligation imposed by it being relied upon by persons concerned. Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

2. Whilst the Sixth Council Directive 77/388 on the harmonization of the laws of the Member States relating to turnover taxes undoubtedly confers upon the Member States varying degrees of discretion as regards implementing certain of its provisions, individuals may not for that reason be denied the right to rely on any provisions which owing to their particular subject-matter are capable of being severed from the general body of provisions and applied separately. 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 EEC Treaty. That obligation would be rendered totally ineffectual if the Member States were permitted to annul, as the result of their inactivity, even those effects which certain provisions of a directive are capable of producing by virtue of their subject-matter.

3. Article 13 C of Directive 77/388 does not in any way confer upon the Member States the right to place conditions on or to restrict in any manner whatsoever the exemptions provided for by Part B. It merely reserves the right to the Member States to allow, to a greater or lesser degree, persons entitled to those exemptions to opt for taxation themselves, if they consider that it is in their interest to do so.

4. The scheme of Directive 77/388 is such that on the one hand, by availing themselves of an exemption, persons entitled thereto necessarily waive the right to claim a deduction in respect of input tax and on the other hand, having been exempted from the tax, they are unable to pass on any charge whatsoever to the person following them in the chain of supply, with the result that the rights of third parties in principle cannot be affected.

5. As from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 B (d) 1 of Directive 77/388 to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply, and the State could not claim, as against him, that it had failed to implement the directive.

In Case 8/81

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Münster for a preliminary ruling in the case pending before that court between

URSULA BECKER, a self-employed credit negotiator, residing in Münster,

and

FINANZAMT MÜNSTER-INNENSTADT [Tax office, Münster Central],

on the interpretation of Article 13 B (d) 1 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 1977, L 145, p. 1),

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grevisse, Judges,

Advocate General: Sir Gordon Slynn
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

In the Federal Republic of Germany turnover tax is charged on any supplies or other services effected for consideration within the territory of the country by a person acting in the course of his business.

Article 4 (8) of the Law on turnover tax [Umsatzsteuergesetz] of 16 November 1973 (Bundesgesetzblatt 1973, I, p. 1682) exempted from turnover tax *inter alia* the granting of credit, the negotiation of transactions involving securities and legal tender, and the management of credit; it did not grant exemption in respect of credit negotiation. The latter transaction was exempted from the charge to turnover tax from 1 January 1980 by the insertion of a new Article 4 (8) (a) by the Law on the new version of the Law on turnover tax and on the amendment of other laws (Gesetz zur Neufassung des Umsatzsteuergesetzes und zur Änderung anderer Gesetze) (Bundesgesetzblatt 1979, I, p. 1953).

Ursula Becker, who resides in Münster, carries on the business of a self-employed credit negotiator. As such she was liable in 1979, under the legislation in force at that time, to pay turnover tax on the income which she received in the form of commissions for her activity as a credit negotiator.

In her preliminary returns in respect of turnover tax for the months March to June 1979, Mrs Becker requested exemptions from tax from the Finanzamt Münster-Innenstadt for her credit negotiation transactions. She based the claim on Article 13 B (d) 1 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 1977, L 145, p. 1).

That provision, which falls under Title X of the directive, dealing with exemptions, provides as follows:

"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

(d) ...

1. The granting and the negotiation of credit and the management of credit by the person granting it;"

.

Mrs Becker submits that the obligation thus imposed on the Member States by that provision to exempt *inter alia* credit negotiation transactions from turnover tax was incorporated in German law as from 1 January 1979, as the final date for the actual implementation of Directive 77/388 in all the Member States, originally laid down by the directive itself as 1 January 1978, was postponed for the Federal Republic of Germany and six other Member States until 1 January 1979 by the Ninth Council Directive 78/583/EEC of 26 June 1978 on the harmonization of the laws of the Member States relating to turnover taxes (Official Journal 1978, L 194, p. 16).

The Finanzamt Münster-Innenstadt did not accept that argument and in the notice of assessment to advance payment of turnover tax for the months March to June 1979 it charged turnover tax amounting to a total of DM 9 582.54 on Mrs Becker's credit negotiation transactions.

On 4 and 10 September 1979 Mrs Becker lodged an objection with the Finanzamt, which was rejected by decision of 13 December 1979.

On 28 December 1979 Mrs Becker instituted proceedings before the Finanzgericht [Finance Court] Münster.

The Finanzgericht, by order of its Fifth Senate of 27 November 1980 and a rectifying order of 21 January 1981, decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

"Is the provision contained in Title X, Article 13 B (d) 1 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, concerning the exemption from turnover tax of transactions consisting of the negotiation of credit, directly applicable in the Federal Republic of Germany as from 1 January 1979?"

The orders of the Finanzgericht Münster were lodged at the Court Registry on 14 and 26 January 1981 respectively.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 16 March 1981 by the Commission of the European Communities, represented by its Legal Adviser, Peter Karpenstein, on 7 April by the Finanzamt Münster-Innenstadt, defendant in the main action, represented by its Director, Mr Bisping, on 15 April by the Government of the Federal Republic of Germany, represented by Martin Seidel, "Ministerialrat" at the Federal Ministry for the Economy and Professor Manfred Zuleeg of the University of Frankfurt-am-Main, and on 16 April 1981 by the Government of the French Republic, represented by Thierry Le Roy, Member of the Secretariat-General of the Inter-ministerial Committee for Questions of European Economic Cooperation in the Prime Minister's office.

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. However, the Finanzamt Münster-Innenstadt, the Government of the Federal Republic of Germany, the Government of the French Republic and the Commission were invited to bring their written observations up to date in writing before the opening of the oral procedure in the light of the judgment of the Court of 6 May 1980 in Case 102/79 *Commission v Kingdom of Belgium* [1980] ECR 1473). The Commission complied with the request within the period prescribed.

II — Written observations submitted to the Court

The *Finanzamt Münster-Innenstadt*, the defendant in the main action, takes the view that Article 13 B (d) 1 of Directive 77/388 does not fulfil the conditions which the Court of Justice laid down for the direct applicability of the provisions of a directive.

(a) The introductory sentence of that provision, like Article 13 C (b) of the directive, confers on the Member States a margin of discretion also as far as the exemption from tax of credit negotiation transactions is concerned.

(b) Article 13 B (d) 1 of the directive must be considered in the context of the comprehensive system of value-added tax. In internal transactions one of the characteristics of the system is the indissoluble link between exemption and exclusion of the right to deduct. Under Article 17 (2) of the directive, deduction is in principle authorized only in so far as the goods and services are used for the purposes of a taxable transaction. In view of that link, exemption is in any case unfavourable for credit negotiators who supply their services exclusively to other taxable persons who fulfil the conditions for deduction. The same may be true for credit negotiators who partly supply their services to other taxable persons fulfilling the conditions for deduction. In certain exceptional cases exemption may even be unfavourable for credit negotiators who supply their services exclusively to taxable persons who are not entitled to make a deduction, particularly where in the year of assessment 1979 investment gave rise to unusually high levels of input tax.

(c) Another material link arises from the provisions relating to the adjustment of deductions contained in Article 20 (2) of the directive: where a credit negotiator has acquired capital goods during the years preceding the year of assessment 1979 and the period for the adjustment of the deduction has not yet expired, liability to tax might, depending on the circumstances of the individual case, be more favourable for the credit negotiator than exemption.

(d) There is also a material link with the provisions on the issue of invoices contained in Article 22 (3) of the directive: invoices relating to taxable supplies of services must state clearly the amount of value-added tax. Under Article 21 (1) (c) of the directive such a mention of the amount of tax gives rise in the case of exempt supplies of services to an independent liability to tax. Tax due under that provision may, according to Article 17 (2), under no circumstances be deducted as input tax by the recipient of the services supplied. Consequently, the retroactive grant of an exemption from value-added tax represents a considerable disadvantage for credit negotiators who have issued invoices stating clearly the amount of the tax.

(e) The retroactive exemption of services supplied by a credit negotiator would have repercussions on all taxable persons who received his services during the year of assessment 1979. Those taxable persons would not be entitled to a deduction in respect thereof (Article 17 (2) of the directive) and would have to amend their own records and returns of tax.

(f) The retroactive exemption of services supplied by a credit negotiator would also have repercussions, depending on the circumstances of the particular case, on taxable persons who carried out transactions benefiting the credit negotiator during the year of assessment 1979, for example where they waived the exemption under Article 13 C of the directive thinking that the credit negotiator would be entitled to the deduction.

(g) It is desirable that the Court should take the opportunity which this case offers to define the limits of its case-law on the direct applicability of the provisions of a directive. It could do so in particular by expressly

denying direct applicability to individual elements, in this case Article 13 B (d) 1, which cannot be divorced from a comprehensive system, in this case Directive 77/388.

The *Government of the Federal Republic of Germany* is of the opinion that the provision in respect of which the Court's interpretation is requested imposes an obligation on the Member States alone and considers that in support of that view it can rely on the case-law of the Court of Justice. Admittedly, the Court has recognized that provisions of directives create rights in favour of individuals, but it lays down in this regard restrictive conditions which are not fulfilled in this case.

(a) As far as terminology is concerned, it is not a question in this case of examining the "direct applicability" or "direct effect" of the directives. The crucial question is whether a provision of a directive creates rights for individuals upon which they may rely in proceedings before the national courts.

In each case it must be examined whether, in the light of the restrictive conditions laid down in the case-law of the Court, a given provision of a directive confers personal rights. The Court of Justice has not stated that a directive is capable, in its entirety, of creating rights in favour of individuals.

(b) According to the case-law of the Court, an obligation incumbent on the Member States creates personal rights which may be relied upon in proceedings before the national courts and which prevail over incompatible national law, if it is in the interests of the individual, it is no longer subject to postponement, it is clear and unconditional and is not contingent, in its execution or in its effects, upon the introduction of any measure, either by the institutions of the Community or by the Member States concerned. On this point the crucial question is whether or not the Member State has a margin of discretion in fulfilling the obligation.

(c) Consequently, a directive cannot be "directly applicable", as that would mean that the national courts must contribute without distinction to the implementation of all the provisions contained in a directive. The case-law of the Court indicates that the cooperation of the national courts in the implementation of Community law is required only for those rules which may be relied upon in legal proceedings. The distinction between directives and regulations has not therefore become of no account.

(d) Moreover, the restrictive conditions do not depend on whether or not the Member State, after the expiry of the final period prescribed by the directive, has adopted legal rules in order to fulfil its obligations. The directive produces effects in favour of individuals only where the obligation, by its very nature, applies directly. The justification for the restrictive conditions governing the creation of personal rights arising from provisions which impose an obligation on a State lies in important reasons which must be respected. Those reasons make it impossible to endow Article 13 B (d) 1 of Directive 77/388 with the legal effect of enabling individuals to avail themselves of that provision in proceedings before national courts in order to make it prevail over national legal provisions which conflict with it.

(e) If it were accepted that a provision of a directive which was not intended to serve the interests of an individual could be relied upon, the result would be that the Community would be entitled to impose obligations on an individual by a legal measure addressed to another person. This would be in conflict with the principle of the rule of law.

An individual is entitled to expect that the provisions of a directive shall impose an obligation upon him only when the Member State has fulfilled its obligation to incorporate the directive into national law. Provisions of a directive do not therefore impose obligations on individuals. That must also be the position where the provision concerned produces effects which are in part favourable but are also in part unfavourable to them.

(f) To acknowledge the existence of personal rights, even though the obligation arising from the directive is subject to a time-limit, would amount to compelling the State to comply with an obligation which has not yet acquired binding force.

(g) If the provision in question of the directive leaves the Member State concerned a margin of discretion

regarding its implementation, the existence of personal rights must be denied owing to the specific role the courts, including both the Court of Justice and the national courts, which is to uphold the law. It would be incompatible with that role if they were to assume the political discretion of the Member States. Justification for the exclusion of personal rights may also be found in the principle of legal certainty, which requires that the legal effects arising under a legal system should be clearly defined.

(h) As regards Article 13 B (d) 1 of Directive 77/388, only one of the conditions required for the existence of personal rights is fulfilled: on the expiry of the period laid down by Directive 78/583, the obligation incumbent on the Member States is no longer subject to any time-limit.

(i) The provision in question serves the interests of the individual where exemption from tax is favourable to the person who carried out the transactions, which appears to be so in the case of the plaintiff in the main action. However, exemption from tax does not always operate in favour of the individual. Exemption gives rise to serious disadvantages for credit negotiators who have supplied their services to a trader entitled to deduct input tax. In the case of credit negotiators who have supplied their services partly to persons entitled to deduct input tax and partly to persons who are not so entitled, the question whether or not exemption from tax is as a whole more favourable to them depends on the value-added during the year 1979 and on the percentage of their transactions carried out with persons entitled to deduct input tax. Exemption from tax may even have drawbacks for credit negotiators who in 1979 carried out transactions exclusively with persons who were not entitled to deduct input tax, if those negotiators had an unusually high level of intermediate consumption during 1979. Furthermore, the effect of conferring a tax exemption on credit negotiators would be to prevent the recipients of their services from deducting the input tax which became chargeable in the chain of transactions preceding the credit negotiation. In that respect also the contested provision imposes a burden on individuals. However, in the interests of the individual the directive may be relied upon only against the State.

(j) The need for clear and unconditional rules overlaps with requirement that it must no longer be necessary to adopt further provisions, of Community or national law, inasmuch as the rules laid down by the directive must disclose unambiguously their legal effects without the need for adaptation of national law. In that regard the exemption from tax must not be considered in isolation. It is an integral part of a system of taxation within which the taxation of various persons is linked by a chain of transactions.

Thus, if the credit negotiator's own transactions are taxable, that would mean that for the period of assessment concerned he has the right of deduction (Article 17 (2) of Directive 77/388), is not entitled to adjust the deduction in respect of capital goods acquired in earlier periods (inference *a contrario* from Article 20 of the directive), and rightly stated the turnover tax on his invoices (Article 22 (3) (b)). If the transactions of a credit negotiator are exempt from tax, then for the period of assessment concerned, he has no right of deduction (inference *a contrario* from Article 17 (2) (a) of the directive) unless the conditions for exemption laid down by Article 17 (3) (c) are fulfilled, he must adjust the deduction in respect of capital goods acquired in earlier periods (Article 20 (2)), and he has wrongly stated the turnover tax on his invoices, with the result that he is nevertheless liable for the tax mentioned (Article 21 (1) (c) of the directive).

For those who utilize the services of the credit negotiator, the consequences vary according to whether the negotiator's transactions are taxable or are exempt. The same holds true for those following the credit negotiator in the chain of supply.

It is particularly indicative of the uncertainty of the legal position that a credit negotiator cannot obtain exemption from tax by relying upon Article 13 B (d) 1 of the directive in so far as he followed the normal practices of mentioning the tax in his invoices.

This "chain" of taxation arising from Directive 77/388 also characterized the German law on turnover tax in force in the year 1979. The application of Article 13 B (d) 1 would lead to further taxation of entire series of transactions. Taxpayers must not be held in uncertainty regarding the tax burden which they must expect to bear, as would be the case if the taxation of transactions arising from the negotiation of credit were to depend on a subsequent judgment of the Court.

So long as the original national legislation purports to continue in force, it would be demanding too much of individuals, administrative authorities and national courts to take it upon themselves to disregard the national law and its penalties and to rely on personal rights arising from the directive.

Consequently, in the absence of adaptation of the law of the Federal Republic of Germany in force in 1979, personal rights cannot arise under Article 13 B (d) 1 of Directive 77/388.

(k) The Member States have a margin of discretion in connection with exemption from tax under the provision in question inasmuch as they may lay down conditions for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse. Exemption must be delimited in the national tax laws by additional rules going beyond the exempt transactions. Such rules cannot be regarded as having "direct effect".

By reason of the first sentence of Article 13 B (d) 1 of the directive, the uniform and precise definition required by the Court is missing.

Moreover, under Article 13 C (b) of the directive the Member States may allow their taxpayers a right to opt for taxation *inter alia* in the case of credit negotiation transactions. The Member States may also restrict the scope of that right of option. They are to fix the details of its use. The Federal Republic of Germany has made use of the power thus conferred upon it and has inserted in the Umsatzsteuergesetz 1980 a new Article 9 on the waiver of exemptions.

If a court were minded to apply the tax exemptions without awaiting the supplementary legislation of the Member State, it would deprive that Member State of the opportunity to grant the right of option. To acknowledge the conferment of personal rights by Article 13 B (d) 1 of the directive would amount to the adoption of a political decision to abolish, at least provisionally, the discretion left by the Community to the national legislature, which is something which the courts have no power to do.

The fact that the margin of discretion left to the Member States precludes the existence of personal rights arising under an obligation incumbent on a State does not mean that the State has failed to fulfil one of its obligations. It is for the Commission to inquire into that matter under Article 169 of the EEC Treaty. In the event, the Commission did in fact bring the matter before the Court (Case 132/79). The action was not pursued because the Federal Republic of Germany brought its law into conformity with the directive as from 1 January 1980.

(l) The following answer should be given to the preliminary question put by the Finanzgericht Münster:

Article 13 B (d) 1 of Directive 77/388 does not constitute a directly applicable provision in the Federal Republic of Germany upon which individuals may rely in proceedings before the national courts.

The *Government of the French Republic* takes the view that a negative reply must be given to the question put to the Court by the Finanzgericht Münster.

(a) According to the case-law of the Court, the principle that Community directives are directly applicable does not have general scope. The role of that principle is auxiliary and is intended only to ensure the "effectiveness" of the directives. It is limited to "specific circumstances" and is subject to conditions which depend on the extent to which the obligations imposed on the Member States are mandatory in nature. Where the provisions of the directive have been incorporated into the legal order of a Member State, judicial review based on the provisions of the directive is permissible only in so far as those provisions do not allow the Member States a margin of discretion. Such review is precluded where the directive leaves to the Member States powers or options. Where a Member State has failed to adopt, within the prescribed period, the measures needed for the implementation of a directive, only provisions containing "unconditional and sufficiently precise" obligations are capable of being directly applicable.

(b) This caution which is evident in the Court's decisions is particularly justified in the field of taxation in which, apart from the sphere of customs duties, no provision is contained in the Treaty which is capable of direct effect in the internal legal order of the Member States.

Whilst this field has in exceptional cases been the subject of Community regulations, it is essentially, and particularly as far as turnover taxes are concerned, governed by national law. The provisions of Community law adopted on the basis of Article 99 of the EEC Treaty, and in particular the directives on value-added tax, seek to achieve progressively the greatest possible harmonization, but not to substitute for the national systems a new and comprehensive Community system of taxation.

Under those circumstances, the directives on taxation, including Directive 77/388, include, in addition to certain precise and mandatory provisions whose uniform implementation must be ensured, provisions the conditions for the implementation of which are generally left to the discretion of the Member States and which, consequently, are not intended to receive uniform application. Such uniformity can clearly not be achieved by means of direct applicability, which cannot be justified by the need for the "effectiveness" of such provisions.

(c) The purpose of Directive 77/388 is to "clarify" and "harmonize" a number of "concepts" common to the laws of the various Member States concerning, in particular, the scope of value-added tax, the conditions for ranking as a taxable person and the chargeability of the tax.

Essentially, it contains provisions which, admittedly within defined limits, leave certain options to the Member States. In particular, that is expressly stated to be the case as far as the definition of taxable transactions (Article 5 (3) and (5); Article 6 (3)), their place (Article 9 (3)), exemptions (Article 13) and transitional provisions (Article 28 (3)) are concerned. Whether or not they have been the subject of national implementing measures, the direct applicability of the above-mentioned provisions of the directive cannot, having regard to the actual criteria enunciated in the case-law of the Court, be directly applicable before the courts of the Member States.

More generally, it may be asked whether, in view of such a large number of options open to the Member States under the directive and their inseparability from the other provisions, the directive was not, in its entirety, incapable of being directly applicable in the Member States before the adoption of the necessary national legislative measures.

In that regard the Court may not ignore the fact that the Council dismissed that possibility by necessary implication when it took the view, in adopting Directive 78/583 that, after the expiry of the period prescribed for the implementation of Directive 77/388, it could extend the period by one year.

(d) In any event, neither Article 13 B (d) 1 of Directive 77/388 nor Article 13 C (b) can be regarded as having any direct effect. Under the latter provision, in the case of transactions involving the grant and the negotiation of credit the Member States may allow taxpayers a right of option for taxation, restrict the scope of the right of option and fix the details of its use. The wording of those provisions implies that if the principle that transactions carried out by credit negotiators shall be exempt (or carry an option) is to be observed, there is clearly an obligation on the Member States to lay down conditions for the "correct and straightforward application" of the measure and also, if necessary, to fix the details of the use of the option. Those are clearly not "unconditional" and "sufficiently precise" obligations within the meaning of the case-law of the Court.

Those provisions of Directive 77/388 are not capable of being directly applicable and are comparable in that respect with the first paragraph of Article 11 of the Second Council Directive 67/228 of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (Official Journal, English Special Edition 1967, p. 16), which lays down a principle of deduction coupled with derogations and exceptions which were expressly left to the discretion of the Member States and to which the Court refused to attribute any measure of direct applicability in its judgment of 1 February 1977 (Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113).

The *Commission* points out, in relation to the facts, that it hesitated for a long time before acceding to the wish expressed by the Member States that the period initially prescribed for the incorporation of Directive 77/388 into national law should be extended, and that it finally decided to propose an extension of one year only on the express condition that "this derogation shall not prejudice the effects of the provisions of Directive 77/388 which do not require the adoption of national implementing measures, if those effects have been produced before the date of notification" of Directive 78/583. That reservation concerning rights already acquired before 1 January 1978 was not adopted by the Council in the directive extending the period.

Moreover, when the Federal Republic of Germany was unable, despite the assurances which it gave, to amend its tax legislation within the additional period granted to it, the Commission brought an action against it for failure to fulfil its obligations under the Treaty. That action was withdrawn following the adoption of the Law of 26 November 1979 on the new version of the Law on turnover tax.

As far as the legal position is concerned, it is less a question of examining in general terms the legal status of a directive which has not been incorporated into national law within the periods prescribed than of resolving the specific question whether the plaintiff in the main action is entitled as from 1 January 1979 to avail herself, as against the national provisions in force in 1979, of that provision of the directive which lays down a mandatory exemption from turnover tax in respect of the negotiation of credit. The true perspective in this instance is not that of the "direct applicability" or "direct effect" of the directive but whether in relations between the citizen and the national authorities "reliance" may be placed on the legal effects of Article 13 B. That question must be answered in the affirmative.

(a) Even when it submitted the proposal for Directive 78/583, the Commission thought it possible that Directive 77/388 could produce direct effects. The same view is to be found in the Commission's reply to Parliamentary Question No 615/78 by Mr Notenboom (Official Journal 1979, C 28, p. 9).

(b) With particular regard to Article 13 B (d) 1 of Directive 77/388, a distinction must be drawn in relation to the exemptions provided for by Article 13 B between the actual obligation to exempt and measures which the Member States must take in order to ensure the correct application of such an exemption. In the case of the majority of the exemptions provided for by Article 13 B, and in any event in the case of the negotiation of credit, the obligation to exempt as such is unconditional. The margin of discretion which the introductory sentence leaves to the Member States is not of a general nature but is granted solely "for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse". The provisions which are to be adopted by the Member States can only deal with ancillary measures, such as the need to keep separate accounts or additional requirements concerning declarations or preservation. Such ancillary provisions cannot alter the unconditional and mandatory nature of the exemptions.

(c) A real margin of discretion is left to the Member States, as far as the nature and scope of an exemption is concerned, only in respect of the matter mentioned in Article 13 B (d) 6 (special investment funds). The management of special investment funds is to be exempt only "as defined by Member States". Exemptions expressed in imprecise terms are also mentioned in Article 13 A (1) (m) and (n).

(d) The Law of 26 November 1979 amending the Law on turnover tax demonstrates that the German authorities themselves have accepted that there is no discretion in connection with the exemption provided for by Article 13 B (d) 1. In accordance with the directive, Article 4 (8) (a) of the Law exempts the negotiation of credit from turnover tax without reserve or limitation. The German legislature did not think it at all necessary to adopt special provisions concerning the evidence to be produced in order to receive the tax exemption.

(e) Article 13 B (d) 1 of Directive 77/388 also fulfils in other respects the requirements which the Court has stated, in a consistent line of decisions, to be the conditions for direct "reliance" upon a directive. The provision in question is concerned with the legal relations between an individual and a Member State during

the period in which the directive should have been incorporated into national law. The plaintiff in the main action may not therefore be prevented from claiming in proceedings before the national courts an exemption from turnover tax which credit negotiators have enjoyed since 1 January 1979.

III — Oral procedure

At the sitting on 30 September 1981 oral argument was presented and replies were given to the questions put by the Court by the following: Professor Zuleeg, for the Federal Republic of Germany; Rembert Schwarze, Ministerialrat at the Finanzministerium des Landes Nordrhein-Westfalen (Ministry of Finance of the *Land* of North Rhein-Westphalia); Alexandre Carnelutti, Secretary of Foreign Affairs at the Ministry for External Relations, for the Government of the French Republic; Peter Karpenstein, for the Commission of the European Communities; and Antonio Sacchettini, an Adviser in the Legal Department, for the Council of the European Communities.

During the sitting the Commission produced a statement by the Council recorded in the minutes of its meeting on 26 June 1978, at which Directive 78/583 was adopted. Following an adjournment of the sitting, the Court accepted that document and invited the Government of the French Republic to submit any observations which it might wish to make. Those observations were submitted on 15 October 1981.

The Advocate General delivered his opinion at the sitting on 18 November 1981.

Decision

1 By order of 27 November 1980, which was received at the Court on 14 January 1981, the Finanzgericht [Finance Court] Münster referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 13 B (d) 1 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 1977, L 145, p. 1) in order to determine whether that provision may be regarded as having been directly applicable in the Federal Republic of Germany since 1 January 1979 in view of the failure by that Member State to adopt within the prescribed period the measures necessary in order to ensure its implementation.

The background to the dispute

2 It should be recalled that the Sixth Directive, which was adopted on 17 May 1977, provided in Article 1 that the Member States were to adopt by 1 January 1978 at the latest the necessary laws, regulations and administrative provisions in order to modify their value-added tax systems in accordance with the requirements of the directive. A number of Member States, including the Federal Republic of Germany, were unable to make the necessary modifications within the prescribed period and therefore the Council, by the Ninth Directive, 78/583/EEC of 26 June 1978 on the harmonization of the laws of the Member States relating to turnover taxes (Official Journal 1978, L 194, p. 16), extended, in the case of those Member States, to 1 January 1979 the period laid down in Article 1 of the Sixth Directive.

3 It was not until the adoption of the Law of 26 November 1979 (Bundesgesetzblatt I, p. 1953), which took effect on 1 January 1980, that the Federal Republic of Germany implemented the Sixth Directive.

4 It is apparent from the order making the reference to the Court that in her monthly returns in respect of turnover tax for the period from March to June 1979 the plaintiff in the main action, who carries on the business of a self-employed credit negotiator, applied for exemption from tax in respect of her transactions, claiming that Article 13 B (d) 1 compelled the Member States to exempt from value-added tax *inter alia* "the granting and the negotiation of credit" and that that directive had been part of national law since 1 January 1979.

5 It appears from the file on the case that the plaintiff in the main action informed the Finanzamt [Tax Office] of the amount of her turnover and of the input tax which she had paid and at the same time claimed

that she was entitled to the exemption provided for by Article 13 B (d) 1 of the directive. Consequently, in each case she declared the amount of tax payable and the deduction in respect of input tax to be "nil".

6 The Finanzamt did not accept those returns and, in its provisional notices of assessment for the months in question, charged turnover tax on the transactions of the plaintiff in the main action, in accordance with the national legislation which had not yet been amended, subject to a deduction in respect of input tax.

7 Following the dismissal of her objection, the plaintiff in the main action appealed against those assessments to the Finanzgericht, relying upon the above-mentioned provision of the directive.

8 In its defence before the Finanzgericht, the Finanzamt contended that during the period in question the Sixth Directive had not yet been implemented in the Federal Republic of Germany. It maintained, moreover, that the view shared by all the Member States was that Article 13 B could not be considered to be a provision creating directly applicable law, in view of the fact that that provision reserved a margin of discretion to the Member States.

9 In order to resolve that issue the Finanzgericht referred to the Court the following question:

"Has the provision contained in Title X, Article 13 B (d) 1 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, concerning the exemption from turnover tax of transactions consisting of the negotiation of credit, been directly applicable in the Federal Republic of Germany as from 1 January 1979?"

10 The plaintiff in the main action was not represented in the proceedings before the Court. Her view was supported by the Commission, which submitted arguments to the Court designed to show that it was possible for individuals to claim the benefit of Article 31 B (d) 1 of the Sixth Directive.

11 The Finanzamt and the Government of the Federal Republic of Germany, on the other hand, put forward a number of arguments designed to demonstrate that the provision in question could not be relied upon during the period before the relevant implementing provisions had been put into force in the Federal Republic of Germany, that is to say, during the tax year 1979. The Government of the French Republic expressed the same view.

Substance of the case

12 The Finanzamt, the Government of the Federal Republic of Germany and the Government of the French Republic do not dispute the fact that the provisions of directives may in certain circumstances be relied upon by individuals, as is clear from the case-law of the Court, but maintain that such an effect is not to be attributed to the provision in question in the main action.

13 The French Government considers that the tax directives seek to achieve the progressive harmonization of the various national systems of taxation but not the replacement of those systems by a Community system of taxation. That is also true of the Sixth Directive which contains a set of provisions the conditions for the implementation of which are left to a large extent to the discretion of the Member States. In view of the particularly large number of options open to the Member States under the directive, the French Government is of the opinion that the directive as a whole is incapable of producing any effects whatever in the Member States before the adoption of the relevant national legislative measures.

14 In any event, and this opinion is shared by the Government of the Federal Republic of Germany, it is impossible, by reason of the margin of discretion, the powers and the options which Article 13 confers upon the Member States, to attribute any direct effect to the provisions of that article.

15 The Finanzamt, supported by the Government of the Federal Republic of Germany, also draws attention to the coherence of the system of taxation established by the directive and, more particularly to the problems resulting from the chain of taxation, which is a characteristic of value-added tax. It considers that it is not possible for an exemption, such as that provided for by Article 13 B (d) 1, to be divorced from its context without disrupting the entire mechanism of the tax system in question.

16 In response to those arguments the problem raised should be considered, in the light of the case-law of the Court on the effect of directives, in relation to the directive itself and to the system of taxation concerned.

The effect of directives in general

17 According to the third paragraph of Article 189 of the Treaty, "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

18 It is clear from that provision that States to which a directive is addressed are under an obligation to achieve a result, which must be fulfilled before the expiry of the period laid down by the directive itself.

19 It follows that wherever a directive is correctly implemented, its effects extend to individuals through the medium of the implementing measures adopted by the Member State concerned (judgment of 6 May 1980 in Case 102/79 *Commission v Belgium* [1980] ECR 1473).

20 However, special problems arise where a Member State has failed to implement a directive correctly and, more particularly, where the provisions of the directive have not been implemented by the end of the period prescribed for that purpose.

21 It follows from well-established case-law of the Court and, most recently, from the judgment of 5 April 1979 in Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629, that whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects.

22 It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned.

23 Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law.

24 Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

26 The question put to the Court by the Finanzgericht seeks to determine whether Article 13 B (d) 1 of the directive may be considered to be of such a nature. Under the terms of that provision "Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse: ...

(d) the following transactions: 1. the granting and the negotiation of credit ...".

The scheme of the directive and the context of Article 13

27 Inasmuch as it specifies the exempt service and the person entitled to the exemption, the provision, taken by itself, is sufficiently precise to be relied upon by an individual and applied by a court. However, it remains to be considered whether the right to exemption which it confers may be considered to be unconditional, having regard to the general scheme of the directive, to the context in which Article 13 is placed and also to the particular characteristics of the system of taxation within which the exemption is to apply.

28 With regard to the general scheme of the directive, the first argument to be considered is that based on the fact that the provision referred to by the national court is an integral part of a harmonizing directive which in various respects reserves to the Member States a margin of discretion entailing powers and options.

29 Whilst the Sixth Directive undoubtedly confers upon the Member States varying degrees of discretion as regards implementing certain of its provisions, individuals may not for that reason be denied the right to rely on any provisions which owing to their particular subject-matter are capable of being severed from the general body of provisions and applied separately. 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. That obligation would be rendered totally ineffectual if the Member States were permitted to annul, as the result of their inactivity, even those effects which certain provisions of a directive are capable of producing by virtue of their subject-matter.

30 Consequently, the general nature of the directive in question or the discretion which, in other areas, it leaves to the Member States may not be relied upon in order to deny any effect to those provisions which in view of their subject-matter may be relied upon to good purpose before a court even though the directive as a whole has not been implemented.

31 With regard to the context in which Article 13 is placed, the Finanzamt, supported by the Government of the Federal Republic of Germany and the French Republic, draws particular attention to the margin of discretion reserved to the Member States by the introductory sentence of Part B of that article, where it is stated that the exemption is to be granted by the Member States "under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse". It is submitted that in view of that rider the exemption provisions contained in Article 13 are not unconditional; consequently, they may not be relied upon until the conditions referred to have been laid down.

32 It should first be observed in that regard that the "conditions" referred to do not in any way affect the definition of the subject-matter or the exemption conferred.

33 The "conditions" referred to are intended to ensure the correct and straightforward application of the exemptions. A Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in the directive, upon its failure to adopt the very provisions which are intended to facilitate the application of that exemption.

34 Moreover, the "conditions" refer to measures intended to prevent any possible evasion, avoidance or abuse. A Member State which has failed to take the precautions necessary for that purpose may not plead its own omission in order to refuse to grant to a taxpayer an exemption which he may legitimately claim under the directive, particularly since in the absence of specific provisions on the matter there is nothing to prevent the State from having recourse to any relevant provisions of its general tax legislation which are designed to combat evasion.

35 The argument based on the introductory sentence of Article 13 B must therefore be rejected.

36 In support of the view that the provision in question may not be relied upon, the Finanzamt, the Government of the Federal Republic of Germany and the French Republic also refer to Part C of Article 13, which reads as follows: "Options. Member States may allow taxpayers a right of option for taxation in cases of: ... (b) the transactions covered in B (d) ... Member States may restrict the scope of this right of option and shall fix the details of its use".

37 The German Government emphasizes that the option provided for by that provision is "reserved to the Member States" and that the Federal Republic of Germany exercised that power only in Article 9 of the implementing law. It is not permissible to pre-empt that legal option. The German Government claims that in view of that power reserved to the Member States and of the possibility which it entails of restricting the scope of the right of option and of fixing the details of its use, the provision relied upon by the plaintiff in the main action may not be considered as constituting an unconditional rule.

38 That line of argument is based on an incorrect understanding of the meaning of Article 13 C. By virtue of the power conferred upon them by that provision the Member State may allow persons entitled to exemptions provided for by the directive to waive their exemptions in all cases or within certain limits or subject to certain detailed rules. However, it should be emphasized that, under the above-mentioned provision, where a Member State makes use of that power, the exercise of the option conferred subject to those conditions is a matter for the taxpayer alone and not for the State.

39 It follows that Article 13 C does not in any way confer upon the Member States the right to place conditions on or to restrict in any manner whatsoever the exemptions provided for by Part B. It merely reserves the right to the Member States to allow, to a greater or lesser degree, persons entitled to those exemptions to opt for taxation themselves, if they consider that it is in their interest to do so.

40 Consequently, the provision relied upon by the Finanzamt and the Government of the Federal Republic of Germany in order to show that the exemption is conditional is not relevant to the position of a taxpayer who has clearly demonstrated his intention to take advantage of the exemption conferred by the directive, since the expression of that intention necessarily excludes the exercise of the right of option envisaged by Article 13 C.

The system of value-added tax

41 In support of the view that Article 13 B (d) 1 may not be relied upon by individuals the Finanzamt, supported by the Government of the Federal Republic of Germany, puts forward various detailed arguments based on the particular features of the tax system concerned, namely the chain of taxation which is typical of value-added tax and which derives from the mechanism of the right of deduction. The Finanzamt considers that the severing of that chain by the effect of exemption might have adverse consequences upon the interests both of the very person who is exempted from tax and of the taxpayers who follow or even precede him in the chain of supply. The Finanzamt also draws attention to the complications which might arise for the tax authorities as a result of the application of the provisions of a directive before any adaptation of the relevant national law.

42 In this connection the Finanzamt claims first that according to the circumstances an exemption provided for by the directive might be disadvantageous for the very person who is entitled to it, where he supplies services to taxable persons who fulfil the conditions for deduction. Disadvantages might also arise for the person who takes advantage of the exemption, where deductions in respect of capital goods, which under Article 20 of the directive may be made over a period of five years, are corrected. The Finanzamt also refers to the difficulties which may arise from the application of the provisions relating to the issue of invoices contained in Article 22 (3) (b) of the directive, under which invoices relating to the taxable supply of services must state clearly the amount of value-added tax. Under Article 21 (1) (c) such a statement gives rise in the case of exempt supplies of services to an independent liability to tax. Tax due under that provision may, according to Article 17 (2), under no circumstances be deducted as input tax by the recipient of the

services supplied. Consequently, the grant of an exemption constitutes a considerable disadvantage for credit negotiators who have issued invoices stating the amount of the tax.

43 The Finanzamt places particular emphasis on the disruption caused by the fact that an exemption might be claimed *a posteriori*, to the detriment of taxpayers who, in a business relationship with the person exempted from the tax, either follow or precede him in the chain of transactions.

44 In that regard it should be pointed out that the scheme of the directive is such that on the one hand by availing themselves of an exemption persons entitled thereto necessarily waive the right to claim a deduction in respect of input and on the other hand, having been exempted from the tax, they are unable to pass on any charge whatsoever to the person following them in the chain of supply, with the result that the rights of third parties in principle cannot be affected.

45 The arguments put forward by the Finanzamt and the Federal Government as to a disruption of the normal pattern of carrying forward the charge to value-added tax are therefore unfounded where a taxpayer has expressed his intention to avail himself of the exemption conferred by the directive and moreover bears the consequences of his choice.

46 Finally, with regard to the argument put forward by the Finanzamt as to the disruption caused by exemptions claimed, *a posteriori*, under the directive by taxpayers, it should be observed that that objection is not relevant to the case of a taxpayer who has claimed the benefit of the exemption when he submitted his tax return and who has consequently refrained from invoicing the tax to the recipients of his services, with the result that third parties are not affected.

47 As regards the administrative difficulties of a more general nature which are alleged to result from the application of the exemption provided for by the directive, in a situation in which the tax legislation and administrative practice have not yet been adapted so as to take account of the new factors introduced by Community law, it is sufficient to point out that if such difficulties were to arise, they would be the consequence of the Member State's failure to implement the directive in question within the period prescribed for that purpose. The consequences of that situation must be borne by the administrative authorities and may not be passed on to taxpayers who rely on the fulfilment of a precise obligation which has been incumbent on the State under Community law since 1 January 1979.

48 It follows from the foregoing that the arguments put forward as to the system of taxation which is the subject of the directive must also be rejected.

49 Consequently, the reply to be given to the question put to the Court is that as from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 B (d) 1 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 to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply, and the State could not claim, as against him, that it had failed to implement the directive.

Costs

50 The costs incurred by the Government of the Federal Republic of Germany, the Government of the French Republic, the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Finanzgericht Münster by order of 27 November 1980, hereby rules:

As from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 B (d) 1 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 to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply, and the State could not claim, as against him, that it had failed to implement the directive.

Mertens de Wilmars
Bosco
Touffait
Due
Pescatore
Mackenzie Stuart
O'Keeffe
Koopmans
Everling
Chloros
Grevisse

Delivered in open court in Luxembourg on 19 January 1982.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

(1) Language of the Case: German