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Opinion of Mr Advocate General Fennelly delivered on 27 February 1997. - Finanzamt Bergisch Gladbach v Werner Skripalle. - Reference for a preliminary ruling: Bundesfinanzhof - Germany. - Tax provisions - Sixth VAT Directive - Taxable amount - Personal relationship between the supplier and the recipient of the supply. - Case C-63/96.

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Opinion of the Advocate-General

1 Where an owner of several buildings lets them to a related company at a rent which does not actually cover the costs incurred in acquiring and maintaining the buildings, but which corresponds to the prevailing market rents for comparable properties, can a Member State nevertheless regard the sum of those costs as the taxable amount for VAT purposes of such a rental transaction? To answer this question a reference from the Bundesfinanzhof essentially calls upon the Court to interpret Article 27 of the Sixth Council Directive and, in particular, the proportionality of a measure adopted thereunder. (1)

I - Legal and factual context

The relevant legislation

(i) The Sixth Directive

2 Under Article 2(1) of the Sixth Directive `the supply ... of services for consideration within the territory of the country by a taxable person acting as such' is subject to VAT. Article 6(1) defines the `supply of services' as `any transaction which does not constitute a supply of goods within the meaning of Article 5'. The `taxable amount' of transactions subject to VAT is regulated by Article 11 of the Sixth Directive. For transactions carried out within the territory of a Member State, Article 11(A) provides the normal rule that:

`1. The taxable amount shall be:

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

...

(c) in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services;

...'.

3 The `full-cost' rule for determination of the `taxable amount' applies to the special cases of own consumption in Article 6(2), which provides:

`The following transactions shall be treated as the supply of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or one of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.'

4 Article 27 of the Sixth Directive is the sole article in Title XV, entitled `Simplification Procedures'. It allows Member States, subject to its terms, to derogate from other provisions of the Directive. Article 27(5) deals with the maintenance in force of existing national measures which may not be compatible with the Sixth Directive. Article 27(1) to (4) concern new derogating measures and are worded as follows:

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

2. A Member State wishing to introduce the measures referred to in paragraph 1 shall inform the Commission of them and shall provide the Commission with all relevant information.

3. The Commission shall inform the other Member States of the proposed measures within a month.

4. The Council's decision shall be deemed to have been adopted if, within two months of the other Member States being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.'

(ii) German legislation

5 In Germany, the Umsatzsteuergesetz 1980 (Law on Turnover Tax 1980, hereinafter `the UStG') brings German turnover tax law into line with the requirements of the Sixth Directive. (2) In so far as the taxable amount for VAT purposes is concerned, Paragraph 10(1) of the UStG provides, by way of general rule, that `consideration' is `everything which the recipient of the supplies expends in order to acquire the supplies, but after deduction of turnover tax'.

6 In the case of supplies for own consumption, Paragraph 10(4) derogates from that general rule. Under subparagraph (2) the basis of assessment is determined `... according to the costs arising in the course of performing that turnover'. (3)

7 Pursuant to Paragraph 10(5) of the UStG, the basis of assessment for own consumption under Paragraph 10(4) is also applied to supplies made for consideration between associated persons. Paragraph 10(5) provides:

`Paragraph (4) applies by analogy to:

1. Goods and services which corporations and associations of persons within the meaning of Paragraph 1(1) Nos 1 to 5 of the Corporation Tax Law, associations of persons without legal personality and communities supply in the context of their business to their equity holders, shareholders, members, partners or persons associated with them or which sole traders supply to associated persons;

...

if the basis of assessment under paragraph (4) exceeds the consideration under paragraph (1).'

The proceedings before the national court

8 The plaintiff and respondent in the main proceedings (hereinafter `the plaintiff') is the owner of a multiple dwelling, which he built himself, and several flats. He let those properties to a limited company (hereinafter `the lessee'), whose shareholders comprised his wife and his adult son. Each shareholder had a 50% holding, but his spouse was the managing director of the lessee company with sole power of representation. It is accepted by the parties to the main proceedings that the rents agreed between the plaintiff and the lessee corresponded to the normal market rents for comparable properties in the area.

9 A dispute arose concerning the amount of VAT that the plaintiff was liable to pay on those rents, because the agreed rent was lower than the so-called `minimum basis of assessment' (the `Mindestbemessungsgrundlage') applicable under Paragraph 10(5)(1) in conjunction with Paragraph 10(4)(2) of the UStG quoted above. The plaintiff was assessed, following a special VAT audit, by the Finanzamt (Tax Office) Bergisch Gladbach in accordance with that basis of assessment.

10 Following an unsuccessful administrative objection to the disputed assessment, the plaintiff appealed to the Finanzgericht (Finance Court), which upheld his appeal. Although the Finanzgericht actually found that the lessee was not associated with the plaintiff for the purposes of Paragraph 10(5)(1) of the UStG, it also ruled that Paragraph 10(5)(1) should be interpreted restrictively, and, consequently, was inapplicable where the consideration agreed for the services provided corresponded to the market rate for such services. Referring specifically to the explanation offered by the German Government in 1978 upon introducing before parliament the draft of what later became the UStG 1980, the Finanzgericht held that the minimum basis of assessment prescribed under Paragraph 10(5) must be applied whenever the trader supplies goods or services `for an unreasonably low consideration' (`zu unangemessen niedrigen Entgelten') so as to preclude instances of partially untaxed consumption occurring. (4) However, it was satisfied that the provision was not intended to cover services performed for market-rate consideration between related persons, which, according to the Finanzgericht, are no different from transactions involving unrelated persons.

11 The Finanzamt appealed against that judgment to the Bundesfinanzhof (Federal Finance Court, hereinafter `the national court'). The national court states that the result of applying the minimum basis of assessment is that - to the extent that it exceeds the agreed consideration - the supplier bears the burden of the additional VAT, since it is not a tax on consideration which can be passed on to the recipient of the goods or services. The national court accepted that the agreed rents corresponded with market rates, albeit lower than the so-called `rental costs' (`Kostenmiete')

determined according to the costs incurred exclusive of turnover tax, and also accepted, unlike the Finanzgericht, that the lessee was an associated person of the plaintiff for the purposes of Paragraph 10(5) of the UStG. That court then expressed uncertainty as to whether that provision should be applied, or whether, instead, the plaintiff could rely on the principal rule on taxable amount contained in Article 11(A)(1)(a) of the Sixth Directive. Accordingly, it decided to refer the following questions to the Court pursuant to Article 177 of the Treaty:

`1. Does Article 27 of Directive 77/388/EEC cover an authorization by the Council to introduce special measures for derogation from Directive 77/388/EEC in order to prevent tax avoidance which, in the case of supplies for consideration made between associated persons, apply the cost to the taxable person within the meaning of Article 11(A)(1)(c) of Directive 77/388/EEC as the minimum basis of assessment also where the agreed consideration represents the market rate but is less than the minimum basis of assessment and there is therefore no tax avoidance?

2. Can a Member State invoke special measures under Article 27 of Directive 77/388/EEC as taxation rules applying to a taxable person, if neither the Council's decision authorizing the measures was published in the Official Journal of the European Communities nor the authorization procedure under Article 27(2) to (4) of Directive 77/388/EEC made public - after its completion - in official publications of the Member State?'

Opinion of the national court

(i) The first question

12 The national court states that Paragraph 10(5) of the UStG was introduced as a special measure within the meaning of Article 27 of the Sixth Directive in derogation from Article 11(A)(1)(a). The German Government's draft law of 15 March 1978 had been accompanied by a statement of reasons for the adoption of Paragraph 10(5) to the effect that `the rule is covered by Article 27(1) of the Sixth Directive.' (5) That provision was invoked on 12 May 1978, when the German Government informed the Commission of its intention to introduce the special measure. It claimed that in transactions where the consideration agreed was unreasonably low, it was necessary, so as to prevent tax evasion or tax avoidance, to ensure that a higher basis of assessment could be applied. The costs rule prescribed by Paragraph 10(4) of the UStG is to be applied as the basis of assessment whenever the consideration actually paid for the relevant supplies is lower than that value. The national court states that the introduction of this minimum basis of assessment ensures that supplies for an inappropriate consideration are taxed similarly to supplies for no consideration and, consequently, that untaxed end consumption is excluded.

13 The Commission informed Germany, by letter of 15 September 1978, that it had initiated the procedure under Article 27(1) to (4) of the Sixth Directive by informing the other Member States, in a letter of 12 June 1978, of the German notification. Neither the Commission nor any Member State requested that the matter be raised by the Council. Once the period laid down in Article 27(4) of the Directive had expired, (6) a Council decision authorizing Germany to adopt the measures was therefore deemed to have been made. (7)

14 The national court doubts whether Paragraph 10(5) of the UStG respects the Community-law principle that `special measures' adopted under Article 27 of the Sixth Directive to prevent tax evasion or avoidance may, in principle, derogate from Article 11 of the Directive only to the extent strictly necessary for achieving that aim. (8) It states that Paragraph 10(5) of the UStG does not permit regard to be had to the possibility that a market-rate consideration agreed between associated persons, though lower than the cost of providing the services, may not be unreasonably low; the minimum basis of assessment must be applied even where no question of tax avoidance arises. The deemed Council authorization, pursuant to Article 27, was based only on the tax avoidance aim of the proposed German measure as communicated to the Commission in the letter of 12 May 1978. Its purported role as a simplification measure was not disclosed to the

Commission during the authorization procedure.

(ii) The second question

15 The national court refers to Handelsvereniging Rotterdam v Minister van Landbouw (9) and states that failure to publish measures whose publication was not required by the Treaty - such as the authorization granted by the Council in this case - can have no effect on the validity or effectiveness of the measure. However, it did not accept the argument of the Bundesfinanzministerium (Federal Finance Ministry, hereinafter `the Ministry'), submitted in the main proceedings, that a reasonable appraisal of the announcement made by the German Government on the introduction in 1978 of its draft law constituted an effective publication of the intended derogation from Article 11 of the Sixth Directive. In its opinion, publication `in generally accessible sources' is necessary in order to enable a taxable person to recognize that a derogation from the Sixth Directive has been obtained that precludes him from relying upon the direct application of other more favourable provisions of that Directive.

II - Observations

16 Written observations were submitted by the Federal Republic of Germany, the French Republic and the Commission. Oral observations were submitted by the plaintiff, Germany, France, the Commission and the Kingdom of the Netherlands. France confined its written and oral observations to the second question. In the light of the concurrence of views expressed in the written observations concerning the second question, Germany confined its oral observations to the first question. The plaintiff and the Commission also concentrated their oral observations on the first question. The Netherlands, though expressing particular interest in the second question, none the less made some observations regarding the first question.

III - Analysis

The first question

17 At the outset, it is appropriate to clarify the nature of the derogation at issue. Neither the Ministry in the main proceedings nor Germany in its observations to this Court has denied that Paragraph 10(5) of the UStG is incompatible with Article 11(A)(1)(a) of the Sixth Directive. Services supplied `free of charge' in the cases of `own consumption' named in Article 6(2)(b) fall to be treated under Article 11(A)(1)(c) at their cost of provision. The special measure, by extending that rule at least to transactions for which market consideration is agreed, is incompatible with Article 11(A)(1)(a). Hence, it can be applied only if it comes within the scope of a valid authorization pursuant to Article 27.

18 By its first question, the national court essentially asks whether the authorization granted by the Council may, in conformity with Article 27 of the Sixth Directive, be applied by Germany in circumstances where there is no evidence either of tax evasion or avoidance. However, since Germany submits in its written observations, as an alternative to its main contention - to wit that Paragraph 10(5) of the UStG as a tax avoidance measure complies with Article 27 - that the special measure may actually be regarded as a simplification measure, I shall deal initially with that submission.

(i) The national rule as a simplification measure

19 Title XV of the Sixth Directive concerns `Simplification Procedures'. Article 27(1) expressly envisages that applications for authorizations to derogate from the provisions of the Sixth Directive may concern measures perceived to be necessary either `... in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance'. (10) Furthermore, the final sentence of Article 27(1) contains a special provision for applications regarding simplification

measures that does not apply to anti-evasion measures, namely the requirement that `measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage'. It is clear, therefore, that the Community legislature intended to draw a distinction between the two types of measures.

20 The importance of this distinction was emphasized by the Court and the Advocate General in Commission v Belgium. (11) Accordingly, under Article 27 of the Sixth Directive, Member States are under an obligation precisely to identify both the content and the nature of the derogating measures for which they are seeking authorization. In Direct Cosmetics I, (12) where the United Kingdom had introduced a new national measure a number of years after it had obtained a Council authorization pursuant to Article 27 for the measure actually referred to in its application to the Commission, the Court held that the original notification became ineffective upon the replacement of the notified measure with the new measure, `... unless it is shown that the new provision may be regarded as being substantially the same as the previous provision'. (13) More recently in BP Supergas, (14) Greece sought to rely on Article 27 in circumstances where it had merely notified the entire text of a draft law to the Commission. The Court ruled that in a notification pursuant to Article 27 an applicant Member State must not only refer the Commission `expressly to Article 27(2)', but must also specifically inform the latter of the special measures which it proposes to adopt in derogation from the Sixth Directive. (15)

21 In my opinion, Member States' obligation under Article 27 of the Sixth Directive clearly to identify the nature of the intended derogating measures includes the need for a statement of the reasons for their proposed adoption. The Commission, the Council and other Member States could not reasonably be expected to evaluate such measures in the short time allowed without knowledge of their claimed objective. The necessity for a strict interpretation of Article 27 as a provision permitting the grant of derogations from the Sixth Directive requires a Member State to formulate a fresh application each time it perceives a new need to seek a derogation. The national court has found that Germany was authorized by the Council to apply special measures designed to combat the avoidance of VAT. The view of the national court that Germany cannot now attempt to rewrite the basis of its 1978 notification by contending that Paragraph 10(5) of the UStG may additionally function as a simplification measure in transactions involving associated persons is manifestly correct. (16)

(ii) The national rule as an anti-avoidance or evasion measure

(a) Introduction and observations

22 The Court has consistently held that derogations from the general provisions of the Sixth Directive must be interpreted strictly. Since Article 27(1) to (4) provide for the authorization of individual national derogations from the Sixth Directive, as the Court has often stated, they must be interpreted strictly. (17) In respect of the scope of measures authorized to prevent tax evasion or avoidance, the Commission rightly refers to the principle enunciated by the Court in Commission v Belgium, to wit that such measures `must be of such a nature as to prevent tax evasion or avoidance and that in principle they may not derogate from the basis for charging VAT laid down in Article 11, except within the limits strictly necessary for achieving that aim'. (18) Furthermore, the Commission submits that, once a market-rate consideration is paid, there can be no justification for permitting a derogation from the normal basis of assessing the taxable amount prescribed by Article 11(A)(1)(a), which refers to `the consideration which has been or is to be obtained by the supplier from the purchaser ...'. At the hearing, the Commission referred with approbation to the Council's present practice of ensuring that those special measures approved under Article 27 are limited to the minimum necessary to achieve their aim. (19) The plaintiff emphasized the potential arbitrariness of an assessment based on costs where, in the building sector, such costs are often inflated. In the present case, the plaintiff constructed the multiple dwelling at his own expense, but the market rent is found to be lower than one based on that cost.

23 Germany denies that its special measure is disproportionate. It states that it is reasonable generally to require of a service provider that it receive a remuneration which, at least, equates with the costs incurred in supplying the relevant service. It says that cases where the level of consideration normally available on the market does not meet those minimum costs are exceptional and submits that the result of applying Paragraph 10(5) of the UStG in those cases respects the principle of proportionality; all legal rules must be objective and, hence, a VAT anti-avoidance measure may legitimately be drafted by reference to the factual circumstances which habitually occur in cases of VAT evasion. Alluding to paragraph 30 of the judgment in Commission v Belgium, (20) it contends that anti-evasion measures may, in conformity with Article 27 of the Sixth Directive, comprise, if necessary, the application of standard amounts. It compares the relative paucity of the cases where the application of Paragraph 10(5) will result in the use of a taxable amount higher than the market rate of consideration with the generality of the Belgian measures found to be disproportionate by the Court in Commission v Belgium; (21) in that case the catalogue price for new motor vehicles notified to the competent authorities was assumed to be the consideration received by a motor dealer, notwithstanding the many discounts and other price rebates which are frequently agreed in practice. Moreover, Germany points out that the special measure applies a basis of assessment whose application is expressly envisaged by Article 11(A)(1)(c) of the Sixth Directive in cases of own consumption. Since such cases are comparable to transactions for consideration between associated persons, the special measure, though based on a derogation, replicates the approach of the Directive.

24 It was contended on behalf of the Netherlands that a national court may not seek to question the proportionality of a Council authorization accorded pursuant to Article 27(1) to (4), since otherwise the validity of the Council decision approving the measure would effectively be subjected to review by the national court. The representative of the Netherlands submitted that the compatibility of the decision with the principle of proportionality may only be raised if its validity is also expressly questioned.

(b) Opinion

25 Article 11(A)(1)(a) of the Sixth Directive imposes a clear and unconditional obligation on Member States when evaluating the taxable amount of a transaction. The Court has already held that `the provisions of Article 11(A)(1) ... confer rights on individuals on which they may rely before a national court'. (22) A Member State relying on an Article 27 Council derogation to combat the avoidance or evasion of VAT, authorizing a basis of assessment other than that specified in Article

11(A)(1)(a), must justify the scope and application of the measures adopted. To the extent that they are not strictly necessary for achieving that aim, they cannot be applied to the detriment of a taxpayer. (23)

26 I do not accept the Netherlands' objection that the first question referred by the national court calls into question the validity of the Council authorization. The national court has chosen to ask whether that decision covers the application of the German measures in cases where there is no tax avoidance and a market-rate consideration is agreed. This raises a question of interpretation and not of validity. The Court must provide the national court with criteria for determining whether the derogation invoked by Germany in defence of the applicability of its special measures in the circumstances at issue in the main proceedings, which would otherwise clearly contravene Article 11(A)(1)(a), is permitted because of the derogation granted under Article 27 of the Sixth Directive. The question of Community law which arises for the determination of the Court therefore concerns the scope and not the validity of the Council derogation.

27 The mere fact that the application of the national measures is generally justifiable in the interests of preventing untaxed end consumption occurring in transactions involving associated persons would not, in itself, justify their application in circumstances where a full market rate of consideration has been agreed. At this point it is important to bear in mind a number of observations made by the national court. Firstly, it says that cases such as the present, where the rent is less than enough to cover costs, although not `so frequent and their financial consequences not so serious that they lead to distortion of competition ... are nevertheless not restricted to relatively few, exceptional cases which can be ignored'. This view of the national court must be preferred to the contrary suggestion of Germany, whose representative, in any event, conceded at the hearing that this occurrence is more likely in the case of the letting of immovable property. Furthermore, the principle of proportionality which governs the application by Member States of anti-avoidance measures adopted pursuant to Article 27 Council authorizations requires their limitation to those cases where they are expressly necessary. Secondly, the national court says that the `turnover tax on the difference between the minimum basis of assessment and the agreed consideration cannot be passed on to the recipient of the goods and services'. Presumably this might superficially be justified by pointing out that the supplier of the services, who must pay VAT on the higher claimed consideration, will be able to deduct VAT inputs to a corresponding amount and will not, therefore, suffer a loss. However, this seems to me to contradict the principle of neutrality of the VAT system. In its recent judgment in Elida Gibbs v Commissioners of Customs and Excise the Court stated that: (24)

`The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the tax ultimately borne by him.'

Moreover, in ordinary cases of trading at a loss, there is no question of insisting on imposing an artificial higher selling price on a transaction so as to equalize input and output tax. Thirdly, and most importantly, the national court considers the use of the minimum basis of assessment to be disproportionate where the consideration is at a market rate and there is no tax avoidance. It points out, in terms with which I agree, that there was nothing to prevent the use of market value as the basis of assessment in a derogating special measure. In short, it considers that Paragraph 10(5) of the UStG goes beyond the aim of the derogation.

28 I agree with the views of the national court. It is not necessary to call into question the validity of the derogation. It would have been very simple to provide for cases such as the present one, where the consideration received for the services is at market rate. In so far as Paragraph 10(5) of the UStG fails to contain such a provision, it goes beyond its declared aim and is incompatible with Article 11(A)(1)(a) of the Sixth Directive.

The second question

(i) Introduction

29 By its second question the national court asks whether non-publication at Community and at national levels can affect the validity or effectiveness of a derogation otherwise validly granted by the Council under Article 27 of the Sixth Directive. Contrary to the views of the national court and the plaintiff, France, Germany, the Netherlands and the Commission unanimously agree that such a derogation does not depend for its validity or applicability on any publication or notification, which in their view is not required by any provision or principle of Community law. This question, in so far as it potentially raises the general issue of the effectiveness of unpublished decisions of Community institutions against parties other than their addressees, would clearly merit consideration by a plenary formation of the Court. Since the Court may, if it follows my recommendation in respect of the first question referred, decide that it is no longer necessary to answer the second question, it is with some reservation that, in the context of the present reference, I feel required to consider the second question. However, the specificity of that question should be noted; as worded by the national court it only concerns the right of Member States to invoke `special measures under Article 27' in the absence of publication of the relevant Council decision in either the Official Journal of the European Communities or that of the addressee Member State. Accordingly, it is in respect of that particular issue alone that the following comments should be considered.

(ii) Opinion

30 Article 191 of the Treaty requires certain Community acts to be published in the Official Journal of the European Communities. It provides in so far as is relevant in the present case:

`2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the Official Journal of the European Communities. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

3. Other directives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification.'

The implied decision of the Council granting a derogation pursuant to Article 27 of the Sixth Directive is a `decision' within Article 191(3) of the Treaty whose publication is not required. (25) Indeed, as argued on behalf of France, since it comes into effect on notification (in such cases, to the applicant Member State), it cannot depend for its validity on any - even implied - obligation to publish in the Official Journal. This interpretation was confirmed by the Court in its judgment in Handelsvereniging Rotterdam v Minister van Landbouw. (26) Stressing that, even if it is desirable that derogating decisions - in that case those adopted by the Commission under Article 226(2) of the Treaty - `should be brought to the attention of the public', the Court observed that `Article 191 lays down only that decisions should be notified to those to whom they are addressed'. (27)

31 France and Germany point out that the practice of including notice of Council decisions adopted under Article 27 of the Sixth Directive in the section of the `L' series entitled `Acts whose publication is not obligatory' in the Official Journal commenced only in the 1980s and that several

prior unpublished Council decisions would be rendered ineffective by the plaintiff's present argument. Moreover, it would be strange if Community law were to impose an obligation on the Council to cause to be published a decision permitting a derogation from a directive, which itself was only published by way of information.

32 Nor does Article 27 of the Sixth Directive impose, in terms, any obligation to publish an authorization thereunder. France places particular reliance on the Court's statement in BP Supergas that `... measures derogating from the directive do not accord with Community law unless they remain within the limits of the objectives referred to in Article 27(1) and have been notified to the Commission and impliedly or expressly authorized by the Council in the circumstances specified in paragraphs (1) to (4) of Article 27'. (28) Although the Court was not there called upon to rule on the issue, the terms of this passage constitute persuasive implied authority for the absence of a Community-law obligation to publish. I agree with the view of the national court that the failure to publish the fact of the authorization in the Official Journal does not affect its validity.

33 However, the second question also asks whether the effectiveness at national level of a validly granted Council authorization may be affected by non-publication in the official publication of the addressee Member State. The national court notes that in its observations in Boesenberg (29) the Commission had expressed the view that, in the absence of publication of the authorization procedure concerning Paragraph 10(5) of the UStG 1980, the German special measure could not be applied to the detriment of a taxable person, who, moreover, would be entitled to invoke the more favourable directly effective provisions of the Sixth Directive. In its observations to this Court Germany defends the arguments advanced by the Ministry in the main proceedings. It relies on the express statement in the explanatory memorandum circulated with the draft law of 15 March 1978 that the provision which ultimately became Paragraph 10(5) was intended to be covered by a derogation under Article 27 of the Sixth Directive. That declaration would have put taxable persons on notice that the German Government had already obtained or was in the process of obtaining the required Council authorization. Naturally a taxable person would be free to challenge the compatibility of any authorization ultimately granted with the Sixth Directive. In such cases, the national court could require the German authorities to provide all the relevant information in respect of the authorization pursuant to Article 35 of the Grundgesetz (German Constitution).

34 In my view, the question to be asked is whether the absence of publication of the derogation diminishes legal certainty or the effectiveness of judicial control which must be available to a taxable person wishing to challenge its application. Thus, for example, in Administration des Douanes v Gondrand Frères the Court stated that `the principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly'. (30) Moreover, in UNECTEF v Heylens (31) the Court described the right to an effective judicial remedy against decisions adverse to the individual exercise of Community-law rights (in that case Article 48 of the Treaty) in terms of permitting the individual concerned to defend his `right under the best possible conditions and have the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in their applying to the courts'. (32) I do not think that non-publication at national level of a Council decision such as that involved in the present case reduces, other than perhaps on a purely formal level, either legal certainty or the efficacy of administrative or legal remedies available to the adversely affected taxable person.

35 In cases such as that of the plaintiff, the taxable person has access, as items of public law, firstly to the text of the Sixth Directive, which expressly puts him on notice that implicit Council derogations may be obtained pursuant to Article 27 and, secondly, to the terms of the national law, which (in the instant case) simultaneously implemented that directive and the impugned derogation from it that is being invoked against him. On its face, therefore, he has a right to an effective judicial remedy, since he may, merely by objecting even at an initial administrative stage,

require the relevant Member State to justify the discrepancy between the terms of its national measures implementing the Sixth Directive and the directive itself. Moreover, unless the Member State can establish a valid derogation, the taxable person has a right to rely directly on the relevant provisions of the Sixth Directive. It is the Member State which therefore carries the burden of proof and which, if necessary, must produce proof to the national court of compliance with the requirements of Article 27 as explained by the Court in BP Supergas (see paragraph 32 above). In such proceedings, in addition to whatever rights are conferred by national law, Community law requires that the taxable person must, obviously, be afforded every reasonable opportunity to challenge and question that compliance. It must be assumed that the national court will, in accordance with national procedures, allow him access to all necessary information, reasonable time and appropriate remedies in respect of legal costs; in effect to fair procedures. (33) Nevertheless, I cannot see how the failure of publication of the derogation can, in itself, affect the right of a Member State to rely upon it. This must, in particular, be the case where the derogation granted limits the scope of a directive which has, in accordance with Article 189 of the Treaty, been implemented in a timely and appropriate fashion by the relevant Member State, and which on its face provides expressly for the grant of such derogations.

IV - Conclusion

36 Accordingly, I am of the opinion that the first question referred by the national court should be answered as follows:

An authorization granted under Article 27 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment by the Council to a Member State permitting the introduction of special measures to prevent the avoidance of VAT does not cover national measures which, in the case of supplies for consideration made between associated persons, apply the cost to the taxable person within the meaning of Article 11(A)(1)(c) of Directive 77/388/EEC as the minimum basis of assessment even where the agreed consideration represents the market rate but is less than the minimum basis of assessment.

In the event of the Court not following my recommendation in respect of the answer to be given to the first question, the second question should, in my opinion, be answered as follows:

A Member State may invoke against a taxable person national measures implementing an implicit Council derogation adopted under Article 27(1) of Directive 77/388/EEC, which satisfies both the procedural and substantive requirements of validity under Article 27(1) to (4) of Directive 77/388/EEC, notwithstanding that, firstly, the Council's decision authorizing the measures was not published in the Official Journal of the European Communities and, secondly, the authorization procedure under Article 27(2) to (4) of Directive 77/388/EEC was not made public - after its completion - in official publications of the Member State.

(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 (hereinafter `the Sixth Directive'); OJ 1977 L 145, p. 1.

(2) - BGBl I, p. 1953.

(3) - Turnover tax does not, however, form part of the basis of assessment.

(4) - See BRDrucks 145/78, 38.

(5) - BTDrucks, 8/1779.

(6) - Since Article 27(4) establishes a two-month time limit, the period should be deemed to have expired, as Germany submits in its written observations, on 13 August 1978.

(7) - In its written observations Germany informs the Court that Paragraph 10(5) of the UStG 1980 entered into force on 1 January 1980. The Court is informed that the text of that provision was not amended during the national legislative process.

(8) - In respect of this principle it cites the judgments in Joined Cases 138/86 and 139/86 Direct Cosmetics v Commissioners of Customs and Excise [1988] ECR 3937 (Direct Cosmetics II), Case 5/84 Direct Cosmetics v Commissioners of Customs and Excise [1985] ECR 617 (Direct Cosmetics I) and Case 324/82 Commission v Belgium [1984] ECR 1861.

(9) - Joined Cases 73/63 and 74/63 [1964] ECR I.

(10) - Emphasis added.

(11) - Cited in footnote 8 above; see, in particular, paragraph 24 of the judgment and paragraph 3 of the Opinion of Advocate General VerLoren van Themaat.

(12) - Case 5/84, cited in footnote 8 above.

(13) - In his Opinion in Direct Cosmetics I, it is noteworthy that Advocate General VerLoren van Themaat compared the replacement by a Member State of a measure notified (and approved) pursuant to Article 27 with a situation where such a measure `later proves to be different in substance than was stated by the Member State concerned at the time of notification and is then replaced by a measure with a different wording'; [1985] ECR 617, p. 627.

(14) - Case C-62/93 BP Supergas v Greek State [1995] ECR I-1883.

(15) - Ibid., paragraph 23 of the judgment. The rationale underlying these requirements is explained by Advocate General Jacobs in his Opinion. Referring to the short time-limits that govern the procedure under Article 27 for tacit approval of measures and the need to verify the proportionality of those measures, he states that: `It is therefore essential that the Member States and, in particular, the Commission should be given a proper opportunity to examine proposed measures in order to verify that those requirements are met. In view of the time-limits imposed by Article 27, this is possible only if specific notice is given of the proposed measures'; see paragraph 36 of the Opinion.

(16) - Indeed, Advocate General VerLoren van Themaat, in his Opinion in Commission v Belgium, referring to the prevailing legal practice of the Commission and the Council concerning Article 27(1), stated that: `It appears in fact from Annex IV to the Commission's reply that in at least one case the Council and the Commission have accepted a minimum taxable base to prevent tax evasion (paragraph 10(5) of the German Turnover Tax Law)' (emphasis added). To accept such a base as a simplification measure, the Council would have to consider whether the proposal would respect the requirement of the last sentence of Article 27(1). It cannot be assumed that a measure notified as a tax avoidance measure invites or permits such consideration.

(17) - See, for example, in respect of the exceptions contained in Article 13 of the Sixth Directive, Case 348/87 Stichting Uitvoering Financiële Acties [1989] ECR 1737, paragraph 13 of the judgment and Case C-453/93 Bulthuis-Griffioen [1995] ECR I-2341, paragraph 19 of the judgment.

(18) - Paragraph 29 of the judgment.

(19) - The agent for the Commission referred to a recent decision whereby the Council authorized the Netherlands to derogate from Article 11(A)(1)(a) and apply the open market value as the

taxable amount for the establishment of certain rights in rem subject to two conditions, the first of which reflects clearly the Council's concern to ensure respect in the relevant Netherlands measures for the principle of proportionality. It provides (Article 1, first indent) that the taxable amount determined in accordance with Article 11(A)(1)(a) must be `abnormally low in comparison with the price that could be obtained for the property in a transaction between independent parties operating at arm's length': see Council Decision 96/432/EC of 8 July 1996 authorizing the Netherlands to apply a measure derogating from Article 11 of Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes (Sixth VAT Directive); OJ 1996 L 179, p. 51.

(20) - Cited in footnote 8 above.

(21) - Ibid.; see paragraphs 2 to 7 of the judgment where the relevant Belgian measures are described in detail.

(22) - See BP Supergas, cited in footnote 14 above, paragraph 36 of the judgment.

(23) - See Commission v Belgium, paragraph 29 of the judgment.

(24) - Case C-317/94 [1996] ECR I-0000, paragraph 19 of the judgment.

(25) - At the relevant time this was Article 191(2) of the EEC Treaty. Indeed, as France aptly observed, under that paragraph, which was applicable upon the adoption of the Sixth Directive, the publication of that Directive in the Official Journal occurred merely by way of information. It is only the new version of Article 191(2) of the EC Treaty, as amended by Article G(63) of the Treaty on European Union, which requires the publication of such Council and Commission directives as are addressed to all Member States.

(26) - Cited in footnote 9 above.

(27) - [1964] ECR 1, p. 14.

(28) - See paragraph 22 of the judgment.

(29) - Case C-340/92 Finanzamt Mainz v Boesenberg. That preliminary reference also concerned Paragraph 10(5) of the UStG 1980 but was withdrawn from the registry of the Court by order of the President of the Court of 6 October 1993.

(30) - Case 169/80 [1981] ECR 1931, paragraph 17 of the judgment.

(31) - Case 222/86 [1987] ECR 4097.

(32) - Ibid., paragraph 15 of the judgment.

(33) - See, for example, in respect of Irish law, State (Healy) v Donoghue [1976] IR 325.