OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 15 February 2007 1(1)

Case C?335/05

?ízení Letového Provozu ?R, s.p.

v

Bundesamt für Finanzen

(Reference for a preliminary ruling from the Finanzgericht Köln (Germany))

(Tax provisions – Harmonisation of laws – Turnover tax – Common system of value added tax – Refund of the tax to taxable persons not established in Community territory – Operator established in a third State which is a member of the World Trade Organisation – Most-favoured-nation clause contained in the General Agreement on Trade in Services – Interpretation of Article 2(2) of Directive 86/560/EEC in a manner compatible with that clause)

1. By the present reference for a preliminary ruling, the Finanzgericht Köln (Finance Court, Cologne) (Germany) is asking the Court for an interpretation of Article 2(2) of Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory ('the Thirteenth Directive'). (2)

2. The national court is basically asking whether that provision must be interpreted as meaning that the possibility which it affords the Member States of making the refund of value added tax ('VAT') to taxable persons who are not established in Community territory conditional on the third States granting comparable advantages regarding turnover tax does not apply in the case of third States which, as contracting parties to the General Agreement on Trade in Services ('GATS'), may rely on the most-favoured-nation clause contained in Article II(1) of the GATS.

3. That question has been raised in the context of proceedings brought by Rizeni Letoveho Provozu ?R, s.p. ('the plaintiff'), an undertaking established in the Czech Republic, against the Bundesamt für Finanzen (German Federal Finance Office) contesting the legality of the decision by which the Bundesamt für Finanzen upheld the rejection of the plaintiff's application for the refund of VAT which it had paid in Germany, in 2002, on the provision of services which it had received in German territory.

The legislative background

4. By decision of 22 December 1994, (3) the Council approved, on behalf of the Community and as regards matters falling within the Community's competence, in particular, the agreement

establishing the World Trade Organisation ('WTO'), as well as the agreements contained in Annexes 1, 2 and 3 to that agreement, including at Annex 1B, the GATS.

5. Article II of the GATS is entitled 'Most-favoured-nation treatment', and Article II(1) provides as follows:

'With respect to any measure covered by this Agreement, each Member State shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than it supplies to like services and service suppliers of any other country.'

6. Article 2 of the Thirteenth Directive provides as follows:

'1. Without prejudice to Articles 3 and 4, each Member State shall refund to any taxable person not established in the territory of the Community, subject to the conditions set out below, any value added tax charged in respect of services rendered or moveable property supplied to him in the territory [of] the country by other taxable persons or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of Directive 77/388/EEC or of the provision of services referred to in point 1(b) of Article 1 of this Directive.

2. Member States may make the refunds referred to in paragraph 1 conditional upon the granting by third States of comparable advantages regarding turnover taxes.

… .'

7. The sixth sentence of Paragraph 18(9) of the Umsatzsteuergesetz 1999 (German Law of 1999 on turnover tax; 'UStG') (4) reads as follows:

'An undertaking not established in the territory of the Community shall be credited with input tax only if in the country in which the undertaking has its seat no turnover tax or similar tax is levied or, if levied, only if it is credited to undertakings established in the country.'

The main proceedings and the question referred for a preliminary ruling

8. The plaintiff is a Czech undertaking which provides services in the flight security sector within Czech airspace. In addition, the plaintiff offers flying instruction sessions which take place only in Czech territory.

9. During 2002, in the context of its flying instruction activities, it used flight simulator training and other training courses, provided in Germany by German undertakings, which were services on which VAT was payable in Germany. The plaintiff paid the VAT on those services and, subsequently, by an application which reached the Bundesamt für Finanzen on 7 July 2003, asked for VAT totalling EUR 29 013.60 to be refunded, covering the period from January 2002 to December 2002.

10. By decision of 12 February 2004, the Bundesamt für Finanzen rejected the application on the ground that the case did not satisfy the condition of reciprocity for the purposes of the sixth sentence of Paragraph 18(9) of the UStG. Furthermore, by decision of 27 April 2004, it also rejected, on the same ground, the plaintiff's objection to the first decision.

11. Consequently, the plaintiff brought proceedings before the Finanzgericht Köln on 5 May 2004.

12. According to the order for reference, the national law – specifically, the sixth sentence of Paragraph 18(9) of the UStG – precluded any refund to the plaintiff of the input tax paid in

Germany. The national court notes that, during the reference period for the refund, the Czech Republic levied a turnover tax but did not grant German undertakings a refund of the input tax.

13. However, the national court has doubts as to whether the sixth sentence of Paragraph 18(9) of the UStG is compatible with Article 2(2) of the Thirteenth Directive, even though it is based on Article 2(2) and mirrors its wording. The national court raises the question whether Article 2(2) of the Thirteenth Directive should not be interpreted restrictively in relation to States which are members of the WTO – hence, contracting parties to the GATS – in accordance with the most-favoured-nation clause contained in Article II(1) of the GATS. In other words, the national court is asking whether, in the light of Article II(1) of the GATS, the possibility under Article 2(2) of the Thirteenth Directive of making the refund of input tax conditional on reciprocity does not apply in relation to WTO members.

14. The national court notes that the Czech Republic and the European Community are members of the WTO and, consequently, as of 1 January 1995, are also contracting parties to the GATS; it further notes that the Member States of the European Community refrain from applying, in relation to each other, a reciprocity requirement comparable to that contained in Article 2(2) of the Thirteenth Directive. Consequently, there can be no doubt that, on the basis of Article II(1) of the GATS, the Czech Republic can expect to be treated in a manner which does not require the condition of reciprocity. (5)

15. The national court also points out that the GATS is an agreement wholly governed by international law which establishes rights and obligations only as between members, and that infringements of the GATS are, as a matter of principle, to be determined solely in accordance with the agreement made within the framework of the WTO on rules and procedures for the settlement of disputes. However, in the view of the national court, that does not mean that the European Community and its institutions need not interpret and apply secondary Community legislation enacted prior to accession to the WTO, including the Thirteenth Directive, in conformity with the GATS. In fact, under Article 300(7) EC, to which Article 133(3) EC expressly refers, agreements such as the GATS, concluded under that article, are binding on the institutions of the Community and the Member States and form an integral part of the Community legal order.

16. Since the national court considers that settlement of the dispute before it depends on whether the sixth sentence of Paragraph 18(9) of the UStG is compatible with Article 2(2) of the Thirteenth Directive, and has doubts concerning the proper construction to be placed on the latter provision, it has stayed the proceedings and referred the following question to the Court of Justice:

‘Is Article 2(2) of [the] Thirteenth … Directive … to be interpreted restrictively as meaning that the possibility thereby afforded the Member States of making refunds of value added tax conditional on the granting by third States of comparable advantages regarding turnover taxes does not apply in the case of States which, as contracting parties to the General Agreement on Trade in Services (GATS), may invoke the most-favoured-nation clause contained in that agreement (Art II(1) GATS)?’

Legal analysis

17. The parties which have submitted written observations to the Court, pursuant to Article 23 of the Statute of the Court of Justice – that is to say, the Cypriot and Polish Governments, as well as the Commission – all take the view, albeit for partly differing reasons – that the question referred should be answered in the negative. (6)

18. I share that view, for the reasons which I shall set out below.

19. I consider it appropriate to begin by considering the arguments which the Commission has set out at greater length in its written observations. The Commission basically contends that it is necessary to avoid according to an operator established in a third State, such as the plaintiff at the material time, (7) a position more advantageous than the position enjoyed by operators established within the Community.

20. The Commission points out that the system for refunding VAT to taxable persons who are not established in the State, which applies to operators established within the Community pursuant to Directive 79/1072/EEC, (8) is characterised by the fundamental correlation – to which the Court drew attention in *Debouche* (9) – between the right to a refund and the right to deduct input tax. The Commission notes that, according to *Debouche*, and in conformity with the purpose of the system of the VAT directives, a taxable person who benefits from exemption and who is therefore not entitled to deduct input tax paid within the country is not entitled to a refund of VAT paid in another Member State either. (10)

21. It follows that this same approach should apply, a fortiori, as regards the refund of input VAT to operators established in third countries, particularly since, under Article 3(2) of the Thirteenth Directive, refunds under Article 2(1) of that directive may not be granted under conditions more favourable than those applied to Community taxable persons. Thus, according to the Commission, if an operator established in a third State is not liable for VAT in that State, he is not able to claim in that State rights concerning input tax; consequently, he ought not to be able to claim entitlement to refund from Member States of the Community in which he may have paid input VAT. The contrary approach would have the effect of according that operator treatment more favourable than the treatment applicable to taxable persons established in the Community.

22. The Commission also maintains that ‘the possibility of deducting the input tax which the operator pays in his country of origin as a taxable person actually constitutes a “reciprocity requirement” under Community law’ and that ‘undertakings established in other Member States of the Community may, incidentally, also benefit from the mechanism for deduction of input tax’. That gives rise to ‘reciprocity’ among the Member States of the Community. (11)

23. In the Commission’s view, the German authorities’ refusal to grant the refund the plaintiff has requested is not incompatible with the most-favoured-nation clause provided for under the GATS. That refusal does not disadvantage the plaintiff as compared with undertakings established in the Community, but is in fact consistent with the Community system of VAT and the general principle of equality, since it avoids placing the plaintiff – which, according to the Commission, is not a taxable person within the meaning of Directive 77/388/EEC (12) – in a more favourable position than that of undertakings established in the Community.

24. It seems to me that the question whether or not these arguments of the Commission – which are based on the assumption, of a factual nature, that, at the material time, the plaintiff was not liable for turnover tax in the State in which it was established – are actually well founded in fact and in law has no bearing on the merits of the question referred, which relates solely to the interpretation of the legislation and, therefore, leaves out of account the circumstances of the particular case.

25. The issue which the Commission’s arguments appear to raise, if any, is one of the relevance of the question referred for the decision which the Finanzgericht Köln will have to take and, consequently, of the admissibility of the question itself.

26. Were it, in fact, to prove that, at the material time, the plaintiff was not liable for a tax on turnover in the Czech Republic or, although liable for that tax, was not entitled in that State to

deduct the input tax, its claim – based on an interpretation of Article 2(2) of the Thirteenth Directive that is consistent with Article II(1) of the GATS – to be accorded the same treatment in relation to refunds of input VAT as Germany accords to Community undertakings could not, in any event, benefit it in terms of enabling it to obtain the refund claimed.

27. In my view, the Commission has correctly construed, with reference to the judgment in *Debouche*, the Community legislation concerning the refund of VAT to taxable persons established in another Member State of the Community. In *Debouche*, the Court clarified the link between the right to deduction in the Member State of establishment and the right to a refund in another Member State where the expenditure is incurred. The Court, in fact, held that a taxable person who is covered by an exemption and is, consequently, not entitled to deduct input tax in the Member State of establishment is not, in accordance with the objective pursued by the VAT directives, entitled to a refund of VAT paid in another Member State. (13)

28. That said, I none the less consider that there should be no serious doubt as to the admissibility of the question which the national court has referred, in terms of its relevance for the decision to be reached by that court.

29. In that connection, I would point out that it is settled case-law that in the context of the cooperation between the Court of Justice and the national courts provided for in Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (14) A reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought is unrelated to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (15)

30. The fact is that the arguments of the Commission that have just been examined do not demonstrate the existence of one of the abovementioned situations in the present case.

31. In that connection, I would point out, first of all, that the factual assumption on which those arguments are based, namely the circumstance that, at the material time, the plaintiff was not liable for turnover tax in the Czech Republic, is simply asserted by the Commission but is not borne out by the information contained in the order for reference.

32. That order does not contain specific information concerning the tax system in force in the Czech Republic at the material time. On page 5, at paragraph (cc) of the order, we are told that ‘the taxes calculated in regard to the plaintiff are also deductible as input tax … because the plaintiff was itself liable to pay the taxes’. Then, at paragraph (bbb), on page 6, that ‘[d]uring the course of the credit period, the Czech Republic levied a turnover tax; however, at that time it granted national undertakings no credit in respect of input tax’. There is the further fact, which the national court considers to be crucial, that there is no corresponding refund to German undertakings of input tax paid in the Czech Republic.

33. It certainly does not appear from the order for reference that, at the material time, the plaintiff was not liable for turnover tax in the Czech Republic. Although the second extract from the order for reference, which I have cited at point 32 above, appears to suggest that the plaintiff could not, in any event, benefit in that State from the deduction of input tax, I do not consider that this fact emerges unequivocally and, thus, manifestly, from the order itself.

34. Furthermore, even if that fact were to be confirmed, the question referred by the national court would not necessarily, in consequence, be devoid of relevance for the purposes of the decision which that court is required to adopt. In that connection, it is useful to point out that, in the light of the facts as they emerge from the order for reference, the decision by the Bundesamt für Finanzen to refuse the refund was based simply on the lack of reciprocity within the meaning of the sixth sentence of Paragraph 18(9) of the UStG; the national court questions the validity of those grounds, since it has doubts concerning the compatibility of that provision with Article 2(2) of the Thirteenth Directive.

35. What the national court appears, therefore, to be seeking to establish is whether the Bundesamt für Finanzen could, legitimately, cite, as against the plaintiff, the lack of reciprocity between the Czech Republic and Germany – in terms of each State's recognition of the right to a refund of VAT paid in the one State by operators established in the other – when Germany does not make reciprocity the condition for granting that benefit to operators established in other Member States of the Community.

36. I consider it useful to make clear, given that there is some ambiguity in the Commission's observations, to which I referred at point 22 above, that it cannot be claimed that the legislative system defined by the Community's VAT directives allows the Member States of the Community to make conditional upon reciprocity the application of the internal rules transposing the Community provisions on refunding VAT to taxable persons resident in another Member State. The fact that, as far as that refund is concerned, an element of that legislative system consists in a kind of reciprocal recognition of the national provisions governing liability for the tax and the right to deduct input tax does not, in fact, mean that the Member States are permitted to require reciprocity before they will grant the benefit in question. Each Member State is required to configure its national law in such a way that operators established in the other Member States are accorded, under the conditions laid down by the Community legislation, the refund of the input VAT paid on transactions which have taken place in its own territory, regardless of whether that obligation is respected by the other Member States.

37. If, during the period at issue, the plaintiff had been liable for turnover tax and had benefited from the deduction of input tax in its State of establishment, an answer in the affirmative to the question referred would imply that it was entitled to be refunded, as claimed, in the same way as a Community operator would be granted such a refund by Germany in the same circumstances.

38. On the other hand, if, during the period at issue, the plaintiff had not been liable for turnover tax or, in any event, had not benefited from the deduction of input tax in its State of establishment, it certainly could not obtain the refund claimed by relying on Community treatment. However, an answer in the affirmative to the question referred would imply that a decision to refuse that refund could not be based on the reasons cited by the Bundesamt für Finanzen.

39. Thus, even in that second situation, it cannot in fact be ruled out that, even if the plaintiff cannot obtain the refund claimed, the question referred by the national court may, none the less, be relevant for the purposes of resolving the dispute of which it has been seised, particularly with a view to the possible variation of the grounds for the decision of the Bundesamt fur Finanzen. (16)

40. In view of the fact that, should the Court answer the question referred in the affirmative, it will be for the national court to determine whether, at the material time, the plaintiff was liable for turnover tax in the Czech Republic and was entitled to deduct input tax in that State, I consider that not only do the Commission's arguments, which I have just examined, have no bearing on the substance of the question referred, they do not demonstrate that that question is manifestly irrelevant for the purposes of the national court's decision, or, accordingly, that the question is inadmissible, pursuant to the Court's case-law in relation to Article 234 EC.

41. Turning now to the substance of the question referred, first of all, I regard as unfounded the Polish Government's contention that Article II(1) of the GATS is not relevant to this case since the rule laid down therein applies only to the provision of services and not their fiscal treatment. As the Commission correctly points out in its answer to the written question on that point which the Court asked the parties in the course of the proceedings, measures of a fiscal nature are not exempt from the application of the GATS' rules.

42. In that connection, I would point out that the definition of the measures falling within the scope of the GATS is very broad. Under Article I(1) of the GATS, that agreement 'applies to measures by Members affecting trade in services', (17) and 'measures by Members' must be interpreted, pursuant to Article I(3)(a) of the GATS as measures 'adopted by central, regional or local governments and authorities' and by 'non-government bodies in the exercise of powers delegated by central, regional or local governments and authorities'. Furthermore, as the Commission has pointed out, Article XXVIII(a) of the GATS provides that, for the purposes of the agreement itself, '"measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form'. Finally, specific references to fiscal issues are contained in other provisions of the GATS, such as Article XIV(d) and (e) and Article XXVIII(o).

43. I must also mention a different aspect, which was raised in neither the order for reference nor the written observations submitted to the Court, and which concerns the so-called 'Community preference', an arrangement derogating from the most-favoured-nation clause contained in Article II(1) of the GATS.

44. In fact, in addition to the specific exemptions provided for in Article II(2) of the GATS, which must be specified in the relevant annex to the agreement itself, the GATS provides for a series of further exceptions to most-favoured-nation treatment, including the derogation *ratione personae* pursuant to Article V on 'Economic integration'.

45. Article V(1) provides that the GATS 'shall not prevent any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement', provided that a certain number of conditions are met: 'substantial sectoral coverage' (Article V(1)(a)); elimination of discriminatory measures and/or the prohibition of new or more discriminatory measures (Article V(1)(b)); the agreement must be designed to facilitate trade between the parties to the agreement and not raise the overall level of barriers to trade in services within the respective sectors or subsectors in respect of any member outside the agreement (Article V(4)).

46. Basically, subject to the above conditions, Article V exempts measures adopted under economic integration agreements – which are typically designed to enable the parties to the agreement to achieve a greater degree of liberalisation than exists among the members of the WTO – which would, otherwise, be incompatible with the obligation to accord most-favoured-nation treatment under Article II. (18)

47. Accordingly, if and to the extent that the EC Treaty meets the conditions laid down in Article V of the GATS, a State which is a member of the WTO and not of the Community cannot claim, by relying on Article II(1) of the GATS, that, in the case of a service provider established in its territory, a Member State of the Community should grant that service provider the same treatment which it accords, pursuant to Community law, to a service provider established in another Member State of the Community. In those circumstances, the question referred must perforce be answered in the negative.

48. That said, I do not consider it necessary, for the purposes of these proceedings for a preliminary ruling, to determine whether the EC Treaty actually meets all of the abovementioned conditions. That assessment could, in fact, prove to be somewhat complex, particularly as regards the condition that the overall level of barriers to trade in services *within the respective sectors or subsectors* must not be raised in respect of any member outside the agreement.

49. In point of fact, even assuming that it were possible to conclude that the EC Treaty does not meet those conditions and that, consequently, the plaintiff's situation could, in theory, be eligible for Community treatment under Article II(1) of the GATS, it seems evident to me that, in accordance with the Court's settled case-law on the effects of the WTO agreements at an internal Community level, the question referred must be answered in the negative.

50. In that connection, it is necessary above all to point out, as have all the parties which have submitted written observations, that, according to settled case-law, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. (19) Furthermore, for the same reasons, the Court considers that the WTO agreements are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law. (20)

51. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to specific provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules. (21)

52. Pointing out that, in this case, the Community did not intend to implement a particular obligation assumed in the context of the WTO and that the Thirteenth Directive does not refer expressly to specific provisions of the WTO agreements, the Cypriot and Polish Governments consider that the case-law cited at point 50 above suggests that the question referred by the Finanzgericht Köln should be answered in the negative.

53. It should, however, be emphasised that, in this case, Article II(1) of the GATS is not relied upon to contest the validity of Article 2(2) of the Thirteenth Directive. As the Commission correctly states, the question referred does not concern the possible direct effect (22) of the most-favoured-nation clause laid down in the GATS, but rather the interpretation, in accordance with the law of the WTO, of the reciprocity clause, in relation to the refund of input tax, laid down in the Thirteenth Directive. (23)

54. In that connection, the national court rightly points out that the international agreements concluded, like the GATS, under the conditions laid down in Article 228 of the EC Treaty (now Article 300 EC) are, pursuant to Article 300(7) EC, binding on the Community institutions and the Member States.

55. According to the Court, the primacy of international agreements concluded by the Community

over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements. (24)

56. That view of the Court is confirmed and reinforced by the judgments in which, citing the case-law to which I have referred at point 50 above, the Court has established that in a field to which the Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPs: Annex IC to the WTO agreement) applies and in respect of which the Community has already legislated, such as the trade marks sector, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights pertaining to that sector, to do so as far as possible in the light of the wording and purpose of Article 50 of the TRIPs. (25)

57. Consequently, in contrast to the view taken by the Cypriot and Polish Governments, according to the Court's case-law, the fact that the WTO agreements do not have direct effect does not preclude the obligation on both the Community Courts and the national courts to interpret the provisions of secondary Community law in a manner that is, so far as is possible, consistent with the provisions contained in those agreements.

58. However, as the Commission rightly points out, that obligation is defined as an obligation to do this 'so far as is possible'. That implies that the Community rule to be interpreted must be open to several possible interpretations. In point of fact, where the meaning of the provision is unequivocal and conflicts with the higher-ranking provision of international law, it will not be possible to interpret it in a manner consistent with the provision of international law, as a result of which, only by construing it *contra legem* – which is tantamount to depriving it of its legislative substance – is it possible to achieve an outcome which is compatible with the agreement in question. However, neutralising the Community provision in that way, in compliance with the provision of the international agreement, presupposes that the agreement in question has some kind of direct effect, at least of an 'exclusionary' nature, (26) within the Community legal order. But, pursuant to the case-law cited at points 50 and 51 above, an effect of that nature cannot be accepted in this case.

59. It seems to me that Article 2(2) of the Thirteenth Directive does not leave room for doubts as regards its interpretation when it comes to identifying the third States in relation to which the Member States of the Community are authorised to require the condition of reciprocity to be satisfied for the purposes of refunding, within the meaning of Article 2(1) of the Thirteenth Directive, the input VAT paid by a taxable person not established in the territory of the Community. The provision at issue refers – clearly and without distinction – to all third States, without allowing for possible exclusions.

60. In the light of its unambiguous wording, Article 2(2) of the Thirteenth Directive does not therefore, in my opinion, lend itself to a restrictive interpretation, as envisaged by the question referred.

Conclusion

61. In the light of the above considerations, I propose that the Court give the following answer to the question referred by the Finanzgericht Köln:

Article 2(2) of Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory must be interpreted as meaning that the possibility it affords the Member States of making refunds of input value added tax paid by taxable persons not established in the territory of the Community

conditional upon the granting by third States of comparable advantages regarding turnover taxes may be applied in relation to all third States, including those which, as contracting parties to the General Agreement on Trade in Services, may rely on the most-favoured-nation clause contained in Article II(1) of that agreement.

1 – Original language: Italian.

2 – OJ 1986 L 326, p. 40.

3 – Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreement reached in the Uruguay Round multilateral negotiations (1986-94) (OJ 1994 L 336, p. 1).

4 – BGBl. 1999, I, p. 1270.

5 – According to the national court, that also follows from the fact that even though Article II(2) of the GATS expressly provides for the possibility of excluding from the scope of Article II(1) of the GATS measures incompatible with the most-favoured-nation clause, provided that those measures are listed in the relevant annex to the GATS and comply with the criteria laid down therein, no reservation of that nature has been provided in the abovementioned annex in respect of Article 2(2) of the Thirteenth Directive.

6 – In any event, the Polish Government asks the Court to limit the effects in time of its decision, should it answer the question referred in the affirmative.

7 – As is common knowledge, the Czech Republic did not accede to the European Community until 1 May 2004.

8 – Eighth Council Directive of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangement for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11).

9 – Case C-302/93 [1996] ECR I-4495.

10 – *Debouche* (cited in footnote 9), paragraph 15.

11 – Written observations of the Commission, paragraph 20, last sentence.

12 – Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

13 – With reference to *Debouche* (cited in footnote 9), paragraph 15, and to Case C-136/99 *Monte dei Paschi di Siena* [2000] ECR I-6109, paragraph 23.

14 – Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 59; Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 16; and Case C-238/05 *Asnef-Equifax* [2006] ECR I?11125, paragraph 15.

15 – *Bosman and Others* (cited in footnote 14), paragraph 61; *Bronner* (cited in footnote 14), paragraph 17; and *Asnef-Equifax* (cited in footnote 14), paragraph 17.

16 – It is also worth emphasising that, as is clear from the order for reference, the plaintiff did not base its action before the Finanzgericht Köln on the most-favoured-nation clause under Article II(1)

of the GATS; in fact, it appears that the national court raised the question referred of its own motion.

17 – According to the Appellate Body of the WTO, the use, in Article I(1) of the GATS of the word ‘affecting’ – which refers to measures which have an ‘effect’ on trade in services – reflects the authors’ intentions to give the GATS a broad scope (report WT/DS27/AB/R, ‘European Communities – Bananas’, of 25 September 1997 (accessible at the WTO internet site: www.wto.org), paragraph 220).

18 – Panel Report WT/DS139/R and WT/DS142/R, ‘Canada – Certain measures affecting the automotive industry’, of 11 February 2000 (accessible at the WTO internet site: www.wto.org), paragraph 10.271.

19 – Case C?149/96 *Portugal* v *Council* [1999] ECR I?8395, paragraph 47; Joined Cases C?300/98 and C?392/98 *Dior and Others* [2000] ECR ?11307, paragraph 43; order in Case C?307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I?3159, paragraph 24; and Case C?377/02 *Van Parys* [2005] ECR I?1465, paragraph 39.

20 – *Dior and Others* (cited in footnote 19), paragraph 44 and order in *OGT Fruchthandelsgesellschaft* (cited in footnote 19), paragraph 25.

21 – *Portugal* v *Council* (cited in footnote 19), paragraph 49, and *Van Parys* (cited in footnote 19), paragraph 40.

22 – Like the Commission in its written observations, I am using the expression ‘direct effect’ in the broad sense, encompassing, as well as the effect of (or ability to plead) ‘substitution’ – that is to say, the ability of the provision of the international agreement, as a source of rights and duties, to be applied to the specific case in place of the conflicting rule (of secondary Community or national law) which would otherwise apply – also the effect of (or ability to plead) ‘exclusion’, that is to say, the ability of the provision, as a criterion of legitimacy, to prevent that rule taking effect, but without actually replacing it. On the conceptual distinction between the ability to plead substitution and the ability to plead exclusion, albeit in the context of the relations between Community directives and the national law of the Member States, I would refer to the Opinion of Advocate General Saggio in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, points 37 to 39, and the Opinion of Advocate General Léger in Case C-287/98 *Linster* [2000] ECR I-6917, points 55 to 77.

23 – I would point out, however, that the Thirteenth Directive preceded the WTO agreements (which were concluded in 1994) and has never been amended, as a result of which it does refer expressly to the precise provisions of the WTO agreements, nor could the Community have intended to implement a particular obligation assumed in the context of the WTO. I would add that the text of the directive also does not support the conclusion that, by adopting it, the Community intended to implement a particular obligation assumed in the context of the General Agreement on Tariffs and Trade (‘GATT’) of 1947, which did not, furthermore, cover the services sector.

24 – Case C-61/94 *Commission* v *Germany* [1996] ECR I?3989, paragraph 52. As early as Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 11, and on the premiss that the Community must respect international law in the exercise of its powers, the Court held that Article 6 of Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources (OJ 1986 L 288, p. 1) had to be interpreted and its scope defined in the light of the relevant provisions of international maritime law, including those laid down in the Convention for the Conservation of Salmon in the North Atlantic (OJ 1982 L 378, p. 25), which the Community entered into in 1982. Furthermore, in Case

C-70/94 *Werner* [1995] ECR I-3189, paragraph 23, and Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 24, the Court referred to Article XI of the GATT, considering it ‘relevant for the purpose of interpreting Community instruments governing international trade’.

25 – *Dior and Others* (cited in footnote 19), paragraph 47, and Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989, paragraph 55.

26 – See footnote 22 above.