OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 24 March 2009 (1)

Case C-2/08

Amministrazione dell'economia e delle Finanze

and Agenzia delle Entrate

v

Fallimento Olimpiclub Srl, in liquidation

(Reference for a preliminary ruling from the Corte suprema di cassazione (Italy))

(VAT – Abusive practice – Primacy of Community law – Legal certainty – Principle of res judicata – Final judgments)

I – **Introduction**

1. By order of 10 October 2007, received at the Court on 2 January 2008, the Corte suprema di cassazione (Italy) (the Supreme Court of Cassation), referred to the Court of Justice a question for a preliminary ruling under Article 234 EC concerning the application of the principle of *res judicata* in legal proceedings relating to payment of VAT.

2. The referring court essentially wishes to ascertain whether, in the light of the *Lucchini* case-law, (2) Community law requires it to disapply a domestic rule laying down the principle of *res judicata*, which confers finality on a judgment drawn up by another court in a case on the same subject, if to do so would enable it to find in a dispute relating to the payment of VAT that the transaction concerned was actually designed solely to obtain a tax advantage and thus constituted abusive practice.

3. That issue has been raised in the context of proceedings between, on the one hand, Fallimento Olimpiclub Srl in liquidation ('Olimpiclub') and, on the other, the Amministrazione dell'Economia e delle Finanze (the Finance Administration) and the Agenzia delle Entrate (the Revenue Authority) concerning VAT adjustment notices for the years 1988 to 1991.

II – **Legal framework**

4. Article 2909 of the Codice Civile (Italian Civil Code), laying down the principle of *res judicata* , provides as follows:

'Findings made in judgments which have acquired the force of *res judicata* shall be binding on the

parties, their lawful successors and assignees.'

5. In that regard, it is noted in the order for reference that, as far as tax cases are concerned, the Supreme Court of Cassation has for a long time been anchored to what is known as the principle of the 'frammentazione dei giudicati' ('the discreteness of final judgments'), in accordance with which each tax year remains conceptually quite separate from other tax years and engenders, as between the taxpayer and the tax authorities, a legal relationship that is distinct from that relating to previous or subsequent tax years. The effect is that, whenever disputes relate to different tax years, they are decided separately by a number of judgments – rather than by a single judgment fusing the various relevant rulings – even if they relate to the same tax and even though they concern questions which are, in whole or in part, the same. This means that none of the rulings made can constitute *res judicata* for the purposes of a case concerning a different tax year.

6. However, according to the order for reference, the principle of the 'frammentazione dei giudicati' has been modified by the more recent case-law of the Supreme Court of Cassation, according to which the subject-matter of a tax judgment is not necessarily confined to the contested measure, but may also cover the merits of the tax claim made by the authorities and the legal context underlying that claim. It has thus been sought to emphasise the unitary nature of the tax, despite the fact that it relates to separate, successive tax periods. (3)

7. Thus, a judgment may now properly be relied on in tax proceedings even where it has been delivered in relation to a tax period other than that to which those proceedings relate, provided that it concerns a fundamental point common to both cases. The reason for this, according to the referring court, is that the principle according to which tax years are to be regarded as discrete does not prevent a judgment relating to one tax period from being binding also in relation to other tax periods, where important elements relevant to more than one tax period are involved.

III – **Facts, procedure and questions referred for a preliminary ruling**

8. Olimpiclub is a limited liability company the objects of which are to construct and manage sporting facilities and which owns a sports complex located on State-owned land.

9. On 27 December 1985, Olimpiclub concluded with the Associazione Polisportiva Olimpiclub (Olimpiclub Sports Association, 'the Association'), virtually all of the founding members of which also held shares in Olimpiclub, a *contratto di comodato*, in other words, a contract by which one party transfers to the other movable or immovable property for that party's use for a given or indeterminate period, the transferee being under an obligation to return the property ('the contract of 27 December 1985'). Under that contract, the use of all the equipment installed in the sporting complex was granted to the Association, the only consideration being that the Association should bear the cost of the State fee, repay standard costs in the amount of LIT 5 000 000 per year, and transfer to Olimpiclub its entire gross income, consisting of the total amount of the fees paid by its members.

10. In 1992, the Guardia di Finanza (the Financial Police) conducted tax investigations which were subsequently also extended to the Association and which culminated in the drawing up of two reports ('the reports') disclosing irregularities regarding the contract of 27 December 1985. It was concluded that that contract could not be relied upon against the tax authorities.

11. As a consequence, four VAT adjustment notices were issued in respect of the tax years 1988 to 1991. Olimpiclub challenged those notices before the Commissione tributaria provinciale di primo grado di Roma (Provincial Tax Court of First Instance, Rome).

12. Before that court, the Agenzia delle Entrate maintained that the investigations carried out by

the Guardia di Finanzia had revealed that, by concluding the formally lawful contract of 27 December 1985, the parties had, in reality, intended solely to circumvent tax legislation in order to obtain an undue tax saving for Olimpiclub. In essence, by having recourse to the device of the *contratto di comodato*, Olimpiclub had transferred to a non-profit-making association all the administrative and management burdens of the sports complex, thus benefiting from the income produced by the Association without any kind of tax being levied on that income. By managing the company's facilities, the Association was, in fact, producing revenue free of direct or indirect taxation, in so far as it was produced in the form of income from membership fees.

13. The Commissione tributaria provinciale, however, upheld Olimpiclub's action, stating that the Amministrazione Finanziaria could not nullify the legal effects of the contract of 27 December 1985 and that that agreement was, in any event, not fraudulent.

14. That decision was upheld on appeal by the Commissione tributaria regionale del Lazio (Regional Tax Court, Lazio), which confirmed, in particular, that fraudulent intent had not been proved, given that the reasons for which the contract of 27 December 1985 had been concluded were to be found in the fact that it was uneconomic for the commercial company directly to manage what are essentially sporting activities, and not in any intention to circumvent tax obligations.

15. In the main proceedings, the Corte suprema di cassazione has to decide on the appeal which the Amministrazione Finanziaria brought against that judgment on a point of law. Since Olimpiclub had, in the intervening period, been put into liquidation, the administrator in the liquidation proceedings appeared before that court and made a counterclaim.

16. The Amministrazione Finanziaria has put forward a single complex ground of appeal, arguing that the grounds stated in relation to a decisive issue in the dispute are illogical and inadequate, and alleging infringement and misapplication of Article 116 of the Civil Code of Procedure, as well as of Article 37a of Presidential Decree No 600/1973 and Article 10 of Law No 408/1990, both of which the Regional Tax Court had declared were not applicable to the case. That ground of appeal is essentially designed to challenge the finding in the judgment of the Commissione tributaria regionale del Lazio that there was no intention to avoid tax.

17. Olimpiclub, on the other hand, referred in its defence, in particular, to a number of final judgments, handed down by the Commissione tributaria provinciale di Roma and the Commissione tributaria regionale del Lazio, and concerning tax assessments relating to different taxation periods but based on the same reports as those which gave rise to the tax assessments and adjustment notes at issue in the case before the referring court.

18. Olimpiclub submitted that those judgments, in which it was held that the mechanism set up under the contract of 27 December 1985 was not illicit for purposes of taxation, had acquired the authority of *res judicata* as laid down in Article 2909 of the Italian Civil Code and that, in consequence, notwithstanding the fact that the findings contained therein relate to tax years other than those at issue, they have binding force for the purposes of the case before the referring court. As a result, according to Olimpiclub, the referring court is precluded from re-examining the question of abusive practice.

19. In respect of that preliminary objection as to the admissibility of the appeal, based on the authority of *res judicata*, the referring court states that, while the judgments of the Commissione tributaria provinciale di Roma referred to by Olimpiclub fall to be regarded as irrelevant for present purposes, Judgments Nos 138/43/00 and 67/01/03 of the Commissione tributaria regionale del Lazio, delivered in VAT disputes and relating, respectively, to the 1987 and 1992 tax years, can, in principle, be relied on.

20. It appears thus from the order for reference that the Corte suprema di cassazione considers itself, pursuant to the principle of *res judicata,* as laid down in Article 2909 of the Italian Civil Code and as interpreted by that same court, bound by those judgments, which were made on the basis of the same questions of fact and of law as those underlying the present case and which concluded that the contract of 27 December 1985 was not abusive or fraudulent.

21. The referring court notes, however, that that legal situation – where it is possible, in proceedings such as those before it, for a taxable person to rely on a final judgment drawn up by another court and relating to a different tax period – appears, given that it may prevent it from determining the existence of an abuse of rights, to thwart the prohibition of the abuse of rights as developed in the case-law of the Court of Justice, specifically in relation to VAT, as a means of ensuring that the Community taxation system is fully implemented. (4)

22. According to the referring court, in that regard doubt also arises in relation to the case-law of the Court on the obligation to give full effectiveness to provisions of Community law and to disapply provisions of national (procedural) law which are in conflict with Community law and which may compromise its application. (5)

23. In particular, the referring court is uncertain as to the pertinence to the present case of *Lucchini*, (6) in which the Court affirmed the principle that Community law precludes the application of a provision of national law such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata*, where the application of such a provision prevents the recovery of State aid granted in breach of Community law. In the view of the Corte suprema di cassazione, that judgment appears to form part of a more general trend in the case-law of the Court of Justice towards considering the authority of judgments handed down by national courts to be relative, and requiring them to be disregarded on grounds of the primacy of Community law. (7)

24. Against that background, the Corte suprema di cassazione decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Community law preclude the application of a provision of national law, such as Article 2909 of the [Italian] Civil Code, laying down the principle of *res judicata*, where the application of that provision would lead to a result incompatible with Community law, thereby thwarting its application, even in areas other than State aid (in relation to which, see Case C?119/05 *Lucchini SpA* [2007] ECR I?[6199]) and, in particular, in matters relating to VAT and with respect to the misuse of rights in order to obtain undue tax savings, in particular in the light also of the rules of national law – as interpreted in the case-law of this Court – according to which, in tax disputes, where a *giudicato esterno* [a final judgment drawn up by another court in a case on the same subject] contains a finding on a fundamental issue common to other cases, it has binding authority as regards that issue, even if it was drawn up in relation to a different tax period?’

IV – **Legal analysis**

25. As is apparent from the foregoing, by its question the referring court is essentially asking whether Community law precludes the application of a provision of national law such as Article

2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata*, in so far as the application of that provision, as interpreted by the national courts, would prevent a national court – in a dispute such as that before the referring court concerning the application of VAT – from examining whether a certain transaction constitutes abusive practice, where a decision on that issue is already contained in a final judgment drawn up by another court, albeit in relation to a different tax period.

A – *Main submissions of the parties*

26. In the present proceedings, written observations have been submitted by the Italian Government, by the Commission and by Olimpiclub. Apart from Olimpiclub, those parties were represented at the hearing on 22 January 2009, at which, additionally, the Slovakian Government was represented.

27. All parties essentially agree that the judgment of the Court in *Lucchini* (8) cannot be transposed to a situation such as that in the case before the referring court, and that that judgment is therefore not pertinent in the present case. They submit in that regard, in particular, that *Lucchini* must be read in its specific context, that is to say, in relation to the failure by a national court to take account of an existing decision of the Commission on the compatibility of particular State aid with the common market. Whereas *Lucchini* thus concerned a matter over which the national courts do not in principle have any jurisdiction, in the case before the referring court it is entirely for the national fiscal authorities and courts to apply the VAT system and to establish whether there is abusive practice.

28. The Commission submits, more specifically, that it is clear from the case-law, mentioned by the referring court, on the relationship between principles of Community law and national procedural law that it is only exceptionally and in accordance with rather stringent conditions that the Court of Justice will conclude that a rule of national procedural law, such as that at issue in the present case, fails to satisfy the requirements of Community law. The Commission notes, however, that the final judgments, handed down by national courts, on which Olimpiclub relies in the present case concern tax years and procedures other than those to which the forthcoming decision of the referring court would refer. On that point, the present case must also be distinguished from cases such as *Eco Swiss* (9) and *Kapferer*. (10)

29. The Commission contends, moreover, that the incompatibility with Community law of a rule on *res judicata* as interpreted by the referring court, under which judgments are binding across different fiscal years, is borne out by the principle, inherent in the VAT system, that each tax period gives rise to a separate tax liability.

30. It therefore appears to the Commission to be unjustified – also in the light of the requirements of legal certainty and the principle of the effectiveness of Community law, but account being taken of the importance attaching, in general, to the principle of *res judicata* – that a national court should be barred from examining, for the purposes of the application of VAT, whether abusive practice has taken place, simply because an ‘external’ final judgment has made a finding on that issue with regard to a different tax period.

31. The Italian Government essentially shares the view that that understanding of the principle of *res judicata* is disproportionate and goes beyond what may be required under Community law. That principle, as fundamental as it may be, must be reconciled with the equally fundamental rule prohibiting abuse of rights in matters of taxation. As appears clearly from the order for reference, it is rather obvious that such an abuse occurred in the present case.

32. The Italian Government observes that with regard to the subject-matter of the case before

the referring court – that is to say, in relation to the tax periods from 1988 to 1991 – no judicial decision has actually been taken yet. In those circumstances, it must remain possible for the referring court to examine the question of abusive practice.

33. By contrast, Olimpiclub maintains that Article 2909 of the Italian Civil Code, as interpreted by the referring court, is not contrary to Community law. Setting out the differences between the present case and the various judgments of the Court cited in the order for reference, it argues that that view is not called into question by those judgments. It emphasises, furthermore, the fundamental importance of the principle of legal certainty – and the principle of *res judicata* – both in the national and the Community legal orders.

34. The Slovakian Government essentially shares the view taken by Olimpiclub, stressing the central role of the principle of *res judicata*, compliance with which is in the general interest. Rather, the present case should be decided on the basis of the *Kühne & Heitz* (11) and *Eco Swiss* (12) line of authority. Although that principle is not absolute, the strict conditions for its disapplication, as set out in *Lucchini*, (13) are not satisfied in the present case. It is ultimately for the national courts to decide whether two cases are identical or not.

B – *Appraisal*

35. In order to place the issues raised by this case in their broader context, it should be remembered first of all that the task of implementing and enforcing Community law – save where specifically entrusted to Community institutions – falls primarily to the national administrative and judicial authorities of the Member States (14) which are under a duty, pursuant to Article 10 EC, to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising under Community law.

36. In the absence of specific provisions laid down by Community law, the Member States, when implementing Community law, act in principle in accordance with the procedural and substantive rules of their own law. Thus, the Court has consistently held that, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. (15)

37. It can therefore be said that the rights and obligations stemming from the sources of Community law flow as a rule through the institutional and procedural ‘channels’ provided for under the various national legal orders.

38. That national framework of the application of Community law must, however, comply with certain requirements under Community law which are designed to ensure its full application.

39. Thus, the Court has consistently held that where Member States lay down, in accordance with what has been termed their procedural autonomy, the procedural rules for proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of Community law, Member States must ensure that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they are not framed in such a way as to make it excessively difficult or impossible in practice to exercise the rights conferred by Community law (principle of effectiveness). (16)

40. Apart from those constraints on national procedural law which the Court has formulated with regard to the principle of procedural autonomy, a number of obligations regarding the application of Community law by the Member States flow directly – and ‘objectively’, that is to say,

quite independently of a context characterised by the ‘assertion of Community rights by individuals’ – from the principle of the primacy of Community law and the duty to secure its full effectiveness.

41. As is well known, according to the core of those principles, any provision of domestic law, be it substantive or procedural in nature, must in principle give way to provisions of Community law with which it conflicts. (17)

42. The Court has specified, as regards the obligations entailed by the principle of the primacy of Community law, that it is both for the national administrative bodies and for all the courts to ensure observance of the rules of Community law within their respective spheres of competence and, if necessary, to refuse of their own motion to apply any national rule which is an obstacle to the full effectiveness of Community law. (18)

43. It is that obligation, incumbent on the national courts, to uphold the primacy of Community law and to ensure its full effectiveness – or, to put it more generally, their duty to defend the rule of law in the Community – which is liable to be affected by a domestic rule such as that at issue here, which seeks to lay down the principle of *res judicata,* in so far as that rule makes it impossible for the national courts to apply a Community rule correctly. Accordingly, it is by reference to that obligation that the rule of national law should be assessed. (19)

44. In that regard, it should be noted, first, that the Court has repeatedly underlined that rules conferring finality on judicial or administrative decisions contribute to legal certainty, which is a fundamental principle of Community law. (20)

45. In the light of that principle, the Court has – more specifically, in *Eco Swiss*, *Köbler* and *Kapferer*, which concerned the finality of judicial decisions and, as regards *Eco Swiss*, the finality of an arbitration award – acknowledged the importance, both for the Community legal order and the national legal systems, of the principle of *res judicata*. It has recognised that in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all legal remedies have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question. (21)

46. As Olimpiclub and the Slovakian Government have emphasised, it appears from *Eco Swiss* and *Kapferer*, in particular, that Community law does not therefore, in principle, require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law inherent in that decision. (22)

47. It is, none the less, also clear from the case-law of the Court that the principle of legal certainty – and the finality of decisions, which flows from that principle – is not absolute in the sense that it prevails in every situation: rather, it must be reconciled with other values worthy of protection, such as the principles of legality and the primacy of Community law, and the principle of effectiveness. (23)

48. Consequently, in so far as national rules conferring finality on decisions create an obstacle to those principles, national courts – and, as the case may be, administrative bodies – may, as can be seen from the case-law of the Court, be required in specific circumstances not to apply those rules. (24)

49. Thus, the Court held in *Kühne & Heitz* that the administrative body responsible for the adoption of an administrative decision is under an obligation, in accordance with the principle of cooperation arising from Article 10 EC, to review and possibly to reopen that decision, if four specific conditions are satisfied. (25)

50. It is apparent from the importance attached to the specific circumstances of the case in *Kühne & Heitz*, (26) as well as from the subsequent *i-21 Germany and Arcor* case, which the Court distinguished from *Kühne & Heitz* by reference to those circumstances, (27) that rules of national law which, in the interests of legal certainty, confer finality on decisions can only exceptionally and in accordance with very narrow conditions be called into question in the light of the force and the effect of Community law.

51. It should be noted next that, in *Kapferer*, the Court neither confirmed nor excluded that the principles laid down in *Kühne & Heitz* – which concerned the obligation imposed on an administrative body to review a final administrative decision which was contrary to Community law – could be transposed into a context, like that of *Kapferer*, relating to a judicial decision: the Court confined itself to the finding that, in any event, one of the conditions laid down in *Kühne & Heitz* was not satisfied. (28)

52. Finally, however, in *Lucchini*, the Court held, referring to the duty of the national courts to give full effect to the provisions of Community law and to its primacy, that Community law precludes the application of a provision of national law – the same as that at issue in the present case – which seeks to lay down the principle of *res judicata*, in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market by a decision of the Commission of the European Communities which has become final. (29)

53. The factor which the Court seems, in essence, to have considered decisive in that case is that, by making the disputed ruling that *Lucchini* was entitled to State aid, when this had already been declared incompatible with the common market by decision of the Commission, the national court had exceeded its jurisdiction as delimited by Community law, in that the assessment of the compatibility of State aid measures with the common market falls, as the Court stressed, within the exclusive competence of the Commission, subject to review by the Community judicature. (30)

54. The approach taken by the Court in that line of cases concerning the obligation to review or reopen final decisions which are contrary to Community law is certainly characterised by its focus on the circumstances of the individual case. Ultimately, however, each of those judgments reflects a balance that had to be struck, in the particular factual and legal circumstances of the case, between legal certainty, which the finality of decisions is intended to serve, and the requirements of Community legality. (31)

55. Accordingly, I do not share the view suggested by the referring court that the line of cases outlined above reveals a general trend in the case-law of the Court towards eroding or watering down the principle of *res judicata*.

56. In order to assess, in the light of the foregoing considerations, the question whether Community law requires the referring court in the present case not to apply the rule of *res judicata*, within the meaning described by that court, the context in which that issue has been raised should be considered in greater detail.

57. In that regard, it should be noted that the referring court apparently entertains doubts as to the correctness of the finding of the lower court – appealed before it on a point of law – to the

effect that the contractual mechanism chosen by Olimpiclub, namely the *contratto di commodato* of 27 December 1985, was not abusive and did not therefore constitute an illicit transaction for the purposes of the levying of VAT.

58. Although, as the Commission has observed, the referring court has not identified in detail the elements on which its doubts as to the correctness of that assessment are founded, it nevertheless emerges from the order for reference that the referring court suspects that that assessment is not in compliance with the concept of the abuse of rights in the field of VAT as laid down in the case-law of the Court. In that regard, the referring court made reference to *Halifax*, (32) as well as to *Part Service*, (33) which was still pending before the Court at the time when the present reference was made. In those cases, the Court set out the principle of the prohibition of abuse of rights under the Sixth Directive (34) and gave guidance as to the conditions under which transactions can be found to constitute abusive practice for the purposes of the application of VAT.

59. The referring court is thus concerned to ensure the correct application in the main proceedings of the Community rule prohibiting abusive practice in the sphere of VAT, but sees itself prevented from doing so by operation of the principle of *res judicata* under Italian law. By dint of that principle, the referring court is compelled to accept the finding, set out in final judgments rendered by another court and relating to different tax periods, that the transaction at issue before it does not constitute abusive practice – notwithstanding the fact that, in the view of the referring court, that finding is incorrect.

60. Indeed, as the parties to the present proceedings have underlined, the circumstances of the present case bear little resemblance to those underlying *Lucchini*. (35) In the present context, the referring court has drawn particular attention to the fact that the dispute is in the field of VAT, that is to say, a field which is administered by the national fiscal authorities and courts and does not involve the exercise of an exclusive Community competence.

61. To my mind, however, the *Lucchini* judgment is not characterised by ‘singularity’, in the sense that Community law can preclude the application of national concepts of the *res judicata* principle *only* in cases where an exclusive competence of the Commission is involved, as in matters of State aid.

62. Two observations can be made in this connection. First, it should be borne in mind that the requirements of primacy and effectiveness apply across the board to the provisions of Community law, including those of the Sixth Directive, it being immaterial for those purposes whether provisions result from the exercise of an exclusive competence by the Commission, such as the decision in *Lucchini* (36) declaring State aid incompatible with the common market.

63. Secondly, it is arguable that whenever an exclusive competence of the Commission is involved, the breach of a rule of Community law, or its incorrect application, is closely related to a failure to respect the distribution of competences as between the Member States and the Community. In other words, if, for instance, a national court takes a decision which is contrary to a Community regulation or directive, it is in fact substituting, to that extent, its own decision for that already taken by the competent Community institutions and reflected in the Community provisions thus breached. In a sense, therefore, where the application of a provision of Community law is frustrated in a Member State, a twofold issue always arises, however marginally: that of the demarcation of the Community legal order from the national legal order, and of the jurisdiction of the national courts in respect of those systems.

64. The fact remains, on the other hand, that where, as in *Lucchini*, the decision of the national court interferes in an area which is entirely within the exclusive competence of the Commission and where, accordingly, that court clearly has no jurisdiction at all, the distribution of powers

between the Community and the Member States is directly called into question and the breach of Community law by the judgment concerned is particularly flagrant. Consequently, in view, in essence, of the flagrant infringements of Community law on which the judgment at issue in *Lucchini* was based, its authority of *res judicata* had to yield to the requirements relating to the primacy and effectiveness of Community law.

65. By contrast, in cases concerning areas such as that of the Community system of VAT, which is only partially harmonised, (37) the distinction between the sphere of Community law and that of national law – hence the delimitation of the jurisdiction of the national court – may be more subtle.

66. Thus, not every mistake made by a national court in determining the existence of abusive practice for purposes of VAT taxation would be a concern of Community legality: for example, if that determination is vitiated by an erroneous assessment of the evidence, rather than by failure to apply the correct concept of abusive practice as defined by the case-law of the Court.

67. That said, the perspective from which the present case should be approached is different again. The key factor – which, in my view, militates in favour of an affirmative answer to the question referred – is to be found in the specific, and to my mind rather unorthodox, scope of the principle of *res judicata* as applicable in the main proceedings and as it falls to be assessed here.

68. As commonly understood, the authority of *res judicata* attaching to a judgment prevents the same matter or dispute – defined by reference to the subject-matter, the legal basis and the parties to the dispute – from being re-litigated in subsequent proceedings. The bringing of such identical proceedings would normally lead to discontinuance for lack of admissibility.

69. In the situation at issue in the present case, however, the judgments which have acquired the force of *res judicata* were handed down in separate proceedings concerning the levying of VAT, the adjustment notices for which were issued in the tax years 1987 and 1992, whereas the tax years at issue in the main proceedings are the years from 1988 to 1991. By the same token, while there are final decisions as regards the levying of VAT in 1987 and 1992, the tax disputes at issue in the main proceedings are still pending.

70. Thus, although the dispute before the referring court overlaps in several respects with the tax disputes which were settled in the two aforementioned final judgments, it must therefore be regarded, in so far as it relates to different taxation periods, as being essentially different as regards its subject-matter.

71. Accordingly, as appears from the order for reference, the referring court is not planning to dismiss the proceedings as a whole as inadmissible. Rather, however, by operation of the principle of *res judicata* (as applicable in the main proceedings), it considers itself bound in respect of certain aspects of the final judgments concerned, namely as regards the assessment of the contract of 27 December 1985, with the effect that it is prevented, in the proceedings before it, from determining whether that contract constitutes abusive practice as defined under Community law.

72. In that light, it should be noted, first, that considerations of legal certainty arise in those circumstances only in relation to a certain part of the findings contained in the judgments which have acquired the authority of *res judicata*, not in relation to those judgments as a whole.

73. Secondly, the circumstances of the case before the referring court differ from those which gave rise to *Eco Swiss* (38) or *Kapferer* (39) – relied upon by Olimpiclub – in which the Court had to decide whether a decision which has acquired the authority of *res judicata* has to be set aside or

reviewed if it is contrary to Community law. In the present case, by contrast, the final judgments concerned, which were handed down in relation to other tax years, will not be called into question *as such* by the decision which the referring court is going to take in the case before it on the payment of VAT in the tax years at issue.

74. Viewed in that light, the present situation is comparable rather with that in *Köbler*, in which the Court dismissed the argument, based on *res judicata*, against the recognition of the principle of State liability for a decision of a court adjudicating at last instance, on the grounds that that recognition does *not in itself* have the consequence of calling in question that decision as *res judicata*. (40)

75. In the circumstances of the present case, there are therefore in my opinion no substantial interests relating to legal certainty at stake which would outweigh the obligation incumbent on the referring court to apply and give full effectiveness to Community law, in this case to the prohibition of abusive practice in the field of VAT. It must therefore be concluded that Community law precludes the application of a provision laying down the principle of *res judicata* with the scope and effects at issue in the present case.

76. In view of all the foregoing, the question referred should be answered to the effect that Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata,* in so far as the application of that provision, as interpreted by the national courts, prevents a national court, in a dispute such as that before the referring court on the payment of VAT, from determining correctly and in compliance with Community law the existence of abusive practice, where a decision on that issue is already contained in a final judgment drawn up by another court in relation to a different tax period.

V – **Conclusion**

77. I therefore propose that the Court answer the question referred as follows:

– Community law precludes the application of a provision of national law, such as Article 2909 of the Codice Civile (Italian Civil Code), which seeks to lay down the principle of *res judicata,* in so far as the application of that provision, as interpreted by the national courts, prevents a national court, in a dispute such as that before the referring court on the payment of VAT, from determining correctly and in compliance with Community law the existence of an abusive practice, where a decision on that issue is already contained in a final judgment drawn up by another court in relation to a different tax period.

1 – Original language: English.

2 – Case C?119/05 [2007] ECR I?6199.

3 – The Corte suprema di cassazione makes reference to its Judgments Nos 13919/06, 16258/07 and 25681/06.

4 – Reference is made in this context, in particular, to Case C?255/02 *Halifax* [2006] ECR I?1609, and Case C?425/06 *Part Service* [2008] ECR I?897.

5 – It refers in that regard, in particular, to Case C?312/93 *Peterbroeck* [1995] ECR I?4599; Joined Cases C?430/93 and C?431/93 *Van Schijndel* [1995] ECR I?4705; and Case C?327/00 *Santex* [2003] ECR I?1877.

6 – Cited in footnote 2.

7 – Reference is made in this context, in particular, to Case C?126/97 *Eco Swiss* [1999] ECR I?3055; Case C?118/00 *Larsy* [2001] ECR I?5063; Case C?201/02 *Wells* [2004] ECR I?723; and Case C?453/00 *Kühne & Heitz* [2004] ECR I?837.

8 – Cited in footnote 2.

9 – Cited in footnote 7.

10 – Case C?234/04 [2006] ECR I?2585.

11 – Cited in footnote 7.

12 – Cited in footnote 7.

13 – Cited in footnote 2.

14 – To that effect, see, for example, Case C?476/93 P *Nutral* v *Commission* [1995] ECR I?4125, paragraph 14.

15 – See to that effect, in particular, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 17; Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; and *Peterbroeck*, cited in footnote 5, paragraph 12.

16 – To that effect, see, inter alia, *Kapferer*, cited in footnote 10, paragraph 22; *Wells*, cited in footnote 7, paragraph 67; and Case C?78/98 *Preston and Others* [2000] ECR I?3201, paragraph 31.

17 – See already Case 6/64 *Costa* v *ENEL* [1964] ECR 585. It should be noted that the resolution of a conflict of norms on the basis of that principle may generally prove to be less straightforward in cases where the application of Community law is indirectly hampered by the national procedural and institutional framework than in cases where, for example, Community law collides directly with a substantive rule of national law. To take up my earlier metaphor, the assessment of the question whether the domestic procedural and institutional ‘channels’ through which Community law must operate are ‘broad enough’ – in the sense that the Community rule at issue can be effectively applied – is gradational in nature and actually requires a balance to be struck between, on the one hand, the interest in upholding the integrity of the domestic rules at issue and, on the other, the Community requirements as to the primacy and full effectiveness of Community law.

18 – See, to that effect, inter alia, Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 to 24; Case C?213/89 *Factortame and Others* [1990] ECR I?2433, paragraphs 19 to 21; as well as *Larsy* , cited in footnote 7, paragraphs 51 and 52; *Kühne & Heitz*, cited in footnote 7, paragraph 20; and *Lucchini*, cited in footnote 2, paragraph 61.

19 – For a similar approach, see the Opinions of Advocate General Léger in *Kühne & Heitz*, cited in footnote 7, in particular points 45, 58 and 75, and of Advocate General Ruiz-Jarabo Colomer in Joined Cases C?392/04 and C?422/04 *i-21 Germany and Arcor* [2006] ECR I?8559, point 69.

20 – To that effect, see, inter alia, *Kühne & Heitz*, cited in footnote 7, paragraph 24; *Eco Swiss*, cited in footnote 7, paragraph 46; and Case C?2/06 *Willy Kempter* [2008] ECR I?411, paragraph 37.

21 – See, to that effect, *Eco Swiss*, cited in footnote 7, paragraphs 46 and 47; Case C?224/01 *Köbler* [2003] ECR I?10239, paragraph 38; and *Kapferer*, cited in footnote 10, paragraph 20; see also, with regard to administrative decisions, *i-21 Germany and Arcor*, cited in footnote 19, paragraph 51, and *Kühne & Heitz*, cited in footnote 7, paragraph 24.

22 – See, to that effect, *Kapferer*, cited in footnote 10, paragraph 21, and *Eco Swiss*, cited in footnote 7, paragraphs 46 and 47.

23 – See, to that effect, Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53; *i-21 Germany and Arcor*, cited in footnote 19, paragraph 52; and Advocate General Ruiz-Jarabo Colomer in the same case, at point 76.

24 – See in that regard *Kühne & Heitz*, cited in footnote 7, paragraph 27; *i-21 Germany and Arcor*, cited in footnote 19, paragraph 52; *Willy Kempter*, cited in footnote 20, paragraph 38; and *Lucchini*, cited in footnote 2, paragraph 63.

25 – See paragraphs 26 and 27 of *Kühne & Heitz*: first, the administrative body must, under national law, have the power to reopen that decision; secondly, the administrative decision in question must have become final as a result of a judgment of a national court ruling at final instance; thirdly, that judgment must, in the light of a decision given by the Court of Justice subsequent to it, be based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling in the circumstances set out in the third paragraph of Article 234 EC; fourthly, the person concerned must have complained to the administrative body immediately after becoming aware of that decision of the Court.

26 – See paragraphs 26 and 28 of the judgment, cited in footnote 7.

27 – See paragraphs 52 to 54 of the judgment in *i-21 Germany and Arcor*.

28 – Namely, the condition that the body concerned must be empowered under national law to reopen the decision; see *Kapferer*, cited in footnote 10, paragraph 23.

29 – See *Lucchini*, cited in footnote 2, paragraphs 60 to 63.

30 – See to that effect, in particular, paragraphs 52, 59 and 62 of the judgment.

31 – Taking account of factors like the specific procedural framework in which the court or administrative body operates, whether or how far the courts or administrations discharged their duties as regards the application and enforcement of Community law and whether the parties made use of the means available to them to assert their rights.

32 – Cited in footnote 4.

33 – Cited in footnote 4.

34 – Sixth Council Directive 77/388/EEC 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) (‘the Sixth Directive’).

35 – Cited in footnote 2.

36 – Cited in footnote 2.

37 – Case C?462/05 *Commission* v *Portugal* [2008] ECR I?0000, paragraph 51.

38 – Cited in footnote 7.

39 – Cited in footnote 10.

40 – Cited in footnote 21, paragraph 39. The Court noted in that context that proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the authority of *res judicata* .