OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 2 December 1988 *

Mr President,
Members of the Court,

1. On 3 November 1981 the Council adopted, at the Italian Government's request, Decision 81/890/EEC authorizing the Italian Republic to derogate temporarily from the value-added tax arrangements in the context of aid to earthquake victims in southern Italy (Official Journal 1981, L 322, p. 40).

2. Article 1 of that decision authorized the Italian Republic until 31 December 1981, to exempt, with refund of the tax paid at the preceding stage, the transactions which are listed, together with the arrangements for exempting them, in the annex to the decision. The list covers various transactions for the supply of goods and services which, as such, unquestionably fall within the scope of the Sixth Council Directive (77/388) (Official Journal 1977, L 145, p. 1) as defined in Article 2 thereof, which provides that 'the following shall be subject to value-added tax:

(1) the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such,

(2) the importation of goods'.

3. The derogation was extended until 31 December 1982 by Council Decision 82/424/EEC of 21 January 1982 (Official Journal 1981, L 184, p. 26) and until 31 December 1983 by Council Decision 84/87/EEC of 6 February 1984 (Official Journal 1984, L 40, p. 30). However, the Italian Republic maintained the derogation in force by means of a series of decree-laws adopted in 1984, 1985 and 1986 and, as it informed the Court in answer to a question, the exemption is to remain in force until 31 December 1988. The Commission therefore brought an action against the Italian Republic under Article 169 of the Treaty for failure to fulfil its obligations, claiming that it had infringed Article 2 of the Sixth VAT Directive.

4. The Commission argues that for the Italian Republic to exempt from tax transactions which, according to the wording of the directive, must be subject to value-added tax constitutes a derogation which is devoid of any legal basis. In its view, it is possible to derogate from the Sixth Directive only in the cases provided for in Title X thereof or by virtue of an *ad hoc* authorization granted by the Council. There ceased to be any such authorization as of 31 December 1983 and the exemption maintained in force by Italy until 31 December 1988 is not covered by Title X. Consequently, there is a manifest and unquestionable infringement of the Sixth Directive and, in particular, of Article 2 thereof.

* Original language: French

5. The Italian Republic raises various arguments relating to the nature and the objectives of the derogations from the Sixth Directive.

6. It argues in the first place that it cannot be considered, as the Commission claims, that Title X is exhaustive. In other words, derogations from the directive are possible despite the fact that they are not referred to in Articles 13 to 16, which make up Title X. The fact that such derogations — like those at issue in this case — are not mentioned therein simply indicates that they fall outside the subject-matter covered by the directive itself.

7. I cannot agree with that view, which, moreover, is contradicted by the defendant's conduct in so far as the defendant itself asked the Council for authorization to derogate from the directive. It therefore certainly considered that the measures which it intended to take fell within the field covered by the directive.

8. Furthermore, the exhaustive nature of Title X of the directive also emerges clearly from the explanatory memorandum of the proposal for a sixth directive submitted to the Council by the Commission on 29 June 1973. It states that '... the common rules must be arrived at by determining the area of application for value-added tax which will be *identical under each national law*, particularly as regards ... which transactions are taxable or exempt'.[1] The Commission adds in its comments on Title X that whereas 'Article 10 (3) of the Second Directive of 11 April 1967 left the Member States completely free ... to provide for whatever exemptions they thought fit ... the purpose of the present directive, dictated by the need to ensure equality of treatment as between the various Member States as regards collection of the Community's own resources, is that there should be uniformity as to the transactions which are taxable. This necessarily implies uniform rules as to exemptions'.[2]

9. It is patent that that objective of uniformity would not be achieved if the provisions of Title X were not regarded as exhaustive, and if as a result the Member States were free to grant such exemptions as they thought fit.

10. However, the Italian Republic further argues, by reference to the 11th recital in the preamble to the Sixth Directive, that the essential objective of the directive is precisely that of securing the collection of the Community's own resources in a uniform manner. It maintains that the measures granting exemption taken by Italy fully respect that objective since they were organized, in accordance with the conditions laid down by the Council, in such a way as to eliminate any impact on own resources.

11. It seems to me that two comments are called for in this connection. In any event, the Italian Republic is not complying with all the conditions laid down by the Council, since it has continued to grant the exemptions in question beyond the time-limit set by the latter.

12. Secondly, the objective of uniformity with regard to the collection of own resources is indeed important, but it is not the only aim of the directive, as witness in particular the fourth recital in the preamble

1 — See *Bulletin of the European Communities — Supplement 11/73*, p. 7.

2 — Op. cit., p. 15.

thereto, which refers to the ultimate achievement of a common market permitting fair competition and resembling a real internal market. Moreover, the Court has recently referred to this.[3]

13. The Italian Republic also claims that the exceptional, temporary conditions which determined the adoption of the Council's decision to grant a derogation still obtain. For its part, the Commission considers that three years after the earthquake most of the reconstruction work must have been completed and hence there is no longer any justification for extending the exemptions. I consider that in taking that view the Commission has not made a manifest error of assessment.

14. Lastly, the Italian Republic argues that logically the Commission should have claimed that it has infringed the more recent Council decision and not Article 2 of the Sixth Directive. For my part, I certainly agree that the Commission's argument that since there is no longer any legal basis for the derogation granted to the Italian Republic, the latter is once again subject to the ordinary legal rules applicable in this area, that is to say Directive 77/388. And it is indeed Article 2 of that directive which lays down the principle that all supplies of goods or services and imports of goods are to be subject to value-added tax.

15. The Italian Republic cannot therefore be entitled to exempt transactions which come under the directive by virtue of Article 2 thereof and which are not included in the exhaustive list set out in Title X by claiming that among the various objectives pursued by the directive there is one that its conduct does not undermine.

16. Lastly, at the hearing the Italian Republic further argued that the tax exemptions maintained in force were covered by Article 92 (2) (b) of the EEC Treaty, which provides that 'the following shall be compatible with the common market . . . aid to make good the damage caused by natural disasters or exceptional occurrences'. However, under Article 42 (2) of the Court's Rules of Procedure no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure. That is not the case here.

17. For all those reasons I propose that the Court should uphold the Commission's application and:

(i) declare that, by granting between 1984 and 1988 inclusive an exemption from value-added tax, with reimbursement of the tax paid at the preceding stage, in

3 — See in particular the judgments of 12 July 1988 in Joined Cases 138 and 139/86 *Direct Cosmetics and Others* [1988] ECR 3937, paragraph 23, and of 5 July 1988 in Case 289/86 *Vereniging Happy Family* v *Inspecteur der Omzetbelasting* [1988] ECR 3655, paragraph 16

respect of certain transactions carried out for earthquake victims in Campania and Basilicata, the Italian Republic has infringed the provisions of Article 2 of 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 (Sixth VAT Directive);

(ii) order the Italian Republic to pay the costs.