OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 24 January 2002 [1]

I — Introduction

1. In this reference for a preliminary ruling the Court is called upon to reply to the question whether the removal with retrospective effect of a right under national law to reclaim sums paid, by way of VAT, more than three years before the claim is made is compatible with Community law. In this case the question is raised in respect of a period during which a Member State failed to implement properly in its domestic legislation a directly effective provision of a directive.

II — The legal framework

Community law

2. Article 11 of 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 [2] (the Sixth Directive) provides as follows:

'A. Within the territory of the country

1. The taxable amount shall be:

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

...'.

1 — Original language: Dutch.

2 — OJ 1977 L 145, p. 1.

National legislation

3. Both the parties to the main proceedings and the national court acknowledge that Article 11A(1)(a) of the Sixth Directive was not properly transposed in the United Kingdom until 1 August 1992, under the Finance (No 2) Act 1992, which amended Section 10(3) of the Value Added Tax Act 1983 ('the 1983 Act'). That section provided:

'If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount of money as, with the addition of the tax chargeable, is equivalent to the consideration.'

4. The 1983 Act was repealed and replaced by the Value Added Tax Act 1994 ('the 1994 Act') with effect from 1 September 1994. Section 19(3) of the 1994 Act is worded in the same way as section 10(3) of the 1983 Act, as it was amended by the Finance (No 2) Act 1992, save that section 19(3) uses the phrase 'VAT chargeable' whereas section 10(3), as amended, uses the phrase 'tax chargeable'.

5. As to legislation concerning the recovery of sums paid to the Commissioners by way of unduly paid VAT, so far as is here relevant, section 24 of the Finance Act 1989 provided (with effect from 1 January 1990) as follows:

'(1) Where a person has paid an amount to the Commissioners by way of value added tax which was not tax due to them, they shall be liable to repay the amount to him.

(2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose.

...

(4) No amount may be claimed under this section after the expiry of 6 years from the date on which it was paid, except where subsection (5) below applies.

(5) Where an amount has been paid to the Commissioners by reason of a mistake, a claim for the repayment of the amount under this section may be

made at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

...

(7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of value added tax by virtue of the fact that it was not tax due to them.

...'

6. Section 24 of the Finance Act 1989 was repealed and replaced by section 80 of the 1994 Act with effect from 1 September 1994. The material parts of section 80 are worded in the same way as section 24 save only that, in the 1994 Act, 'VAT' appears where the words 'tax' and 'value added tax' are used in the Finance Act 1989.

7. On 18 July 1996, Her Majesty's Paymaster-General announced in Parliament that, in view of the increasing amounts of revenue at risk as a result of retrospective claims for the refund of sums collected erroneously by way of tax, it was the Government's intention to introduce a three-year limitation period for retrospective refund claims, applying to VAT and to other indirect taxes, with effect from 18 July 1996.The proposed change in the law was intended to take effect from the date of the announcement so as to prevent the change from being deprived of its effect by the passage of time before the parliamentary process could be concluded.

8. On 4 December 1996, the House of Commons voted in favour of the government's budget proposals (including the proposal announced on 18 July 1996, which was included in the Finance Bill as section 47).

9. The Finance Act 1997 was enacted on 19 March 1997. Section 47(1) of the Act amended section 80 of the 1994 Act. Section 80(5) was repealed in its entirety. Section 80(4) was amended so as to provide as follows:

'The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.'

10. So far as is here relevant, section 47(2) of the Finance Act 1997 provides:

'... subsection (1) above shall be deemed to have come into force on 18 July 1996 as a provision applying, for the purposes of the making of any repayment on or after that date, to all claims under section 80 of the Value Added Tax Act 1994, including claims made before that date and claims relating to payments made before that date.'

11. Sections 47(2) to (5) of the Finance Act 1997 also contained transitional provisions. Under those provisions, the three-year limitation period does not apply to any claim made after 18 July 1996 that was consequential upon a (successful) challenge to a decision of the Commissioners, as long as the legal proceedings in which the decision was challenged had been brought before 18 July 1996. In that event, the claim would be limited only to amounts paid (by mistake) to the Commissioners less than three years before the commencement of those proceedings.

III — Facts of the main proceedings

12. Marks and Spencer plc (hereinafter 'M&S') is a well-known retailer in the United Kingdom and is a taxable person for the purposes of value added tax (VAT).

13. The Commissioners of Customs and Excise (hereinafter 'the Commissioners') are responsible for the administration and collection of VAT in the United Kingdom.

14. At all material times, M&S sold gift vouchers to corporate purchasers at a price that was less than the face value of the vouchers. The gift vouchers would then be sold or given away to third parties who could redeem them by returning them to M&S and receiving, in return, goods equivalent in price to the face value of the voucher. In December 1990, M&S sought to persuade the Commissioners that it should account to the Commissioners for VAT on the sums received by M&S when it sold the vouchers, and not on their face value. In January 1991, the Commissioners ruled that M&S should account for VAT on the face value of the vouchers. M&S proceeded to do so until the Court of Justice gave judgment in the *Argos Distributors* [3] case. In that case, the Court held that Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that, when a supplier has sold a voucher to a buyer at a discount and promised subsequently to accept that voucher at its face value in full or part payment of the price of goods purchased by a customer who was not the buyer of the voucher, and who does not normally know the actual price at which

3 — Case C-288/94 *Argos Distributors* [1996] ECR I-5311.

the voucher was sold by the supplier, the consideration represented by the voucher is the sum actually received by the supplier upon the sale of the voucher.

15. Following that judgment, it became apparent that the VAT regime applicable to M&S gift vouchers was incorrect. Therefore, by a letter dated 31 October 1996, M&S submitted to the Commissioners a claim for repayment of the VAT in the amount of GBP 2 638 057 that, as a result of the incorrect treatment of the gift vouchers, it had overpaid to the Commissioners. The claim covered the period from May 1991 to August 1996. It was revised and supplemented by letters dated 6 and 22 November 1996.

16. By a letter dated 11 December 1996, the Commissioners stated that they were prepared to repay that part of the claim that was not affected by the introduction of the three-year limitation period. On 15 January 1997 they repaid to M&S an amount of GBP 1 913 462.

17. From April 1973 to October 1994 M&S had also paid too much VAT in respect of teacakes as a result of the wrongful application to the sale thereof of the standard rate of VAT instead of the rate of zero per cent which was in fact applicable. This error was acknowledged by the Commissioners in a letter of 30 September 1994. Consequently, on 8 February 1995 M&S also requested of the Commissioners repayment of VAT unduly paid in the amount of GBP 3.5 million. The Commissioners accepted that claim but, relying on section 80(3) of the 1994 Act (unjust enrichment defence), limited it to 10 per cent of the unduly paid VAT on the ground that the remainder had been passed on to customers.

18. As regards the repayment of the VAT relating to the teacakes, the Commissioners informed M&S on 10 March 1997 that they intended to apply the new limitation provisions to that claim as well.

19. On 4 April 1997, M&S, instead of receiving 10% of GBP 3.5 million, received repayment of a sum corresponding to 10% of the three-year uncapped amount of its claim, namely GBP 88 440.

20. M&S requested a review of the Commissioners' decision to apply the three-year limitation period to both its claims. However, the Commissioners maintained their previous position.

21. On 15 April 1997 M&S challenged that decision before the VAT and Duties Tribunal. On 22 April 1998 that tribunal dismissed M&S's application. M&S appealed to the High Court, which also dismissed its application by decision of 21 December 1998. M&S then appealed to the Court of Appeal.

22. By judgment of 14 December 1999, the Court of Appeal dismissed M&S's appeal relating to the claim for repayment in respect of the teacakes and to the gift vouchers claim for the period August 1992 to August 1996 inclusive.

23. However, as regards the claim relating to repayment of the VAT unduly paid in respect of the period from May 1991 to July 1992, the Court of Appeal concluded that during that period Article 11A of the Sixth Directive had not been properly implemented by the 1983 Act. Accordingly, the Court of Appeal held that in respect of that period Community law had conferred on M&S rights which it could rely on before the national courts. According to the Court of Appeal, it was nevertheless unclear whether it was consistent with the principles of the effectiveness of rights conferred by Community law and the protection of legitimate expectations to amend with immediate effect a limitation period so as to deprive those possessed under domestic law of a right to reclaim payments which should not have been made, of that right.

24. That consideration prompted the Court of Appeal to submit the preliminary question.

IV — The preliminary question

25. The question referred by the Court of Appeal (Civil Division) (England & Wales) by order of 14 December 1999, which was received at the Registry of the Court on 28 February 2000, is in the following terms:

'In the circumstances in which a Member State has failed to implement properly in its domestic legislation Council Directive 77/388, is it compatible with the principle of the effectiveness of the rights that a taxable person derives from Article 11A, or with the principle of the protection of legitimate expectations, to enforce legislation which removes with retrospective effect a right under national law to reclaim sums paid, by way of VAT, more than three years before the claim is made?'

V — Assessment

Preliminary observations: scope of the question

26. It appears from the documents before the Court that M&S made two claims: first, a claim concerning VAT erroneously paid on teacakes and, secondly, a claim concerning VAT erroneously paid in respect of gift vouchers. The latter claim is further divided into two parts: a claim concerning gift vouchers in respect of the period prior to August 1992, that is to say before section 10 of the Finance (No 2) Act 1992 came into force, and a claim in respect of gift vouchers in the period from August 1992 to mid-October 1996.

27. The question submitted for a preliminary ruling concerns solely the claim for repayment of VAT erroneously paid in respect of gift vouchers in the period prior to the entry into force of section 10 of the Finance (No 2) Act 1992.

28. In regard to M&S's claims for repayment the referring court is making a distinction between the case where the directive is said not to have been transposed or not to have been correctly transposed and the two other cases in which the directive was correctly transposed into national law but incorrectly applied.

29. That is manifestly apparent in the case of the gift vouchers. The distinction is drawn as between the period prior to July 1992 (when Article 11A of the Sixth Directive had not been correctly transposed) and the period subsequent thereto (when the relevant provision of the directive had indeed been correctly transposed into national law but was incorrectly applied by the competent tax authorities for a number of years until the judgment in the *Argos* case). The referring court is of the view that in the former case individuals may directly rely on the Sixth Directive. In the latter case, however, that is said not to be possible in a situation where the Sixth Directive had been correctly transposed into national law. In such a situation individuals are said no longer to be able to derive rights from the Sixth Directive. The referring court bases that conclusion on the *Becker* judgment.[4] According to that judgment, where (1) a Member State has not or has incorrectly transposed a directive and (2) the relevant provision of the directive is unconditional and sufficiently precise, individuals may directly rely on it before the national courts. Since 'the first *Becker* condition' is not met, the referring court reasons, the Sixth Directive cannot be invoked.

4 — Case 8/81 *Becker* [1982] ECR 53, paragraphs 24 and 25.

30. The order for reference does not mention the claim for repayment of VAT erroneously paid in respect of teacakes. None the less, a similar problem arises in the case of teacakes. In that connection, too, the question arises as to whether individuals have rights under Community law where a directive has in itself been correctly transposed into national law but that law is applied in a manner clearly inconsistent with the scope of the directive.

31. M&S and the Commission are of the view that the *a contrario* reasoning followed by the referring court is incorrect and point to its likely consequences. The Commission points out that in the implementation of directives there is an obligation as to the result to be achieved. In support of its viewpoint it refers to the wording of Article 249 EC which plainly states that a directive is binding as to the result to be achieved. In that connection the Commission and M&S also cite the Opinion of Advocate General Jacobs in *Commission* v *Germany* [5] where he stated, at paragraph 14 of his Opinion, that it was not sufficient for the Member States simply to incorporate the terms of a directive into national legislation; in addition, they were required to ensure that that legislation was applied correctly, that is to say in accordance with the directive. In the Commission's view, the danger inherent in the referring court's reasoning is that a Member State could evade obligations under a directive by implementing it correctly but then proceeding to misapply it. Both the Commission and M&S have requested that consideration be given to this matter of principle, whether by means of an *obiter dictum* or by interpreting the scope of the preliminary question more widely.

32. According to settled case-law on Article 234 EC [6] the Court considers itself bound by the preliminary questions referred to it and does not depart from the substantive framework of those questions. None the less, the view of the matter taken in the judgments of the High Court and the Court of Appeal prior to the order for reference prompt me to make a preliminary observation. [7]

5 — Opinion in Case C-237/90 *Commission* v *Germany* [1992] ECR I-5973.

6 — Case 44/65 *Singer* [1965] ECR 969, since reaffirmed on many occasions. See also, more recently, Cases C-412/96 *Kaunan Lukenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraphs 23 and 24; C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraphs 25 and 26 and C-77/97 *Unilever* [1999] ECR I-431, paragraph 22.

7 — In the judgment of the Court of Appeal the following passage is cited from the High Court's judgment: 'It is, to use the argot [*sic*] of the European Court of Justice, settled case law that an individual may assert an enforceable right on the basis of a Directive *only* where: 1. The Member State has failed to transpose or has failed properly to transpose the Directive into domestic legislation. In such circumstances, a Member State is estopped from pleading its own failure to perform its obligations. 2. The provision of the Directive upon which reliance is placed must be unconditional and sufficiently precise.'
The High Court's approach is upheld by the Court of Appeal. That is clear, *inter alia*, from the following passage: '... If what [the submission made by M&S] is intended to convey is that an individual can continue to assert his rights in the national courts under the Directive during such time as the Directive has been properly transposed I would reject it. So far as the teacakes and late vouchers claims are concerned, M&S, because they cannot rely on any right given to them by the Treaty or regulations made thereunder, lack any basis upon which to found a complaint that there has been an infringement of the general principles of Community law. I therefore conclude that, save as to the early voucher claim, there is in the present case no right in play upon which the general principles of Community law could bite. So far as the teacakes claims and the latter vouchers claims are concerned, I would like to dismiss the appeals... .'

33. Two issues of principle arise here. The first is the question as to when a directive may be deemed to have been correctly implemented, and the second is whether individuals may continue to rely on rights conferred on them by a directive after the directive has been implemented in national legislation.

34. The chief characteristic of a directive is that it is not binding on the national legislature and the national authorities as to form and methods but as to the result envisaged by the Community legislature. Depending on the subject-matter and nature of the directive that result may be achieved simply by transposition of the directive into national law but, as in this case, implementation of a directive may first require its transposition into national law and then the correct application of that legislation. Finally, there are directives whose correct implementation does not require intervention so much by the national legislature as by the State's administrative authorities, as is true, for example, of the directives on nitrates [8] and habitats. [9]

35. However, in all the three cases listed as being typical the result envisaged by the Community legislature is and continues to be the decisive factor in determining the question whether the Member State has or has not correctly implemented the directive.

36. The actual problem pointed up by the Commission and M&S is precisely the incorrect practice adopted by the Commissioners in applying the directive. In my view, it is right that attention should be paid to this matter. National practice in the matter of the application of a transposed directive is of such importance because incorrect application may lead to totally different results than those contemplated by the directive. Moreover, divergencies in the application of directives have a negative effect on uniformity and equivalence within the Community legal order.

37. The result envisaged by the directive thus requires (1) correct transposition [10] and (2) application of the relevant national legislation in conformity with the scope of the directive. In that sense I concur with the Commission that the implementation of a directive requires more than its correct transposition into national law; the relevant national legislation must also be applied in conformity with the directive. [11]

8 — Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1).

9 — Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

10 — Save where the directive no longer needs to be transposed because the matters covered therein are already provided for in the legislation in force in a Member State.

11 — See also in that connection Opinion of Advocate General Jacobs, already cited at footnote 5.

38. Accordingly, the question arises whether individuals may continue to invoke rights under a directive after it has been transposed into national law.

39. Put another way, the question is whether where Community law transposed into national law is incorrectly applied it is a matter solely for the Commission or whether national authorities, including the national courts, are obliged to ensure that the transposed directive is applied correctly, that is to say in conformity with the directive. In other words, does the directive, as drawn by the Community legislature, continue to serve as a guideline for interpreting the national law into which it was transposed?

40. In my view the reply to this question is unreservedly affirmative. If the referring court's view of the matter were followed, the result would be that Community nationals would, as a result of the directive's transposition into national law, lose rights under the directive, and thus under Community law, which they were able to assert before the directive was transposed. In its settled case-law the Court has acknowledged the rights of the individual to correct implementation in cases of incorrect transposition by national legislation. It would produce a result inconsistent with the Community legal order if an individual were able to rely on a directive in cases where the national legislature has acted incorrectly, that is to say inconsistently with the directive, but not in cases where the administrative authority of a State acts in a manner which is inconsistent with the directive in applying the transposed national legislation.

41. Nor can the *Becker* judgment be interpreted *a contrario*. That judgment concerned a case in which the Member State concerned had failed to implement a directive within the prescribed period and the question arising was whether in such a case individuals could rely on the directive. With that situation in mind the Court laid down the two conditions and the individual there had to rely on the directly effective obligation. It cannot be inferred therefrom, as the United Kingdom courts are plainly inferring, that if a Member State has adopted the requisite measures but then goes on to apply them in a manner inconsistent with the directive, an individual may no longer derive any rights from the directive. In that case as well the directive cannot be said to have been properly implemented.

42. The Member States' obligations under Community directives are extinguished only when the results sought by the directive are attained or secured. Thus, in a matter concerning implementation of the Sixth Directive, transposition by the legislature alone cannot be sufficient. Both the authority charged with implementation and the national courts are under an obligation

to ensure that the result contemplated by the directive is secured.

43. More specifically, it appears from the documents before the Court that Article 11A of the Sixth Directive [12] was in fact correctly transposed by section 10 of the Finance (No 2) Act 1992, but that those legislative provisions were construed and applied in such a way as to produce a result inconsistent with the directive. The obligations imposed by directives on Member States do not concern only their legislative competence but extend also to their administrative and judicial competences. It is therefore in principle a matter for the United Kingdom tax authorities to reimburse amounts received otherwise than in accordance with the directive and it is for the national courts to ensure that individuals can vindicate rights conferred on them by Community law.

44. It is manifestly clear from the documents before the Court that, in regard to both teacakes and gift vouchers after August 1992, the Commissioners applied national tax legislation in a manner inconsistent with the directive. It is also clear that the referring court is not permitting M& S to rely on the directive against that incorrect administrative practice. It follows therefrom, in my view, that in that case both the tax authorities and the competent courts are acting in breach of Community law. Thus, the United Kingdom is failing correctly to implement the relevant part of the Sixth Directive.

Assessment of the preliminary question

45. The referring court seeks a reply to the question whether the retrospective effect which the United Kingdom legislature gave to its legislation in order to limit the period in respect of which claims for repayment of unduly paid VAT may be made is compatible with the principles of effectiveness and the protection of legitimate expectations.

46. In their written observations M&S and the Commission submitted that the relevant provisions of the United Kingdom tax legislation are indeed inconsistent with those principles. In support of their assertions they also rely on Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and on Article 1 of Protocol No 1 thereto.

47. I shall first examine what guidance may be obtained by the referring court from the principle of effectiveness. I shall then conduct the same examination in respect of the

12 — This provision has direct effect. See judgment in Case C-62/93 *BP Supergas* [1995] ECR I-1883.

principle of protection of legitimate expectations. Finally, I shall deal briefly with the arguments put forward by M&S and the Commission concerning the ECHR and Protocol No 1 thereto.

48. In the present case it is established that between May 1991 and July 1992 M&S overpaid VAT on the basis of national legislation in which Article 11A of the Sixth Directive was incorrectly transposed.

49. It is likewise established, in my view, that under the Court's settled case-law M&S is entitled to repayment of VAT paid in breach of provisions of Community law. In that connection it must be stated that the right to repayment of amounts charged by a Member State in breach of the rules of Community law is the consequence and complement of the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties and the application of national charges in a discriminatory fashion as interpreted by the Court (judgments in Cases 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, 309/85 *Barra* [1988] ECR 355, paragraph 17 and C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 40). The Member State is therefore as a matter of principle required to repay charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 *Comateb and Others* v *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165, paragraph 20). [13] In the *Supergas* judgment cited above the Court stated that a right to repayment also subsists in regard to VAT paid in breach of Community law.

50. In its written observations and at the hearing the United Kingdom Government contended that, since the directive contains no provisions applicable to requests for repayment of VAT paid in breach of Community law by taxable persons, the United Kingdom's obligation to repay can stem only from the applicable national legislation. Under the applicable national legislation the right to repayment, it is contended, arises only upon a claim in that connection being made within the period prescribed and after verification by the Commissioners as the competent authority. Only after these procedural requirements had been satisfied, could M&S have a claim for repayment, thus giving rise to a corresponding obligation on the part of the United Kingdom. In the United Kingdom Government's view the following inference may be drawn therefrom. At the time when, on 18 July 1996, the proposed legislative amendment to shorten with retroactive effect the limitation period applicable to claims for repayment was presented to Parliament, M&S merely had a procedural right to make a claim in respect of sums mistakenly paid by it to the Commissioners by way of VAT. Since M&S, as at that time, had made no request

13 — Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 23.

for repayment of VAT unduly paid in respect of the gift vouchers, the Commissioners were not at that time liable to make any payment to it. Thus, on 18 July 1996 M&S had no substantive right to repayment of the amounts unduly paid.

51. In light of the Court's case-law reproduced above I consider the view of the matter taken by the United Kingdom Government to be untenable. A deliberate distinction is drawn, in the Court's case-law, between the right, or claim, to repayment of amounts paid to national authorities in breach of Community law and the national provisions giving effect to that right or claim. Those provisions may apply to the procedure to be followed, designation of the authority charged with repayment, the period within which the claims must be made and verification thereof.

52. The referring court's question does not therefore concern the existence of M&S's claim to repayment of VAT unduly paid in respect of the gift vouchers but the conditions imposed by national legislation subject to which effect is given to that right. More specifically, it concerns the issue whether the limitation with retroactive effect of the period in respect of which claims may be made is compatible with the principle of effectiveness, as laid down in the Court's case-law.

53. The Court's case-law concerning the compatibility of national provisions governing repayment of charges paid in breach of Community law is extensive and clear.

54. The principal rule, recently reaffirmed in the judgment in *Roquette Frères*,[14] is that

'in the absence of Community rules concerning the refunding of domestic taxes which have been wrongly levied, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing legal proceedings seeking to safeguard the rights which citizens derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature, and may not make it impossible in practice to exercise rights which the national courts have a duty to protect (Case 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 13 and 16; Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, paragraphs 25 and 29; and Case 240/87 *Deville* v *Administration des Impôts* [1988] ECR 3513, paragraph 12).'

14 — Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 20.

55. The latter condition, namely that the exercise of the rights which the national courts have to uphold may not be rendered impossible in practice, is the embodiment in Community law of the principle of effectiveness.

56. At paragraph 30 of his Opinion in the *Roquette* judgment cited above Advocate General Ruiz-Jarabo Colomer reviewed the cases in which the Court has acknowledged, in the interests of legal certainty which protects both the taxpayer and the national authority concerned, that the setting of reasonable limitation periods for bringing proceedings is compatible with Community law. In this connection, the Court has decided that such periods cannot be regarded as rendering impossible in practice or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought.

57. More particularly, in its judgment in *Aprile II*, the Court ruled that shortening the limitation period for claims for repayment of taxes paid in breach of the provisions of Community law was not as such incompatible with the principle of effectiveness. [15] That judgment was reaffirmed in *Dilexport* in the following terms: 'Community law does not preclude the adoption by a Member State, following judgments of the Court declaring duties or charges to be contrary to Community law, of provisions which render the conditions for repayment applicable to those duties and charges less favourable than those which would otherwise have been applied, provided that the duties and charges in question are not specifically targeted by that amendment and the new provisions do not make it impossible or excessively difficult to exercise the right to repayment.' [16]

58. However, the facts underlying this preliminary-reference procedure differ from those in the judgments cited above by virtue of the fact that the United Kingdom legislature retroactively shortened the limitation period from six to three years. That affected not only taxable persons who expected under the existing rules to have ample time to make their claims but even taxable persons who before the date on which the announcement of a change in the law was made (18 July 1996) or prior to the date on which it was enacted (19 March 1997) had made claims for repayment of unduly levied tax.

59. The facts underlying the present case reveal an unmistakable analogy with those in the *Barra* case. [17] In that case the Belgian legislature retroactively limited the period

15 — Judgment in Case C-228/96 *Aprile II* [1998] ECR I-7141, paragraphs 34 and 35.

16 — Cited in footnote 13, paragraph 43.

17 — Cited in paragraph 49.

within which repayment could be claimed of enrolment fees unduly paid for admission to vocational training to those persons who had already made a claim for repayment before delivery of the Court's judgment in which it held those fees to have been unlawfully levied. [18] In that connection the Court stated at paragraphs 17 to 21 of the judgment in that case that such a legislative provision entirely negated the right to repayment of amounts unduly paid in the case of persons who did not satisfy the conditions laid down therein. It was thereby rendering impossible the exercise of the rights conferred on the persons concerned by Community law — in this case Article 7 of the then Treaty (now Article 12 EC).

60. In the *Deville* [19] judgment the Court reaffirmed its judgment in *Barra*. That case concerned a special fixed tax on motor vehicles which the Court had previously held to be contrary to Article 95 of the EC Treaty (now Article 90 EC). Following that judgment, the relevant national legislation concerning claims for repayment of the unduly levied tax was amended. On this point the Court ruled in paragraph 13 of the judgment that 'a national legislature may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were wrongly levied under that legislation'. In such a case the exercise of the rights which the national courts have to uphold was being rendered impossible in practice.

61. The *ratio* of that case-law is that conferring retroactive effect on national legislative provisions, which make the bringing of claims under Community law for repayment of charges levied in breach of that law subject to stricter conditions, renders it wholly or in part impossible in practice for taxpayers to exercise their rights in that connection. Consequently, the rights which they derive from the direct effect of Community law lose their effectiveness.

62. In my view the principle of effectiveness does not merely preclude the retroactive limitation of claims for recovery in the case of persons who under the currency of the previously applicable rules had already made a claim for repayment, as in the case of M&S, but also of claims which could still validly have been made under the terms of the previously applicable rules. The claims which it had been open to them to assert by diligent use of the possibilities of the 'old' rules are rendered ineffective in advance under the more restrictive rules introduced with retroactive effect. In its judgment in *Barra* the Court expressly protected the rights of persons who until then had not made any claim for repayment of amounts unduly paid. In the present

18 — Case 293/83 *Gravier* [1985] ECR 593.
19 — Cited in paragraph 54.

case, as well, there is every reason for doing so on the same grounds.

63. The reasoning here followed applies *mutatis mutandis* also to claims by individuals to repayment of VAT levied in breach of directly effective provisions of Community law, where those provisions have indeed been transposed correctly into national law but are applied in a manner inconsistent with the scope of the directive.

64. The referring court also asks whether the retroactive limitation of the period in respect of which individuals may make their claims for repayment of amounts unduly paid is in breach of the principle of the protection of legitimate expectations.

65. M&S and the Commission consider that this question should be answered affirmatively. They rely in that connection on the judgment in *Meiko-Konservenfabrik*. [20]

66. The United Kingdom Government replies to that argument by stating that the principle of protection of legitimate expectations adds nothing to the protection afforded to individuals by the principles of equivalence and effectiveness. As a matter of Community law M&S could legitimately expect only that its claim would be dealt with under domestic law in accordance with those principles. Since it is not disputed that M&S's claim was dealt with in accordance with the applicable English law, it would be sufficient for it to rely on the principles of effectiveness and equivalence. As a matter of English law, the United Kingdom Government further argues, M&S had no legitimate expectation that its claim for repayment would be dealt with on the basis of the law in force at the time when the payments in question were made to the tax authorities. On this point the United Kingdom Government refers to its view set out above according to which the Commissioners as the competent tax authority could incur liability for repayment only after a claim in that connection had been made and subjected to verification. Under English law the applicable legislation may be amended even retroactively between the time when amounts are unduly paid and a decision on a claim for repayment. Accordingly, M&S cannot, it is contended, rely on the principle of protection of legitimate expectations. In this connection the United Kingdom Government recalls that the announcement of the legislative amendment was made on 18 July 1996, whilst M&S made its request for repayment only on 31 October 1996. It could not therefore expect to be immune from application of the new limitation period for the lodging of claims, which had been halved to three years.

67. I would recall that, in accordance with the Court's consistent case-law, the general

20 — Case 224/82 *Meiko-Konservenfabrik* [1983] ECR 2539.

principles of law recognised by Community law apply to the interpretation and implementation of that law at national level. That is true of the principle of protection of legitimate expectations, as it is of the principle of effectiveness.[21] Accordingly, it must first be examined whether the principle of protection of legitimate expectations precludes the restriction with retroactive effect of the possibilities of claiming repayment of amounts unduly paid. The question then arises as to whether and if so to what extent that principle precludes the national legislature from restricting with retroactive effect the possibilities of obtaining repayment of charges levied in breach of directly effective rules of Community law.

68. I would summarise the principal features of the Court's case-law on the principle of protection of legitimate expectations as follows:

— first of all, the Court has held in a series of judgments that that principle, which stems from the principle of legal certainty, forms part of the Community legal order.[22] The principle requires legal rules to be precise and legal situations and relationships governed by Community law to be foreseeable;

— secondly, individuals cannot legitimately expect that the legal rules applicable to them will not be amended. The Community legislature retains competence to adapt existing legislation to altered economic circumstances and, I would add, to altered political, policy and social views;[23]

— thirdly, individuals may legitimately expect that rights created under existing rules will not be retroactively abridged.[24] Only in very exceptional cases is it possible to derogate from this general principle, for example in the case of overriding economic necessity relating to the management of common organisation of agricultural markets or on grounds of overriding public interest.[25]

69. It follows from the foregoing that, contrary to the United Kingdom Government's contentions, the principle of the protection of legitimate expectations does indeed constitute a supplementary factor in relation to the facts underlying the main proceedings. For these have to do with the way in which the national authorities have

21 — Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraphs 8 to 10; Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19 and Case C-381/97 *Belgacodex* [1998] ECR I-8153, paragraph 26.

22 — See, for example, Case 74/74 *CNTA* v *Commission* [1975] ECR 533 and Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019.

23 — See for example Case 245/81 *Edeka* [1982] ECR 2745, Case C-63/93 *Duff and Others* [1996] ECR I-569 and Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809.

24 — The prohibition of retroactive effect was laid down in Case 98/78 *Racke* [1979] ECR 69. To the same effect was the judgment in *Meiko-Konservenfabrik* (cited at footnote 20, paragraph 12).

25 — See, for example, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 and Case C-183/95 *Affisch* [1997] ECR I-4315.

implemented and applied at national level rules of Community law conferring rights on individuals. The view that individuals acquire a right to repayment of unduly paid amounts only after they have satisfied the applicable national requirements governing the making of a claim and that therefore the principle of the protection of legitimate expectations should in such a case be regarded merely as a 'national' legal principle cannot be reconciled with the Court's case-law, as has already been noted above.

70. Therefore, the principle of protection of legitimate expectations, as a principle of Community law, must also be regarded as binding on the United Kingdom legislature when it limits the periods within which individuals may assert their rights conferred on them by Community law.

71. To give retroactive effect to such a limitation is inconsistent with that principle unless there is a compelling justification relating to the public interest. The justificatory grounds adduced by the United Kingdom Government in support of its measure are inadequate. It is true that under the 'old' rules applicable prior to 18 July 1996 there were certain risks to the United Kingdom Exchequer but the extent of those risks could logically be no greater than the amount of the unjustified enrichment on the part of the Exchequer by means of VAT levied in breach of the rules of Community law. The desire to retain for the Exchequer amounts paid unduly by the taxable person can in no event provide satisfactory justification for the retroactive shortening of the period for claiming repayment of unduly paid VAT.

72. My conclusion is therefore that the conferral of retroactive effect on the legislative amendment in question is incompatible with the principle of protection of legitimate expectations.

73. The Commission and M&S further maintain that the conferral of retroactive effect on the contested legislative amendment also conflicts with Article 6(1) of the ECHR and Article 1 of Protocol No 1 thereto.

74. The Commission submits that the right of access to the courts enshrined in Article 6(1) of the ECHR precludes the retroactive shortening — in order to limit the repayment liabilities of the tax authorities — of the period for claiming repayment. In that connection it cites certain judgments of the European Court of Human Rights which show that that court accepts certain restrictions on access to the courts as being compatible with the normal operation of the judicial system but that

such measures must not restrict access by an individual to the courts in such a way as to impair the very essence of the right of access. [26] An excessively short period for lodging an action has been held by the European Court of Human Rights to be contrary to the Convention. The Commission infers therefrom that the retroactive shortening of periods for lodging legal claims is in any event precluded under that case-law. For that would be to bar a plaintiff's access to the courts as regards that part of the claim which is caught by the retroactive rule. Moreover, the Commission continues, to shorten the limitation period merely in order to limit the repayment liabilities of the tax authorities can hardly be regarded as a legitimate aim.

75. The Commission and M&S are also relying on the case-law of the European Court of Human Rights in connection with Article 1 of Protocol No 1 to the ECHR. [27] They infer from it that legislation which retroactively extinguishes monetary claims amounts to a deprivation of property contrary to that provision on the basis that such claims constitute possessions for the purposes of that provision. In one of the judgments cited (*Pressos Compania Naviera* v *Belgium*) the European Court of Human Rights specifically rejected the contention that the need to protect the financial interests of the State served to justify a retroactive measure of the kind contested in those proceedings.

76. I would observe that, strictly speaking, these arguments put forward by M&S and the Commission are outside the terms of the question raised by the referring court which has requested the Court only for an interpretation of the principles of effectiveness and protection of legitimate expectations as principles of Community law. In a now extensive body of case-law the Court has held that human rights form part of the general principles of Community law and on that basis also affect the transposition and application of Community law by the national authorities in the national legal order. That could provide grounds for examining *ex officio* whether and if so which fundamental rights are at stake in regard to the conferral of retroactive effect on the United Kingdom legislation challenged in the main proceedings.

77. Nevertheless, I consider that in this case a specific interpretation of the principles of effectiveness and protection of legitimate expectations, as sought by the referring court, are sufficient. That interpretation produces a result which is either consonant or analogous with the case-law of the European Court of Human Rights cited by M&S and the Commission. At most the conclusions to be drawn there-

26 — Case 224/84 *Johnston* [1986] ECR 1651 and Case 222/86 *Heylens* [1987] ECR 4097, and judgments of the European Court of Human Rights in *National and Provincial Building Society* v *United Kingdom*, 1997 IV 2325; *Stubbings* v *United Kingdom*, 1996 IV 1487; *Pérez de Rada Cavanilles* v *Spain* (judgment of 28 October 1998).

27 — *Pressos Compania Naviera* v *Belgium* (1995) 21 EHRR 301 and *Stan Greek Refineries* (1994) 19 EHRR 293.

from would add little to the case. Since the referring court makes no request in this connection and there is no reason, from the standpoint of the protection of human rights, to deal with the additional matters raised in that regard, I would suggest that the Court should not deal with the supplementary arguments adduced by the Commission and M&S based on the ECHR and Protocol No 1 thereto.

VI — Conclusion

78. In light of the foregoing I suggest that the Court should reply as follows to the Court of Appeal:

Where a Member State has received overpayment of tax as a result of the incorrect transposition and/or application of directly effective provisions of the 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, such as Article 11A(1), the retrospective shortening of the limitation period laid down for recovery of such overpayment is incompatible with the principle of effectiveness and with the principle of the protection of legitimate expectations.