OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 11 March 1999 *

1. The Hoge Raad der Nederlanden [1] asks whether VAT is payable on the rent of coffee-shop tables for the sale of cannabis in the Netherlands. Underlying the question is the moral dilemma of whether it is a fact that to tax an activity is to condone it. Most legal systems have long resolved the issue by preferring not to allow moral scruple by a paradox to reward criminality by exempting it from taxation. Community law is generally of the same view but has made an exception of the supply of narcotic drugs. The Hoge Raad's question arises in the context of the Dutch policy of tolerating the supply of strictly limited amounts of cannabis in coffee shops. I shall first summarise the Dutch legal background and the order for reference. Secondly, I shall examine the principles underlying the relevant case-law. Finally, I shall explore whether it is possible to treat the hire of a table as a transaction, innocent in itself, and distinct from the illegal drug supply which it is designed to facilitate, or whether, by reason of the clear criminal content of the transaction, but in spite of the officially approved policy of the Netherlands Government, it should be regarded as inseparable from that drug supply and thus governed by the reasoning of the Court in *Happy Family*. [2]

I — The legal and factual background

2. The defendant, a partnership trading under the name V.O.F. Coffeeshop 'Siberië' (hereinafter 'the defendant'), runs a '*coffee-shop*' in Amsterdam. [3] The Netherlands states, in its observations, that Dutch coffee shops are establishments, not serving alcohol, where 'soft' drugs are sold and consumed. They also typically supply coffee, tea and soft drinks and provide gaming machines for the use of their patrons. [4] From 1990 to 1993, narcotics derived from Indian hemp were sold at a table in the defendant's coffee shop by an accredited *huisdealer* (house dealer). The defendant made the table available expressly for that purpose and the table hire paid to it by the house dealer was recorded in its accounts under the heading '*tafelhuur*'. Customers

* Original language: English.

1 — Supreme Court of the Netherlands, hereinafter 'the Hoge Raad'.

2 — Case 289/86 *Happy Family* v *Inspecteur der Omzetbelasting* [1988] ECR 3655.

3 — Coffee shops are also known in Dutch by the following names: '*reggaebar*'; '*koffiehuis*'; '*theehuis*'; '*shoarma-huis*'; '*sappenbar*'.

4 — See, in this respect, the recent Hoge Raad judgment of 28 January 1998 *Nederlandse Belastingrechtspraak* 1998/116 (Nr. 33 0777).

who enquired at the bar about the purchase of drugs were directed to the relevant table by a 'barkeeper' employed by the defendant. No VAT was paid by the defendant in respect of the proceeds of the table hire, although it paid VAT in respect of its other supplies, deducting VAT paid on its inputs. The Netherlands tax authorities (the Staatssecretaris van Financiën, hereinafter 'the plaintiff') made a demand on the defendant for additional VAT in the sum of NLG 22 733 in respect of table hire.

3. The defendant successfully contested the demand before the Gerechtshof (Regional Court of Appeal), Amsterdam, which held that the defendant was involved in the illegal trafficking of 'soft' drugs, with the result that the service in question provided by it to the house dealer fell entirely outside the provisions of the Wet op de Omzetbelasting (Law on Turnover Tax) 1968. Being of the opinion that *Happy Family* should apply, notwithstanding the fact that criminal proceedings are systematically no longer brought in the Netherlands in respect of dealings in such drugs, that court ruled that no liability to VAT arose in respect of the provision of the service in question. The plaintiff has appealed to the Hoge Raad, which has made the present reference.

4. The Hoge Raad points out, firstly, that the sale of cannabis-based drugs is prohibited in the Netherlands by the Opiumwet (Opium Law, hereinafter 'the Law') of 12 May 1928.[5] Cannabis is one of the hemp-based substances, mentioned on List II in the schedule to the Law, whose intentional possession, sale and supply constitutes a criminal offence under Article 3(1)(B), which is punishable under Article 11. Equally, however, the Hoge Raad points out that, pursuant to Article 48 of the Wetboek van Strafrecht (Code of Criminal Procedure), any person who intentionally provides the opportunity, resources or information for the commission of that offence is liable to prosecution as an accomplice to a criminal offence.

5. None the less, it appears that under guidelines issued by the Netherlands Public Prosecutor's Office on policy with regard to the investigation and prosecution of offences against the Law, in force since 1976[6] and most recently consolidated in 1996,[7] no prosecutions will be initiated in respect of small-scale retail sales of canna-

5 — *Staatsblad* 167, as most recently amended by the Law of 21 December 1994, *Staatsblad* 1995, 32.

6 — Guidelines of 28 October 1976. Murphy and O'Shea, 'Dutch drugs policy, Ecstasy and the 1997 Utrecht CVO Report', (1998) 8 *Irish Criminal Law Journal*, 141, p. 142, trace the origin of the present Dutch policy back to the recommendations of the *Werkgroep Verdovende Middelen* (Working Party on Narcotics) 1972, known as the *Commissie-Baan* (Baan Committee); see Baan, *Achtergronden en Risico's van Druggebruik*, Den Haag, 1972.

7 — See *Staatscourant*, 187, p. 12.

bis-based drugs if certain criteria, known as the AHOJ-G criteria, are satisfied. [8]

6. Article 2(1) of the Sixth VAT Directive provides that 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' shall be subject to VAT. [9] In *Happy Family* the Court interpreted that provision as meaning that 'no liability to turnover tax arises upon the unlawful supply of narcotic drugs within the territory of a Member State', save in respect of the strictly controlled trade for medical or scientific purposes. [10]

7. The Hoge Raad notes that the illegality of providing an opportunity to deal in 'soft' drugs does not alter the fact that it constitutes the supply of a service. The Hoge Raad is uncertain, however, whether *Happy Family*, under which no liability to VAT arises in respect of the unlawful *supply* of narcotic drugs, should be interpreted as also covering *provision of the opportunity* to deal in cannabis, since such an interpretation would further restrict the scope of the Sixth Directive and would ignore the evolution which it believes to have occurred in many Member States in society's view of the economic and illegal nature of conduct related to the supply of 'soft' drugs. The question referred is worded as follows:

'Must Article 2 of the Sixth Directive therefore be interpreted as meaning that no liability to turnover tax arises in respect of a person who, for consideration, offers another person the opportunity to deal in cannabis products?'

II — Observations

8. Written observations only were submitted by the defendant, the Netherlands and the Commission. [11]

8 — They are: (*afficherıng*) drugs may not be advertised; (*harddrugs*) no 'hard' drugs may be sold; (*overlast*) the coffee shop must not cause any nuisance; (*jeugdigen*) no drugs may be sold to minors (under the age of 18) nor may minors be admitted to the premises; (*grote*) no more than five grams per person may be sold in any one transaction. In addition, the *handelsvoorraad* (commercial stock) of a tolerated coffee shop must not exceed 500 grams. Furthermore, the local municipal or district authorities may refuse to permit the establishment of a coffee shop or may order the closure of an existing one, even if the criteria are satisfied.

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

10 — Cited in footnote 2 above, paragraph 23.

11 — An oral hearing was not requested and the Court decided, pursuant to Article 104(4) of its Rules of Procedure, to dispense with holding one.

9. The gravamen of the defendant's submissions is to emphasise its own illegal behaviour. The renting of the table to the house dealer for the purposes of facilitating the sale of unlawful drugs cannot be distinguished from actually selling them and, therefore, must not be subject to VAT. It denies that there has been any significant development in the law and practice regarding 'soft' drugs in either the Netherlands or other Member States. Dutch local authorities are not bound to apply the AHOJ-G criteria and may, and, it asserts, frequently do, bring proceedings in respect of drug dealing in coffee shops.

10. The Netherlands submits that this case may be distinguished from *Happy Family*. First, it maintains that if the AHOJ-G criteria are respected, then, in the absence of local opposition, no criminal prosecutions will be brought against the operators of a coffee shop. Secondly, it contends that the latter's activities may be distinguished from those considered by the Court in *Happy Family*; coffee-shop activities are not in themselves illegal since their potential illegality only arises from their connection with those of the house dealer.

11. The Commission considers the AHOJ-G criteria to be compatible with the Netherlands' international obligations under the 1961 United Nations Single Convention on Narcotic Drugs.[12] It also observes that the Netherlands has designed this policy in order to protect young people from exposure to 'hard' drugs. The publication in the *Nederlandse Staatscourant* (Netherlands Official Journal) of the new AHOJ-G policy gives it official recognition. In reality, most municipalities and districts in the Netherlands permit the presence of one or more coffee shops. The Commission observes that coffee shops' average turnover is in the region of NLG 200 000, which is equivalent to that of half the legitimate establishments providing ordinary bar-type services in the Netherlands, with which they are in competition. The *Happy Family* line of case-law is concerned with the importation or supply for consideration of narcotics whose importation or sale is strictly prohibited and which may not therefore enter into the ordinary trade channels in the Community. As an exception to the principle of neutrality, that case-law should not be extended to cover coffee shops, part of whose services are, in any case, quite lawful. Finally, the Commission submits that, since *Happy Family*, there has been a significant development in public opinion in the Netherlands regarding the small-scale supply of 'soft' drugs. It submits that such supplies have *de facto* become legitimate.

12 — U.N.T.S. 520, No 7515 (hereinafter 'the Single Convention').

III — Analysis

12. Both the Netherlands and the Commission emphasise that, in accordance with the principle of fiscal neutrality, VAT should generally be payable in respect of lawful and unlawful transactions without distinction. Thus, in *Lange*, the Court, referring to *Happy Family*, declared that: [13]

'The Sixth Directive, whose purpose is to achieve widespread harmonisation in the area of VAT, is based on the principle of fiscal neutrality. That principle ... precludes a generalised differentiation between lawful and unlawful transactions, except where, because of the special characteristics of certain products, all competition between a lawful economic sector and an unlawful sector is precluded.'

To date, only two types of products have been recognised as possessing 'special characteristics' as so described, to wit narcotic drugs and counterfeit currency. [14] That list cannot be exhaustive and, in principle, may include services. None the less, as Advocate General Jacobs has observed, the exclusion 'constitutes an exception to the normal rule that lawful and unlawful transactions should be accorded the same treatment'. [15] The present case, as the Hoge Raad has explained, concerns the intentional provision of the opportunity to deal in drugs. Accordingly, it is necessary to refer briefly to the case-law concerning the supply of narcotics.

A — *The exclusion of narcotics*

13. The Court's narcotics case-law commences in the early 1980s with a group of cases concerning the unlawful import of 'hard' narcotic drugs (heroin, cocaine, morphine) into Germany [16] and the question of the applicability of the Common Customs Tariff. The Court held that no customs debt arose. As is clear from *Einberger I*, the starting point of the Court's reasoning is that such drugs 'display special features in so far as their harmfulness is generally recognised and their importation and marketing are prohibited in all the Member States ...'. [17] The Court noted that this legal position was 'in conformity with the Single Convention on Narcotic Drugs, 1961 ... to which all the Member States [were] parties'. [18] The conclusion that no customs debt arose fol-

13 — Case C-111/92 *Lange* v *Finanzamt Fürstenfeldbruck* [1993] ECR I-4677 (hereinafter '*Lange*'), paragraph 16.

14 — See Opinion of Advocate General Léger in Case C-3/97 *Goodwin and Unstead* [1998] ECR I-3257, paragraph 9.

15 — Case C-283/95 *Fischer* [1998] ECR I-3369, paragraph 17 of the Opinion.

16 — See Case 50/80 *Horvath* v *Hauptzollamt Hamburg-Jonas* [1981] ECR 385; Case 221/81 *Wolf* v *Hauptzollamt Düsseldorf* [1982] ECR 3681; Case 240/81 *Einberger* v *Hauptzollamt Freiburg* [1982] ECR 3699 (hereinafter '*Einberger I*').

17 — Paragraph 8.

18 — Ibid., paragraph 9. It referred expressly to the preamble to the Single Convention, which speaks (recital 3) of the 'serious evil' and the consequent 'social and economic danger to mankind' posed by such drugs.

lowed from the fact that the drugs remained within illegal channels and might 'not be marketed and integrated into the economy of the Community', [19] and from the terms of the prevailing legislation on customs duty which linked the customs debt with 'the economic nature of the duties on imports and ... the conditions under which the goods ... are integrated into the economy of the Community'. [20]

14. Two years later, in *Einberger II*, [21] the Court, holding that there was no distinction between the liability to customs duties and the liability to VAT, applied the above reasoning to the collection of VAT on the import of the morphine, which had been in question in *Einberger I*. It completed the picture in *Mol* [22] and *Happy Family* [23] by applying the same reasoning generally to sales that are internal to the Member States. It recalled its earlier statements that the release of such goods 'into the economic and commercial channels of the Community [was] absolutely precluded... [and that such] importation [could] give rise only to penalties under the criminal law', all of which was 'wholly alien to the provisions of the Sixth Directive...'. [24] Acknowledging that the principle of fiscal neutrality precluded 'a generalised differentiation between lawful and unlawful transactions', [25] the Court stated that: [26]

'[T]hat is not true in the case of the supply of products, such as narcotic drugs, which have special characteristics inasmuch as, because of their very nature, they are subject to a total prohibition on their being put into circulation in all the Member States, with the exception of strictly controlled economic channels for use for medical or scientific purposes. In a specific situation of that kind where all competition between a lawful economic sector and an unlawful sector is precluded, the fact that no liability to value-added tax arises cannot affect the principle of fiscal neutrality.'

15. The key elements of this case-law seem to me to be: firstly, the generally recognised harmfulness of narcotic drugs, as confirmed by the Single Convention; secondly, the existence of a total prohibition in all the Member States on their entry into normal economic channels; thirdly, the fact that they can give rise only to criminal penalties. These are, however, observations of fact or of the prevailing position in national law and do not in themselves constitute pronouncements of principles of Community

19 — Paragraph 13.

20 — Paragraph 14.

21 — Case 294/82 *Einberger* v *Hauptzollamt Freiburg* [1984] ECR 1177 (hereinafter '*Einberger II*'). Under Article 2(2) of the Sixth Directive, 'the importation of goods' is subject to VAT.

22 — Case 269/86 *Mol* v *Inspecteur der Invoerrechten en Accijnzen* [1988] ECR 3627, which was concerned with sales of amphetamines.

23 — Cited in footnote 2 above.

24 — *Happy Family*, paragraph 17.

25 — *Happy Family*, paragraph 20.

26 — Ibid.

law. In *Witzemann*,[27] Advocate General Jacobs commented that the true basis of the rule was obscure[28] and supported the Commission's query regarding the legal basis of this case-law by suggesting that the case, which itself concerned trade in counterfeit currency, presented the Court with a 'timely opportunity to clarify whether its case-law was founded on the Treaty itself ... or whether it was founded on secondary sources...'.[29] Regrettably, the Court does not appear to have responded to this invitation although it considered that its case-law applied *a fortiori* to counterfeit currency.[30]

16. In my view, the essence of the case-law is that narcotic drugs, because dealing in them is absolutely prohibited in all the Member States and can result only in criminal proceedings, do not play any role in the normal economy. Consequently, the principle of fiscal neutrality simply does not come into play because 'all competition between a lawful economic sector and an unlawful sector is precluded ...'.[31]

17. Apart from *Witzemann*, where the Court confirmed that neither customs duties nor VAT could be applied to imports of counterfeit currency, the exclusion regarding VAT developed in *Einberger II*, *Mol* and *Happy Family* has not been applied since. More recently in *Lange* (unlawful diversion of exports of potentially strategic equipment to proscribed countries),[32] *Goodwin and Unstead* (deliberate non-payment of VAT in respect of dealing in counterfeit perfumes),[33] and *Fischer* (unlicensed operation of roulette games),[34] the Court, although restating the principle that no VAT may be levied on products which 'may not be marketed or incorporated into economic channels', has distinguished, in each case, the degree of illegality affecting the supply of the products or services at issue from the 'absolute prohibition' applicable in the drugs case-law and in *Witzemann* and, accordingly, declared VAT applicable.[35] Thus, although the Court could conceivably in future be asked to consider, for instance if the proceeds of under-age prostitution, paedophile pornography or trafficking in human beings were at issue, whether the activity were subject to the requisite unconditional prohibition to fall within the exclusion, as the activities of house dealers clearly fall within the scope of the *Happy Family*

27 — Case C-343/89 [1990] ECR I-4477.

28 — Ibid., paragraph 20 of the Opinion.

29 — Paragraph 15 of the Opinion.

30 — The Court declared (paragraph 20) that the reasoning developed 'concerning the illegal importation of drugs applied *a fortiori* to imports of counterfeit currency', since there was a total prohibition on the making, possession, importation and marketing of such currency, whether national or foreign, in all Member States.

31 — *Happy Family*, paragraph 20.

32 — Cited in footnote 13 above.

33 — Cited in footnote 14 above.

34 — Cited in footnote 15 above.

35 — See, e.g., *Lange*, paragraphs 12 and 13.

reasoning, it need here only decide whether their relationship with coffee shops is sufficiently proximate and intertwined so that the exclusion of VAT in respect of drug sales should also apply to assisting them.

B — *Recommendation*

18. In the light of this case-law, there seem to me to be two possible approaches to the issue of whether the activities of the defendant should be subjected to VAT. Firstly, it must be considered whether, as suggested by the Netherlands Government, what is in question is simply table-hire charges which are indisputably subject to tax, in spite of the immediate and direct link between that transaction and the sale of illegal drugs. Alternatively, if the hire of the table cannot be divorced from its unlawful purpose, it becomes necessary to consider whether the sale of cannabis-based drugs within the terms of the Netherlands Government's official policy of tolerance falls within or without the principles developed in the case-law, in particular in *Happy Family*.

(i) Social developments

19. It is appropriate to address, as a preliminary matter, the suggestion of the Hoge Raad that there has been an evolution in society's view of the sale of cannabis products. In my view, it would be entirely inappropriate for this Court to pronounce on any such proposition.

20. In the first place, it is clear from *Happy Family* that any supposed distinction between trade in so-called 'hard' and 'soft' drugs is as devoid of any legal basis in Community law as it is in international or national law. [36] Secondly, the Court has no basis in fact (there being no evidence presented by the national court) as it has no function in law to draw any such distinction. In so far as the European Union, as distinct from the Community, has taken any position on drug-related issues, it does not appear to recognise any such distinction, which is also absent from Article K.1 of Title VI of the Treaty on European Union as amended by the Treaty of Amsterdam. [37] That provision envisages,

36 — In answering the second question referred by the Hoge Raad in that case, the Court, following Advocate General Mancini, refused to draw any distinction between 'hard' and 'soft' drugs; see paragraphs 25 and 26 of the judgment and paragraph 5 of the Opinion (joint Opinion on the *Mol* and *Happy Family* cases [1988] ECR 3627, p. 3643). Indeed, the distinction, based as it is solely on the nature of particular narcotics, is even regarded by some as misleading because it ignores the significant role of other factors affecting drug use such as the setting in which it occurs; see Murphy and O'Shea, op. cit., p. 144.

37 — See the Joint Action of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat illegal drug trafficking (OJ 1996 L 342, p. 6).

inter alia, Union action to combat crime including 'illegal drug trafficking'.

21. The Hoge Raad may also have envisaged that the Court would consider departing from its *Happy Family* reasoning consequent upon social developments in the Netherlands even if they were not replicated in other Member States. However, the exclusion from VAT of sales of narcotics is too entrenched in the case-law now to be reconsidered, save perhaps by the Community legislator.

(ii) Distinguishing table hire from sales

22. The Netherlands' submission that the provision of a table in a coffee shop to drug dealers should be subject to tax raises the question whether direct selling of unlawful narcotics ought to be distinguished from activities which comprise aiding and abetting their sale. This question has not been raised in the case-law to date. The precise legal basis upon which the Netherlands tax authorities sought to impose VAT on the Happy Family Association in respect of drug sales realised by a house dealer at its youth centre is not clear from *Happy Family*. The Court assumed that the profits generated by the sales accrued to the association (at least in part) and, consequently, that they could be attributed to the association.[38] For present purposes, however, I must assume that in Netherlands law the association was deemed to be the vendor of the drugs. The difference between the activities of that association and those of the defendant in the present case is that the latter does not sell the drugs but, instead, rents a table to the house dealer, an activity which, independent of the unlawful purpose of the hire, is perfectly lawful. Is that a meaningful distinction for the purpose of the application of the reasoning of *Happy Family*?

23. It is, of course, right to recall that any exclusion of VAT would be an exception to the principle of fiscal neutrality, already discussed. That fact does not, however, obviate the necessary consideration of whether a particular transaction which falls within the category of supplies of goods (and presumably of services) with the 'special characteristics' described in the case-law can be readily excluded from VAT. It would, I think, be perfectly feasible for the Court to resolve the present case by pointing out simply that the hire of a table is, in itself, a routine provision of a service

38 — Whereas the Report for the Hearing refers to the Happy Family Association being assessed on '*its* sales of soft drugs' ([1988] ECR 3655, p. 3656, emphasis added), the judgment is silent on this point, merely referring to 'sales of hashish in that youth centre' (paragraph 2). Advocate General Mancini, however, states (see [1988] ECR 3627, p. 3639) expressly that part of the proceeds accrued to the association.

and thus taxable, because it forms part of the income of a lawful business operating in the mainstream of economic life and engaging in normal competition to which the principle of fiscal neutrality applies.

24. In my view, however, such an answer would be incomplete and unsatisfactory if it did not address the illegality which the transaction at issue shares with the sale of drugs by the house dealer. To begin with, that approach seems unhappily dependent on the assumption that the hiring of tables constitutes an autonomous market. The Hoge Raad has said that the activity of the defendant is criminal as amounting to the giving of opportunity, resources and information for the commission of the criminal offence of drug dealing.

25. If the drug-dealing activity of the house dealer falls entirely outside normal economic channels because of its very nature, it is difficult to see what basis exists in Community law for treating the coffee-shop owner differently. The distinction between principals and accomplices in national law has no bearing on whether the activities of hiring tables for the sale of drugs are different in nature from those of the drug sellers. The table is hired only for the purpose of selling drugs and those sales are assisted directly by the coffee-shop owner in advising customers.

26. Two additional points help to illustrate this point. If the tables were being hired for the sale of 'hard' drugs completely outside the AHOJ-G criteria, it would be easier to see the hire as having the 'special characteristics' envisaged by the case-law. Yet, if the essentially economic difference between actual drug sales and hiring out of tables for that purpose were to form the basis for distinguishing *Happy Family*, the same logic would compel the Court to declare table hire obtained from dealers in 'hard' drugs subject to VAT. Secondly, a distinction based on the difference between table hire and drug sales could quite easily be circumvented. For example, the coffee-shop proprietor, while respecting the AHOJ-G criteria, could become a joint seller of the drugs or could employ the house dealer. Either of these devices would arguably bring the activity within *Happy Family* and would probably compel Dutch courts, faced in future with such revised selling arrangements, to seek further guidance from the Court.

27. Consequently, I consider that it is necessary to treat the matter as raising anew the effect of the AHOJ-G policy on

the applicability of the *Happy Family* line of cases.

(iii) The *de facto* decriminalisation of coffee-shop activities

28. In *Happy Family*, the Court held that 'the total prohibition on the marketing of narcotic drugs [wa]s not affected by the mere fact that, in view of their — obviously limited — manpower and means and in order to use the available resources for combating narcotic drugs in a concerted manner, the national authorities responsible for implementing that prohibition give lower priority to bringing proceedings against a certain type of trade in drugs, because they consider other types to be more dangerous', and was adamant that such a decision '[could] not put illegal dealing on the same footing as economic channels which are strictly controlled by the competent authorities in the medical and scientific field'. [39] The Court also noted that such dealings, 'albeit tolerated within certain limits, remain[ed] illegal and m[ight] at any time be the subject of police action when the competent authorities consider such action to be appropriate'. It added that the applicability of VAT to an illegal transaction could not depend on the actual prosecution policy pursued in a Member State, once the transaction concerned remained prohibited, since otherwise the harmonisation objective underlying the Sixth Directive would be jeopardised.

29. It must be recalled that this assessment was made against the background of a supposed total ban on trade in all narcotic drugs, including cannabis, and led the Court to exclude the application of the principle of neutrality because of the absence of all competition between lawful and unlawful activity. It seems to me at least doubtful whether that can really be said of the current situation in the Netherlands, where an official distinction has been drawn between 'hard' and 'soft' drugs.

30. Before reaching a conclusion on this aspect of the case, I would like to draw attention to two undesirable consequences of the current position regarding the exclusion enunciated in the drugs case-law, which are well illustrated by the present case. Those engaged in drug dealing are permitted, even encouraged, to avail of their opportunity to present observations before the Court to emphasise their own criminality. The defendants have, for example, argued that they are guilty not merely of complicity but also of the primary offence of possession of drugs. Wrongdoers should not reap benefits in proportion to their wrongdoing. It is a well-established principle of most legal systems that parties should not be permitted to rely for their own benefit on their own criminal behaviour. I would share the unhappiness expressed by Advocate General Léger in

39 — Ibid., paragraph 29.

Goodwin and Unstead, when noting the 'flippant disregard' of the principle '*Nemo auditur turpitudinem propriam allegans*' exhibited by the appellants in that case 'in seeking to rely on the unhealthy, and even dangerous nature, from an economic point of view, of their activities in order to prove that they [we]re not liable to pay VAT'. [40] This applies *a fortiori* in the present case, where the unhealthy and dangerous nature of the activities in question gives rise to an infringement of both national criminal and international law. More generally, I find the notion that criminal activity, and particularly drug dealing, should, by the very fact of its criminality, receive specially favourable tax treatment, repugnant.

31. The question to be addressed in the present case is whether the activity of selling drugs in coffee shops in the Netherlands, in circumstances falling within the AHOJ-G policy, satisfies the requirement of possessing the 'special characteristics' which mean that 'of their very nature' they are outside normal economic channels.

32. It does not seem to me that the AHOJ-G policy, certainly in its present form, is based on a mere discretion whether or not to prosecute, motivated by considerations of efficiency in the management of police and prosecuting resources.

33. The present Netherlands official guidelines on prosecution policy have been in force since 1 October 1996 and were published in the *Nederlandse Staatscourant*. They appear, as the Commission has submitted, essentially to update the earlier policies and consolidate developments in practice. [41] The defendant contends, nevertheless, that coffee-shop proprietors still face significant risk of prosecution. That view cannot be reconciled with the guidelines or with the comprehensive policy document produced by the Commission and published in 1995 by the Netherlands Government. [42] That Government pursues an integrated policy regarding drug use combining vigorous pursuit of illegal trafficking with measures for protecting the young, including the discouragement of the use of cannabis. In *Continuity and Change*, referring to scientific data, it formally recognises a difference, based on public-health grounds, between 'soft' drugs, such as Indian hemp, and 'hard' drugs; in its view, the health-related risks associated with the former are considered to be

40 — Paragraph 18 of the Opinion.

41 — The Commission cites in this respect in particular the earlier guidelines of 28 October 1976 and 21 October 1994.

42 — See *Het Nederlandse Drugbeleid: Continuïteit en Verandering* (Drugs Policy in the Netherlands: Continuity and Change), Rijswijk, 1995 (hereinafter '*Continuity and Change*').

acceptable.[43] Regarding cannabis, *Continuity and Change* states that:[44]

'Dutch policy on the use of cannabis is based on the assumption that people are more likely to make the transition from soft to hard drugs as a result of social factors than because of physiological ones. If young adults wish to use soft drugs — and experience has shown that many do — the Netherlands believes that it is better that they should do so in a setting in which they are not exposed to the criminal subculture surrounding hard drugs. Tolerating relatively easy access to quantities of soft drugs for personal use is intended to keep the consumer markets for soft and hard drugs separate, thus creating a social barrier to the transition from soft to hard drugs.'

34. The policy of toleration on the part of judicial authorities, which began with cannabis sales in youth centres by bona fide dealers (such as occurred in *Happy Family*), has now been extended to coffee shops selling '*op commerciële basis*' ('on a commercial basis') to adults.[45] Control and supervision is essentially assigned to local authorities. A coffee shop is established in a district with the approval of the relevant local regulatory triumvirate of mayor, chief of police and public prosecutor. Of course, the sale of cannabis remains technically illegal.[46] Furthermore, local authorities may close down coffee shops either in particular or in general. If, however, all the AHOJ-G criteria are respected, there will be no prosecutions. This non-prosecution policy seems to me to go far beyond mere expediency. Indeed, it would appear that if the Public Prosecutor's Office wishes to depart from an established non-prosecution policy that prevails in a particular district or municipality in respect of sales that comply with the AHOJ-G criteria and to initiate a prosecution, it might be called upon to justify such a decision.[47]

35. In these circumstances, I agree with the Commission that the small-scale retail, though illegal, sale of cannabis in coffee shops, deliberately channelled by official policy into a separate market, must be treated, as the Netherlands Government has itself recognised in *Continuity and Change*, as *de facto* decriminalised and, consequently, as a commercial activity that is in partial but direct competition with

43 — See *Continuity and Change*, p. 2 of version produced to the Court by the Commission.

44 — Ibid., p. 3.

45 — *Continuity and Change*, p. 3.

46 — Although, in *Continuity and Change*, the Netherlands Government refers to the *decriminalisering* (decriminalisation) of coffee-shop sales of Indian hemp, it is clear both from its observations in the present case and from the order for reference that they remain prohibited by Dutch criminal law.

47 — In this respect, the Commission refers to a decision of the Hoge Raad of 5 March 1991, *Nederlandse Jurisprudentie* 1991, Nr 694 (nr. 88087), in which it upheld in principle a lower court's finding, in a case concerning a prosecution brought against a coffee-shop owner, that the interests of proper criminal procedures required that a prosecution brought in contravention of a generally known policy of non-prosecution be declared inadmissible unless justified by the Public Prosecutor's Office. However, the judgment under appeal was quashed because it did not establish the existence of such a policy.

taxable persons operating similar but ordinary bars or coffee-houses in the Netherlands. It follows, in my opinion, that such retail sales and other inextricably linked activities, such as those at issue in this case, should be treated as ordinary commercial activities for VAT purposes and taxed accordingly. This conclusion would, in my opinion, have no adverse effect on the level of harmonisation achieved to date in respect of the application of VAT in the Community, since, in those Member States which do not apply a policy similar to that of the Netherlands (i.e. in most if not all of the others), the illegal retail sale of cannabis could not be classified as a commercial transaction and could not, by definition, be effected by persons in circumstances which are comparable, and therefore in competition, with those prevailing in hostelries operated by ordinary taxable persons. [48]

C — *The VAT classification of coffee-shop activities*

36. The Commission raises in its observations the issue of how activities such as those of the defendant ought to be classified for VAT purposes, on the assumption that, in principle, they fall within the scope of the Sixth Directive. In its view, they should be classified as the 'leasing or letting of immovable property', or of a part thereof, which is exempt pursuant to Article 13(B)(b), rather than as the activity of 'tolerat[ing] an act or situation', which is taxable under the second indent of Article 6(1). However, since the Hoge Raad has not considered it necessary to ask any question in this respect I do not propose that the Court express any view on the Commission's proposed classification. Suffice it to say that I would not, prima facie, be inclined to regard the renting of a table in a coffee shop as amounting to the letting of immovable property for the purposes of construing an express VAT exemption that must, in any case, be narrowly interpreted. [49]

48 — There is another reason which supports the adoption of this more dynamic view of competition between coffee shops and the ordinary bar and coffee-house sector in the Netherlands. In a judgment of 28 January 1998 (cited in footnote 4 above), the Hoge Raad has decided that coffee shops may exercise the right to deduct granted by the Sixth Directive in respect of all inputs paid in respect of the goods and services acquired by them in the course of their business, even though they are not liable, pursuant to *Happy Family*, to pay output VAT on their supplies of 'soft' drugs. In circumstances where a full right to deduct is accorded, while the liability to pay VAT applies only to certain supplies, it seems all the more critical, so as to avoid actually favouring the activities of coffee shops over those of ordinary hostelries, to subject the former to VAT in respect of all turnover realised from the exploitation of their premises.

49 — The cardinal role of the principle that VAT exemptions be narrowly construed in the interpretation of the Sixth Directive has been confirmed consistently by the Court: see, *inter alia*, Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 19; Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 13; and Case C-149/97 *Institute of the Motor Industry* v *Commissioners of Customs and Excise* [1998] ECR I-7053, paragraph 17.

IV — Conclusion

37. In the light of the foregoing, I recommend that the Court answer the question referred by the Hoge Raad der Nederlanden as follows:

Article 2 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 should be interpreted as meaning that VAT is payable upon charges for the rent of a table to be used for the purposes of the sale of illegal narcotic drugs in circumstances such as those described in the main action.