item 5, to the Second Directive of the Council of the European Communities of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes.

2. **For the purposes of the application of value added tax Member States are not empowered to treat an ancillary service such as the collection of the cash-on-delivery price separately from the service of the transport of goods.**

3. **The national court must take account of the combined provisions of Article 6 (2) of the Second Directive and of Annex B, item 5, thereto.**

Kutscher Mertens de Wilmars Mackenzie Stuart

Pescatore Sørensen O'Keeffe Touffait

Delivered in open court in Luxembourg on 12 June 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 8 MAY 1979 [1]

Mr President,
Members of the Court,

Just as in Joined Cases 181/78 and 229/78 on which I have recently given my opinion, the main proceedings giving rise to this case are concerned with the compatibility of the Netherlands Law of 1968 on turnover tax (Wet op de Omzetbelasting of 28 June 1968, Staatsblad 329) with the Second Council Directive of 11 April 1967 (67/288/EEC) on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (Official Journal, English Special Edition 1967, p. 16).

The following are the facts of the case:

The limited company Nederlandse Spoorwegen, the appellant in the main

1 — Translated from the German.

action, is an undertaking within the meaning of the Netherlands Law of 1968 on turnover tax engaged in the transport of passengers and goods.

Its subsidiary, the limited company Van Gend & Loos, with which the appellant is treated as a single entity for tax purposes within the meaning of the Netherlands tax law, engages *inter alia* in cash-on-delivery transactions for which besides the cost of delivery a special payment is agreed for the collection of the sale price of the goods before their delivery to the consignee. Van Gend & Loos charged this so-called cash-on-delivery commission, plus value added tax, to its principals' account and included the tax in its own tax declaration. The appellant did not make a return of these collections as services within the meaning of Article 11 of the Netherlands Law on turnover tax and claimed deduction of input tax under Article 15 (1) of that law.

The Netherlands tax authorities levied this input tax which had been deducted amounting to Hfl 467 076 in respect of the period from 1970 to 1974 inclusive on the ground that the collection of the sale price was a service which was separate from the carriage of the goods. Accordingly it is a service within the meaning of Article 11 (j) of the Netherlands Law of 1968 on turnover tax, which exempts "the granting of credit; the transfer, collection and payment of financial obligations including bank transfers, cheques and current account transactions" from turnover tax.

The appellant challenged this assessment before the Tariefcommissie and claimed that the collection of cash on delivery was a service ancillary to the carriage of goods within the meaning of the Second Council Directive on the harmonization of turnover taxes and therefore had to be taxed in the Netherlands. In support it relied on Article 6 (2) of that directive which reads:

"The rules laid down in this Directive as regards the taxation of the provision of services shall be compulsorily applicable only to services listed in Annex B;"

and in this connexion Annex B, item 5, lists the following services:

"Transport and storage of goods, and ancillary services."

Further, the appellant referred to Point 10 "Regarding Article 6 (2)" of Annex A to the directive which provides:

"Member States shall refrain, as far as possible, from granting exemption from tax in respect of the provision of the services listed in Annex B."

The Tariefcommissie rejected the appeal *inter alia* on the ground that the power given to the Member States in Point 10 of Annex A excluded reliance on Article 6 (2) of the directive and that therefore Article 11 (j) of the Netherlands Law on turnover tax could not infringe that directive. The question whether collection of the sale price could be regarded as an ancillary service within the meaning of Annex B, item 5, to the Second Directive was therefore left open. Further, the Tariefcommissie observed that in any event there could be no reliance on the Second Directive in respect of the period prior to 1 January 1972 because the directive entered into force only on that date.

The appellant in the main action appealed against that decision of the Tariefcommissie to the Hoge Raad of

the Netherlands. In support it alleged that the Tariefcommissie had wrongly held that the directive was not directly applicable. The words "as far as possible" used in Point 10 "Regarding Article 6 (2)" of Annex A to the Second Directive did not mean that the Member States have a discretion to exempt the transport and storage of goods and ancillary services or part thereof from turnover tax. If it is assumed that the collection of the sale price is a service ancillary to the carriage of goods within the meaning of the directive, then although Article 10 (3) of the Second Directive, which allows every Member State, subject to the consultations provided for in Article 16, to determine such other exemptions as it considers necessary, offers the possibility of exempting the collection of that price from turnover tax, the Netherlands have neither put forward valid grounds nor engaged in the requisite consultations. Moreover, the Tariefcommissie wrongly assumed that the Second Directive could not be relied on in respect of the period before 1 January 1972.

By judgment dated 24 May 1978 the Hoge Raad stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

"I. If a carrier has undertaken, in addition to the transport of the goods, to collect the price of the goods before delivering them to the consignee (cash-on-delivery system) is the collection of that price a service ancillary to the transport within the meaning of item 5 of Annex B to the Second Directive of the Council of the European Communities of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes?

II. If so, are the Member States free, in the application of the turnover tax, to treat an ancillary service such as the aforesaid collection of the cash-on-delivery price separately in such a way that the services of transport and storage of goods referred to in item 5 of Annex B are not exempted from turnover tax but the ancillary service of collection of money is so exempted?

III. (a) If the answer to Question II is in the affirmative, can the exchange of letters between the Netherlands Government and the European Commission referred to in the opinion of Mr Advocate General Van Soest be regarded as the consultation referred to in Article 16 of the Second Directive?

(b) If not must the national court before which it is claimed that no consultation took place take account of this?

IV. If Question II is answered in the negative, must a national court before which Article 6 (2) of the Second Directive in conjunction with the provisions of item 5 of Annex B is invoked take account of this?"

My opinion on these questions is as follows:

1. The Hoge Raad asks in the *first question* whether the collection of the price of goods by the carrier before their delivery to the consignee is a service ancillary to the transport and storage of goods within the meaning of Annex B, item 5, to the Second Council Directive.

The appellant takes the view that the collection of a debt in connexion with the carriage of goods has become a typical ancillary service in relation to carriage. This is already apparent from the practice in the Netherlands where the collection of cash debts takes place to any appreciable extent only in connexion with delivery services. This conclusion is also supported by the fact that the charges for the collection of accounts by transport undertakings, as determined by the Transport Minister, are substantially less than the charges which banks can make for such transactions, although it is true that banks are not very active in this field. Moreover, the prevalent opinion in civil law is that the collection clause is an integral part of the contract of carriage and that the contract of carriage with a cash-on-delivery clause is an extension of the normal contract of carriage. Therefore it cannot be accepted that the revenue court should interpret the revenue laws differently and add a further doctrine to the prevalent principle of civil law. Therefore the exemption contained in Article 11 (j) of the Netherlands Law on turnover tax is relevant only to normal collection activities and not to collection transactions connected with other activities. Moreover, it seems that cash collection within the European Communities is exempt from turnover tax only in the Netherlands. This fact is apparent from a questionnaire conducted by the Commission. On the basis of that investigation and an independent inquiry it is apparent that the majority of the Member countries treat collection on delivery as a service ancillary to transport. On the wording of the directive itself the appellant takes the view that for example charges for loading and unloading and similar services must be treated as part of the transport service itself and that therefore the Community legislature meant something quite different by *ancillary service*, such as for example cash collection.

The Commission and the Netherlands Government, on the other hand, take the view that the collection of the sale price by the carrier is not to be treated as a service ancillary to the carriage of goods. Both stress that only those services may be treated as ancillary within the meaning of Annex B, item 5, to the Second Council Directive which are necessarily closely related to the carriage and contribute to the latter in a special way.

I think it will be necessary to adopt this last view. In this respect I should first like to recall that the concept of ancillary service in question is taken from Community law and therefore according to the established case-law of the Court must be interpreted according to uniform criteria in order not to jeopardize the equal application of Community law. In my view the wording shows that the concept of *ancillary service* covers only such services as are not simply in any kind of relationship to the main service but cannot reasonably be performed in its absence. These include special payments, such as those for loading and unloading, any refrigeration, counting, weighing or repacking of goods. In my view the Council intended to apply the general concept of ancillary services to these kinds of service which are not as

such transport or storage of goods but are necessarily closely connected thereto. I do not find convincing the appellant's argument to the effect that such kinds of service are part of the carriage itself and that in consequence the concept of ancillary services must cover completely different services.

Cash-collection transactions are not so closely related to the essence of the carriage of goods that they can be treated as a service ancillary thereto. On the contrary, they are services which intrinsically have nothing to do with the carriage of goods and therefore could just as well be carried out separately but for the sake of simplicity are performed in connexion with the delivery of the goods. This must also be the reason why under the Netherlands rules the charges made by carriers for collection on delivery are less than the charges arising from collection by banks.

Moreover, it cannot depend on the civil law principle followed in the individual Member States since, on the one hand, the *revenue* treatment of a matter is distinguishable from its *civil law* treatment and, on the other, the civil law principle may vary from country to country, which would lead to a varied interpretation of a concept of Community law.

Finally, the interpretation which I propose is not affected by the comparative examination of taxation practice in the Member States undertaken by the appellant. Its conclusions would be evidence of the intention of the draftsmen of the directive only if it were conclusively shown that all the Member States treated collection on delivery by the carrier as a service ancillary to transport within the meaning of Annex B, item 5, to the Second Council Directive. I cannot see this from the documents before us, quite apart from the fact that they largely originate from private and not official sources.

Since, therefore, I come to the conclusion that the first question must be answered in the *negative,* I need with the requisite brevity discuss the remaining questions only *in the alternative.*

2. The national court asks in the *second question* whether, assuming that collection of the price is a service ancillary to the carriage of goods, the collection alone and not the carriage or storage of goods can be exempted from taxation by a national law.

Tax exemption of such an ancillary service assumes first of all that having regard to the services listed in Annex B, item 5, to the Second Council Directive Member States can in fact derogate from the provisions of the directive.

The appellant takes the view that in spite of the possibility provided for in Article 10 (3) of the Second Council Directive for the Member States to grant exemptions, because of Point 10 of Annex A to that directive, which provides that the Member States shall refrain, as far as possible, from granting exemptions in respect of the provision of the said services, there is in practice no scope to derogate from the directive in this respect. This is particularly clear in the French version, which uses the words "dans toute la mesure du possible".

Moreover, there is nothing in the legislative procedure to indicate that the Netherlands considered such exemption necessary. On the contrary, it is apparent that all that was intended was to retain a practice which had obtained under the old law. Finally, it has also to be considered that exemption of the cash-on-delivery commission from turnover tax only in the Netherlands would lead to distortion of competition.

The existence of Article 10 (3) of the directive is evidence that the obligation contained in Article 6 (2) of the directive to tax the provision of services listed in Annex B is not absolute. Regarding Article 10 (2) and (3), Point 19 of Annex A provides that where those paragraphs are applied to the transport services referred to in Annex B, item 5, they must be so applied as to ensure equality of treatment as between the different modes of transport. From this it is clear that subject to the consultations provided for in Article 16 every Member State may under Article 10 (3) of the directive derogate also from the taxation of the provision of services prescribed in Article 6 (2) of the directive if it considers such exemption necessary.

If it is assumed, however, as in the second question, that collection of the price by the carrier is an ancillary service within the meaning of the said directive, then the very existence of Article 11 (j) of the Netherlands Law of 1968 on turnover tax shows that the Netherlands intended to derogate from the rule laid down by the directive. There can therefore be no question of whether that provision simply intended to maintain a practice which was current under the old law.

The second question then arises as to whether in the said circumstances if a Member State makes no use of the possibility of granting exemption in respect of the main service it may nevertheless derogate from the directive *only in respect of such an ancillary service.*

Following my observations to the first question I join here with the Commission in thinking that the meaning and purpose of the concept of ancillary service in Annex B, item 5, show that those "contingent" services have to be taxed in the same way as the main service. If in respect of turnover tax the ancillary services could be treated differently from the carriage to which they necessarily extend, the concept of ancillary service would then lose all meaning for the ancillary services would have to be treated as if they were completely independent of the main service. Since this would be incompatible with the system of value added tax under Community law, the second question has to be answered in the *negative.*

3. The *third question,* on the requirement of consultation under Article 16 of the Second Directive and the consequences of insufficient consultation on the application of national law, can again be dealt with only in the alternative, since it is asked only in the event of the second question being answered in the affirmative. The content of the third question is basically the same as Questions 3 and 4 which the Hoge Raad asked in Joined Cases 181/78 and 229/78; the arguments of the parties are likewise the same. In this respect I can therefore refer to my opinion in the said cases. In the present case it is apparent especially from the letter to the

Commission of 16 July 1968 from the Permanent Representative of the Kingdom of the Netherlands to the European Communities that there was no consultation in respect of the provision in question of Article 11 (j) of the Netherlands Law on turnover tax. That letter, communicating to the Commission the Law on turnover tax which had already appeared in the official gazette of the Netherlands, expressly lists the articles of the Netherlands law which the Netherlands Government considers require consultation. Article 11 (j) is, however, not contained in that list.

4. With the *fourth question* the national court seeks to ascertain whether a party before the national courts may rely directly on Article 6 (2) in conjunction with Annex B, item 5, to the Second Council Directive. This question is asked only in the event of the collection of the price being treated as a service ancillary to the carriage within the meaning of Annex B, item 5, to the Second Council Directive and of the Member States not having a discretion under that directive of exemption from turnover tax only the ancillary service of collecting the price and not the transport and storage of the goods. Since I have come to the latter conclusion in answering the second question, if only in the alternative, it seems proper to make some brief remarks on this question.

The appellant takes the view that Article 6 (2) of the Second Council Directive has direct effect in the sense that it gives individuals rights which the national courts must respect. In its view, contrary to that of the Tariefcommissie, the directive took effect not from 1 January 1972 but as soon as it was communicated to the Member States.

I have already discussed the question of when the Second Council Directive took effect in my opinion in Joined Cases 181/78 and 229/78 and I would refer thereto.

As regards the direct applicability of the directive itself, the established case-law of the Court, beginning with its judgment of 6 October 1970 in Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] 2 ECR 825, has recognized that directives, which pursuant to the third paragraph of Article 189 of the EEC Treaty are addressed only to States, may in certain circumstances have direct effects in the legal relationships between the Member States and individuals. This is, according to the case-law, always provided that the obligation imposed on the Member States by the directive is clear and unambiguous, is unconditional and in particular leaves the addressee no discretion in respect of its translation into national law. However, as I have indicated in discussing the second question, the provisions of Article 10 (3) of the directive and of Points 10 and 19 of Annex A thereto show that the Member States have a discretion, albeit limited, regarding the granting of exemptions from taxation in respect of the provision of services which in principle have to be taxed pursuant to Article 6 (2). As the Court has expressly declared, *inter alia* in its judgment of 1 February 1977 in Case 51/76 *Verbond*

van Nederlandse Ondernemingen v *Inspecteur der Invoerrechten en Accijnzen* [1977] 1 ECR 113, the exercise of such discretion is not subject to review by the Court. However, as the Court made clear in the said judgment, it follows from the binding effect attributed to a directive that it is for the national courts to determine whether a disputed national measure exceeds the limits of the discretion given to the Member States.

I accordingly propose that the question should be answered as follows:

The collection of the price of goods is not a service ancillary to the transport within the meaning of item 5 of Annex B to the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (No 67/228/EEC).