On those grounds,

THE COURT

in answer to the question referred to it by the Tribunale di Trento by order of 30 June 1975 hereby rules:

Article 6 (4) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes cannot be interpreted as permitting the moment when the service is provided to be identified with that when the invoice is issued or a payment on account is made if these transactions take place after the service has been carried out.

Lecourt Kutscher O'Keeffe Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart Capotorti

Delivered in open court in Luxembourg on 20 May 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 6 APRIL 1976 [1]

Mr President,
Members of the Court,

The Ferrovia del Renon in Bolzano and the Mazzalai firm in Trento entered into an agreement in 1964 pursuant to an invitation to tender for the construction of a suspension cable railway near Bolzano. The construction work was completed in 1967; moreover, some of the instalments were paid until completion. Differences later arose concerning *inter alia* the total costs and the outstanding balance thereof. The dispute was settled by an enforceable decision of the Appeals Court in Trento of 10 December 1972, in which the outstanding balance was quantified. This

1 — Translated from the German.

amount was then paid after 31 December 1972.

This date is important, because on 1 January 1973, as provided for in the fourth directive 71/401/EEC of 20 December 1971 (OJ 1971, L 283, p. 41), the system of value-added tax was introduced in Italy. This was effected by virtue of the enabling Law No 825 of 9 October 1971 and the Decree of the President No 633 of 26 October 1972. The latter provides that value-added tax is chargeable on the supply of goods and services after 31 December 1972 (Article 76). According to Article 6 of the decree services are deemed to be provided at the moment when the consideration is paid.

Under these provisions Mazzalai had to pay value-added tax at the rate of 12 % on the balance received from Ferrovia del Renon in 1973. It demanded payment of a corresponding amount from Ferrovia del Renon calculated from June 1973. Ferrovia del Renon refused payment; it was only willing to pay turnover tax at the rate of 4 % under the system previously in force.

In the legal proceedings which Mazzalai thereupon brought, Ferrovia del Renon relied on the second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes, and in particular on Article 6 (4) thereof which provides that 'The chargeable event shall occur at the moment when the service is provided'. It pointed out that Article 5 of the Italian enabling Law of 9 October 1971 already mentioned refers to the directive and states that the rules on value-added tax must be compatible with Community law. However Presidential Decree No 633 of 26 October 1972 is not compatible with it, because under Article 6 thereof services are to be treated as being provided at the moment when the consideration is paid.

In view of these arguments the court seised of the dispute stayed the proceedings and by order of 30 June 1975, which reached the Court of Justice on 24 October 1975, referred the following question to it under Article 177 of the EEC Treaty for a preliminary ruling:

'Is Article 6 (4) of the second Council Directive of 11 April 1967 (OJ, English Special Edition 1967, p. 16) to be interpreted as meaning that, in the case of the provision of services and, in particular, in the case of works contracts, the chargeable event occurs at the moment when the service is provided, and that individual Member States have continuing authority to identify the chargeable event with the issue of an invoice or with a payment on account, whether the issue of the invoice or the payment on account takes place before completion ot the work or, as in the case under review, if they take place afterwards?'

I — Before I can examine this question I must make some preliminary observations. They are prompted by the submissions of some of the parties to the proceedings relating to the admissibility of the request for a preliminary ruling.

1. The defendant in the main action submits that under Article 90 of Decree No 633 liabilities arising out of relations which came into being before 1 January 1973 are not affected. In its view the entry into force of a new tax law cannot change liabilities which have already arisen. Accordingly the inference to be drawn from Articles 6 and 76 of Decree No 633 is that it cannot be applied to services which were performed before its entry into force.

The plaintiff in the main action on the other hand points out that the tax due under the earlier turnover tax law had to be paid, in the case of services, when the consideration was provided. If, as happened in this case, the consideration was provided after 1 January 1973, the services can therefore only be taxed

under the new value-added tax system, for the very good reason that the earlier turnover tax rules were at that time no longer in force.

In my opinion there is no need to concern ourselves any more with these arguments. They clearly relate to a question of their relevance to the decision to be taken by the court making the reference, that is to say, to the question whether the interpretation of the second directive is in any way relevant to the facts such as those in the present case. It has been settled for a very long time by the case law of the Court that such objections as to the relevance of any matter to the decision to be taken by the court making the reference can only be considered in very exceptional cases. They are undoubtedly irrelevant if they are based on considerations arising out of national law, for the Court does not have jurisdiction under Article 177 to undertake examinations of this kind. Since the arguments put forward by the parties to the main action, with which we are now concerned, are undoubtedly derived from the field of national law, it appears to be impossible to regard them as a justification for refusing to answer the question referred by the Tribunale di Trento.

2. During the proceedings it was also argued that the kind of taxation to be applied was laid down for the national court in this case by a national law. The court is said to be bound to apply this law. It cannot disregard it, even should it take the view that this law is incompatible with a Community directive, because Community measures of this kind cannot by virtue of their legal nature supersede national legal provisions which diverge from them. It is therefore not relevant to the main action to know the meaning and scope of the second directive on value-added tax.

I am convinced that this reasoning, which again is concerned with the relevance of the question referred to the decision in the main action, cannot be followed. In this connexion one may leave aside — and I will return to this point — whether the provision of the second Council directive concerning value-added tax mentioned by the court making the reference is directly applicable according to the Court's case-law and has the effect of superseding national rules of law. The only material factor — attention was drawn to this point in the proceedings — is that the Italian enabling Law No 825, upon which Decree No 633 is based, refers to Community law and provides that the Italian rules on value-added tax must comply with the provisions of Community law. It can therefore be said that, for the purpose of interpreting the said enabling Law, it is material to know the scope of the directive concerning value-added tax irrespective of the answer to be given to the question whether the effect of the reference contained in the enabling Law is that the Community provisions referred to have become national law. Further the question whether the court making the reference can itself rule on the compatibility of the decree with the enabling Law or whether such a power is reserved to the Constitutional Court can, as far as we are concerned, remain open. It must in each case be acknowledged that, at least for the purpose of answering the question whether the problem of the compatibility of Decree No 633 with the enabling Law should be submitted to the Constitutional Court, it is necessary to know exactly what principles the directive mentioned in the enabling Law laid down. This is sufficient for the purposes of conducting proceedings relating to preliminary rulings; on the other hand it does not appear in any way to be tenable to argue that the reference is to be treated as premature and to take the view that only the Constitutional Court, after the matter has been brought before it by the court making the reference, can raise the question which has been referred.

3. A further objection which must also be dealt with as a preliminary point was

raised by the Italian Government. It submitted that a national court can only ask for those Community measures to be interpreted, which are directly applicable and which it therefore has to apply. In the view of the Italian Government this principle does not apply to the relevant Council directive. It was issued pursuant to Articles 99 and 100 of the EEC Treaty and its sole purpose is the harmonization of the laws of Member States. It is moreover clear that Article 6 (4) of the second Council directive does not impose any obligation on Member States; it requires in any case supplementary legislation and cannot therefore be regarded as sufficiently clear and precise in the sense which emerges from the relevant case-law. Consequently the Court should confine itself to finding that the directive is not directly applicable. Further, there is no need for the Court to examine the contents of the directive.

In my view Article 177 of the EEC Treaty cannot be given such a narrow interpretation. It is clear that the jurisdiction to interpret embodied in that Article, if the Treaty is disregarded, applies in general to all Community legal measures. In fact it can readily be imagined that Community measures other than those which are directly applicable may be relevant in national legal proceedings. This is for example what happened in Case 32/74 (Judgment of 12 November 1974, *Friedrich Haaga GmbH* [1974] ECR 1201). In that case a Community directive was interpreted, without any preliminary finding that it was directly applicable, for the simple reason that it was relevant for determining the scope of a national law. There is a similar situation in the present case where — as I have already pointed out — the interpretation of the directive is important in relation to Article 5 of the enabling Law No 825 which contains clear references to Community law.

Moreover, I would not admit the argument, which was also submitted in this connexion, namely that acceptance of a request for an interpretation could lead to an overlapping with and to the detriment of proceedings under Article 169 of the EEC Treaty, that is to say, to an adverse effect on proceedings in which the compatibility of national laws with Community directives primarily falls to be examined. That may indeed be true, but it is irrelevant, because such consequences cannot be ruled out in proceedings relating to preliminary rulings which relate to the interpretation of directly applicable Community laws and which are clearly admissible.

It has therefore to be said — and it is with this observation that I dispose of this point — that there is no need to give a ruling on the direct applicability of the value-added tax directive, because no request has been made for any such ruling. The Court is in no way limited to pronouncing on this aspect but is fully entitled to define its position as to the interpretation of the content of the value-added tax directive, which is what the court making the request has requested it to do.

4. Finally there are still two questions to be examined as preliminary points which relate to the interpretation of the directive if not to the problem raised by the court making the reference. I am dealing with them in the present context, because they also refer to the relevance of the question referred to the decision in the main action.

Thus it was argued on the one hand that the directive did not cover services, which were provided before the entry into force of national implementing provisions, and that the directive on the contrary only applies to relationships formed after the entry into force of national laws giving effect to the directive.

On the other hand the Italian Government doubted whether the directive at all covers services which are provided under a works contract.

With reference to the first point it is in my opinion right to proceed on the assumption that, when the system of value-added tax was introduced — in Italy from 1 January 1973 — the principles laid down in the directive governing the structure and procedures for the system of value-added tax were binding. From that time onwards those Community principles which relate to the occurrence of the chargeable event are decisive. In fact nowhere in the directive is there any indication that outstanding tax cases arising in earlier years could be dealt with after the said date in disregard of the principles mentioned in the directive.

So far as the doubts expressed by the Italian Government are concerned, it must first be recalled that according to Article 5 (2) (e) of the second directive on value-added tax 'the delivery up of works of construction, including those in which moveable property is incorporated in immoveable property' is considered as supply of goods. On the other hand paragraph 5 of Annex A of the directive empowers Member States, which for specifically national reasons cannot consider the transactions just mentioned as supply, to classify them in the category of provision of services. Italy made use of this power in Article 3 of Decree No 633. Having regard to this fact and because Article 6 (2) of the directive in addition provides that the provisions laid down in the directive as regards the taxation of the provision of services shall be compulsorily applicable only to services listed in Annex B, and also because works contracts of the kind at issue in the main action are not expressly listed in Annex B, the Italian Government came to the conclusion that it was doubtful whether they were covered by the decision.

In fact these doubts are also without foundation. The wording of paragraph 5 of Annex A supports this view, for under this paragraph Member States which cannot consider the transactions referred to in Article 5 (2) (e) as supply *shall* classify them in the category of provision of services and subject them to the rate which would be applicable to them if they were considered as supply. This means that such transactions fall within the field of application of the directive, that Member States, which make use of the opportunity offered by paragraph 5 of Annex A, are in no way free to refrain from taxation; it is merely the classification of the transactions in question which is left to their discretion.

Moreover it is interesting to note the way in which paragraphs 2, 3 and 8 are arranged. It can in fact be said of the services listed in these paragraphs that they presume that works contracts, too, are subject to the tax and that main services are included in the same way as the additional services under paragraph 8.

Finally it is also of importance that the sixth recital of the directive — and this clearly relates to the question at issue in this case — only states that it has proved possible to leave Member States themselves to make rules concerning the numerous services whose cost has no influence on the prices of goods. This certainly does not apply to the services at issue in the main action.

Thus there is also no ground for refusing, on the basis of the actual field of application of the directive, to give the interpretation requested.

II — After making these necessary preliminary observations on matters concerning the relevance of the question referred to the decision in the main action, I now turn my attention to the substance of the request for a preliminary ruling. This makes it necessary to consider whether Article 6 (4) of the directive on value-added tax is to be interpreted as meaning that in the case of works contracts the chargeable event occurs at the moment of issue of the invoice or of the receipt of the consideration, even if these events follow the provision of the service.

Let me first of all recall the wording of the provision at issue. It reads as follows:

'The chargeable event shall occur at the moment when the service is provided. In the case, however, of the provision of services of indeterminate length or exceeding a certain period or involving payments on account, it may be provided that the chargeable event shall already have occurred at the moment of issue of the invoice or, at the latest, at the moment of the receipt of the payment on account in respect of the whole of the amount invoiced or received'.

It has become clear from my previous observations that the court making the reference was right to refer to Article 6 (4) of the directive concerning value-added tax. Whilst it is true that contracts of the kind at issue in this case are considered, on the basis of the definition of Italian civil law, as 'supply of goods' according to Article 5 of the directive concerning value-added tax, Article 6, however, has effect because Italy availed itself of the opportunity presented by paragraph 5 of Annex A.

On the question of the construction of the expression 'service is provided', which is the principal issue in this case, the Italian Government expressed the view that having regard to the variety of possible legal relations which come into consideration in connexion with the provision of services, the stipulation in general terms of a time-limit in an abstract provision is not possible. It is often difficult to determine when services have been provided since at times an acceptance is necessary or a trial period must have elapsed. In addition the consideration is frequently not stipulated in advance. In particular in the case of public works experience shows that again and again the consideration which the parties had in mind has to be revised. Looked at in this light it must appear to be inappropriate to sever the coming into being of the tax liability from the basis of its assessment, namely the consideration, the payment of the tax falling due only when the consideration is provided. For all these reasons the acceptance by individual Member States of the payment of the consideration as the moment when the service is provided must, however, be considered as compliance with the directive.

The Commission opposes this argument. It supports its view by relying on the wording, system and purpose of the rules on value-added tax. It also refers to events which preceded the adoption of the directive and throw light on the particular problem at issue.

When considering this divergence of views it is above all necessary not to overlook the fact that Article 6 (4) of the directive on value-added tax and also the corresponding Article 5 (5) thereof are only concerned with the occurrence of the chargeable event, that is to say – according to the definition of paragraph 8 of Annex A – with the event giving rise to the tax. Other factors must of course supervene, which are not at issue in this case, before the amount of the tax can be determined and the tax becomes payable.

When interpreting a legal provision one must in the first place proceed on the basis of its wording: it is therefore necessary to bear in mind that Article 6 (4) provides that the chargeable event shall occur at the moment when the service is provided. This clearly means that, in the case of contractual relations, which are of paramount importance in this case, what is of importance is the performance by *one* of the parties to a contract of his obligations thereunder. Moreover such performance must, by reason of its legal nature be clearly distinguished from the performance by the other party of his obligations, that is to say, the consideration. If this is borne in mind it can hardly be accepted that a legal text drafted in this way treats the provision of services on the same footing as the provision of the consideration or

that it permits such equal treatment without any suggestion of the existence of a discretion.

The fact that the concept of 'consideration' is used in another context in the directive itself is an additional argument against this assumption. This occurs first in Article 8 which defines the basis of assessment. It happens again in the second sentence of Article 6 (4) which provides for derogations from the principle contained in the first sentence. However the important point to note is that it is clear from the wording that these derogations only apply to cases where part of the consideration is provided *before* the provision of services has been completed, where therefore, money passes before the moment at which in principle the tax liability arises and therefore the coming into being of the tax liability is brought forward.

It is also worth noting that when the directive was being drafted the idea of making the coming into being of the tax liability dependent upon the provision of the consideration was fully considered. Thus the Economic and Social Committee in its opinion on the proposal for a second directive on the harmonization of the laws of the Member States concerning turnover taxes stated that in certain cases it is difficult to determine the moment when the service is provided and from this it drew the conclusion that it would be simpler to provide a single chargeable event, 'in which case the moment when payment is collected can be considered' (JO 1966, p. 572). Although this proposal has not been accepted by the Commission and the Council, it is not however admissible to arrive at a similar result by means of an interpretation of another text which has been deliberately drafted in a different way.

Finally the purpose of the value-added tax directive must be recalled. It is intended to bring about the widest possible harmonization of the law on value-added tax. It is therefore to be assumed that the directive uses the most precise concepts possible and is designed to be as complete as possible. In these circumstances it is scarcely possible to agree with the view that the freedom of action left to Member States is so wide that, for the purpose of establishing when the chargeable event occurs in the case of the provision of services, they can go beyond the provision of the service and take the moment when the consideration passes, which freqently happens much later. In fact in this way uniformity — one has in mind for example cases where the rate of the tax is altered — would be abandoned to an unacceptable extent if the determination of the moment when the chargeable event occurred in such cases depended in the final analysis upon the intention of the taxpayer.

Even if it has to be admitted that the determination of the moment when the provision of services occurs can in some circumstances cause certain difficulties — we are certainly not concerned with exceptional problems which have to be settled in cases of dispute — and although we have been shown that other Member States have also not implemented the directive in a wholly correct manner, in view of the arguments which have been submitted I have no alternative but to acknowledge that the interpretation of Article 6 (4) of the second directive on value-added tax proposed by the Commission is the only one which is correct.

III – The question of the Tribunale di Trento should therefore be answered as follows:

Article 6 (4) of the Second Council Directive of 11 April 1967 is to be interpreted as meaning that in the case of the provision of services the chargeable event is to be regarded in principle as occurring at the moment when the services are in fact provided. Member States have the opportunity, however, in the case of the provision of services of indeterminate length or exceeding a certain period or involving payments on account, to provide that the chargeable event shall occur at the moment of issue of the invoice or, at the latest, at the moment of the receipt of the payment on account in respect of the whole of the amount invoiced or received.