OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 10 June 2010 [1]

I — Introduction

1. The Commission finds fault with the transposition by Poland of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2] ('Directive 2006/112'). The case specifically concerns the reduced VAT rate of 7 % on clothing and clothing accessories for babies and children's footwear that applies in Poland. In the Commission's opinion, by applying that reduced rate of VAT Poland is in breach of Article 98 of Directive 2006/112 in conjunction with Annex III to that directive. Poland does not deny that the reduced rate applies but takes the view that it is justified, both on socio-political grounds and on the basis of Article 115 of Directive 2006/112.

2. Decisive for the outcome of the case is primarily the temporal application of Article 115 of Directive 2006/112 to Poland. Article 115 of Directive 2006/112 allows Member States which, at 1 January 1991, were applying a reduced rate of VAT to inter alia children's clothing and children's footwear to continue to apply such rate. However, Poland was not yet a Member State of the European Community on the date stated in Article 115 of Directive 2006/112, nor when the corresponding preceding rule in the Sixth Directive [3] was introduced. The question is, therefore, whether Poland can nevertheless rely on that provision and continue to apply a special rule in existence on 1 January 1991, or whether only Article 98 in conjunction with Annex III and Article 128 of Directive 2006/112 and the rules contained in the Act of Accession should be relevant.

1 — Original language: German.

2 — OJ 2006 L 347, p. 1.

3 — The rule was formerly contained in Article 28(2)(d) of 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates) ('the Sixth Directive').

II — Legislative background

A — *Community law*

1. 2003 Act of Accession

3. Article 24 of the 2003 Act of Accession [4] reads as follows:

'The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.'

4. Annex XII to the Act of Accession contains the list of *acquis communautaire* attributable to Poland. Point 1 of Chapter 9 – Taxation – of that annex states that the rules on the common system of value added tax are applicable:

'31977 L 0388: 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 (OJ L 145, 13.6.1977, p. 1), as last amended by:

— 32002 L 0038: Council Directive 2002/38/EC of 7.5.2002 (OJ L 128, 15.5.2002, p. 41).

(a) By way of derogation from Article 12(3)(a) of Directive 77/388/EEC, Poland may (i) apply an exemption with refund of tax paid at the preceding stage on the supply of certain books and specialist periodicals, until 31 December 2007, and (ii) maintain a reduced rate of value added tax of not less than 7 % on the supply of restaurant services until 31 December 2007 or until the end of the transitional period referred to in Article 28[1] of the Directive, whichever is the earlier.

(b) By way of derogation from Article 12(3)(a) of Directive 77/388/EEC, Poland may maintain (i) a reduced rate of value added tax of no less than 3 % on foodstuffs

4 — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

(including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in preparation of foodstuffs; products normally intended to be used to supplement or substitute foodstuffs; and on the supply of goods and services of a kind normally intended for use in agricultural production, but excluding capital goods such as machinery or buildings, referred to in points 1 and 10 of Annex H to the Directive, until 30 April 2008, and (ii) a reduced rate of value added tax of no less than 7% on the supply of services, not provided as part of a social policy, for construction, renovation and alteration of housing, excluding building materials, and on the supply before first occupation of residential buildings or parts of residential buildings as referred to in Article 4(3)(a) of the Directive until 31 December 2007.

(c) For the purposes of applying Article 28(3)(b) of Directive 77/388/EEC, Poland may maintain an exemption from value added tax on international transport of passengers referred to in point 17 of Annex F to the Directive, until the condition set out in Article 28(4) of the Directive is fulfilled or for as long as the same exemption is applied by any of the present Member States, whichever is the earlier.'

2. Directive 2006/112

5. Article 96 of Directive 2006/112 provides:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

6. Article 97(1) of Directive 2006/112 states that the standard rate of VAT from 1 January 2006 until 31 December 2010 may not be less than 15%.

7. Article 98 of Directive 2006/112 states:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

…'

8. Under Article 99(1) of Directive 2006/112 the reduced rates are to be fixed as a percentage of the taxable amount, and may not be less than 5 %.

9. Chapter 4 of Title VIII of Directive 2006/112 (Articles 109 to 122) determines the circumstances in which, pending introduction of a definitive VAT arrangement at Community level, the Member States can apply exemptions with deductibility of the VAT paid at the preceding stage or apply reduced rates that differ from the general rules.

10. Article 114(1) of Directive 2006/112 provides as follows in this context:

'1. Member States which, on 1 January 1993, were obliged to increase their standard rate in force at 1 January 1991 by more than 2 % may apply a reduced rate... to the supply of goods and services in the categories set out in Annex III.

The Member States referred to in the first subparagraph may also apply such a rate to... children's clothing, children's footwear and housing.'

11. Article 115 of Directive 2006/112 provides:

'Member States which, at 1 January 1991, were applying a reduced rate to … children's clothing, children's footwear or housing may continue to apply such a rate to the supply of those goods or services.'

12. Article 115 of Directive 2006/112 adopts verbatim the provision in Article 28(2)(d) of the Sixth Directive, as amended by Council Directive 92/77/EEC of 19 October 1992. [5]

13. Chapter 5 of Title VIII – Temporary provisions – contains, in Articles 123 to 130, rules which grant certain Member States which acceded to the European Union on 1 May 2004 an exemption with deductibility of VAT paid at the preceding stage in respect of the supply of certain items and permits a reduced rate to be applied to certain items.

5 — Cited in footnote 3.

14. Following the provisions in the Act of Accession, Article 128 of Directive 2006/112 lays down the following special provisions for Poland:

'1. Poland may, until 31 December 2007, grant an exemption with deductibility of VAT paid at the preceding stage in respect of the supply of certain books and specialist periodicals.

2. Poland may, until 31 December 2007 or until the introduction of definitive arrangements, as referred to in Article 402, whichever is the earlier, continue to apply a reduced rate of not less than 7% to the supply of restaurant services.

3. Poland may, until 30 April 2008, continue to apply a reduced rate of not less than 3% to the supply of foodstuffs as referred to in point (1) of Annex III.

4. Poland may, until 30 April 2008, continue to apply a reduced rate of not less than 3% to the supply of goods and services of a kind normally intended for use in agricultural production, but excluding capital goods such as machinery or buildings, as referred to in point (11) of Annex III.

5. Poland may, until 31 December 2007, continue to apply a reduced rate of not less than 7% to the supply of services, not provided as part of a social policy, for construction, renovation and alteration of housing, excluding building materials, and to the supply before first occupation of residential buildings or parts of residential buildings, as referred to in point (a) of Article 12(1).'

B — *National law*

15. Under Article 41 of the Polish Law on value added tax of 11 March 2004 ('the Polish VAT Law') the standard rate of VAT is 22%, although derogations are permitted. Accordingly, Article 41(2) of the Polish VAT Law provides for a reduced rate of VAT of 7% on the goods and services specified in Annex III.

16. Annex III to the Polish VAT Law lists under item 45 clothing and clothing accessories for babies and, under item 47, children's footwear.

III — Pre-litigation procedure and forms of order sought

17. On 23 March 2007, the Commission sent a letter of formal notice to the Republic of

Poland. In that letter it raised the objection that Poland was applying a reduced rate of VAT to clothing and clothing accessories for babies and to children's footwear contrary to Article 98 of Directive 2006/112 in conjunction with Annex III to that directive.

18. Poland commented on the facts in its reply of 22 May 2007. As the arguments put forward by the Republic of Poland in its defence did not convince the Commission it sent Poland a reasoned opinion on 1 February 2008 giving that Member State a period of two months in which to comply with Community law requirements.

19. Poland replied in a communication of 31 March 2008. The Commission maintained its view and, by a document dated 2 February 2009, received at the Court on 3 February 2009, brought the present action seeking that the Court:

— declare that, by applying a reduced VAT rate of 7 % to supplies, the import and the intra-Community acquisition of clothing and clothing accessories for babies and of children's footwear on the basis of Article 41(2) of the Law on Goods and Services Tax of 11 March 2004, in conjunction with items 45 and 47 of Annex III to that Law, the Republic of Poland has failed to fulfil its obligations under Article 98 of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in conjunction with Annex III thereto;

— order the Republic of Poland to pay the costs of the proceedings.

20. Poland contends that the action should be dismissed and the Commission ordered to pay the costs of the proceedings.

IV — Legal analysis

21. Under Article 96 of Directive 2006/112 the Member States apply the standard rate of VAT fixed by each Member State as a percentage of the taxable amount and which is the same for the supply of goods and for the supply of services.

22. Article 98 of the directive, on the other hand, permits the application of either one or two reduced rates to the categories of goods and services set out in Annex III to the directive. The supply of clothing and clothing accessories for babies and of children's footwear taxed by Poland at a reduced rate of 7 % ('the goods at issue') are undeniably not listed in Annex III. Consequently, Article 98 of the

directive does not permit the supply of the goods at issue to be charged at a reduced rate of VAT.

23. However, Poland is relying on Article 115 of Directive 2006/112. This states that all Member States which, at 1 January 1991, were applying a reduced rate to children's clothing, children's footwear or housing may continue to apply such a rate.

24. The Commission refuses to accept that this provision should apply to Poland. It argues that the transitional provision was originally introduced into the Sixth Directive as Article 28(3)(b) by Directive 92/77 and is directed only at the States that were already members of the Community when Directive 92/77 was adopted. The Commission also points out that derogations run contrary to the harmonisation objective of the directive and are therefore to be interpreted narrowly. Member States that acceded to the European Union later on can rely only on derogations provided for in the Act of Accession. The 2003 Act of Accession does not permit Poland to apply a reduced rate of VAT that derogates from the general system in the case of the supply of the goods at issue here.

25. Poland contends, on the other hand, that the wording of Article 115 of Directive 2006/112 does not prevent its application to Poland. If the application of the provision to Poland were to be excluded it would be discriminated against as compared to other Member States. What is more, the application of the derogation is justified on socio-political grounds.

A — *Application of the provision to Poland*

26. Article 24 of the Act of Accession, which is headed 'Transitional measures' reads as follows: 'The measures listed in Annexes... XII... to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.'

27. Point 1 of Chapter 9 ('Taxation') of Annex XII lists inter alia the Sixth Directive 77/388, as last amended by Directive 2002/38/EC. This also incorporates all amendments to the directive adopted between 1977 and 2002. Point 1(a) to (c) then lists the derogations from the Sixth Directive applicable to Poland, that is to say derogations from Article 12(3)(a) and Article 28(3)(b) of the directive. The Act of Accession does not make any provision

for derogations from Article 28(2)(d) of the Sixth Directive.

28. In the absence of specific limits or reservations the State which joins accepts *all* the rights and obligations resulting from the *acquis communautaire.*[6] Hence, derogations such as Article 28(2)(d) of the Sixth Directive and Article 115 of Directive 2006/112 are also applicable, in principle, to the Member States that acceded in 2004 unless any provisions to the contrary are contained in the Act of Accession. This is not the case as regards the goods at issue here.

29. This is not precluded by the fact that Poland was not a member of the Community on the date of adoption of Directive 92/77, which originally introduced the said provision. The specific objective of the rules on adoption of the *acquis communautaire* in the Act of Accession was to extend the application of legal instruments adopted prior to the accession of the Member State concerned so that they also applied to that Member State. It is not apparent that Directive 92/77 was excluded in any way from the *acquis communautaire*, which Poland adopted by acceding to the Community.

30. However, the Commission would seem to be concluding from Article 24 of the Act of Accession in conjunction with the provisions in the aforementioned Annex that only the normal regime in the Sixth Directive, as it were, has become part of the *acquis* adopted. It argues that special arrangements were only included in so far as they were listed in the annex and then only in the form of adaptation stated there.

31. There is no basis for this interpretation to be found in either the wording or structure of the provisions of the Act of Accession, however. Indeed, point 1(a) to (c) of Chapter 9 ('Taxation') of Annex XII to the Act of Accession expressly provides for *derogations* from the exceptions stated in the Sixth Directive. This approach to regulation is based on the premis that derogations apply, in principle, to the acceding States. This is also supported by the wording of point 1(c) of Chapter 9 of Annex XII to the Act of Accession, which reads: '*For the purposes of applying Article 28* Poland may maintain an exemption from value added tax on international transport of passengers …' [emphasis added by the author].

32. If the derogations were not to apply *ab initio* to the new Member States, however, they would not have needed to be modified in the Act of Accession. It would then have been necessary to introduce quite new derogations in favour of the acceding States.

6 — See too the Opinion delivered by Advocate General Tesauro on 7 May 1991 in Case C-35/90 *Commission* v *Spain* [1991] ECR I-5073, point 6.

33. There can be no question, on grounds of legal certainty, of concluding, so to speak, from silence in the Act of Accession that certain provisions in the Sixth Directive, which according to their wording have unlimited application, should not be capable of application to the acceding Member States. In order to achieve clarity in this respect the Act of Accession would have had to not only list the amended derogations applicable but also all of the derogations that were not to apply in their entirety to the acceding States.

34. The Commission is ultimately also relying in support of its argument on the rule on reduced taxation of housing. The taxation of services in connection with the construction, renovation and alteration of housing is regulated with regard to Poland in point 1(b) of Chapter 9 of Annex XII to the Act of Accession and in Article 128(5) of Directive 2006/112. In addition, Article 115 of the directive permits Member States to apply a reduced rate to housing where they were applying such relief on 1 January 1991. If that provision were also to apply to the later acceding States, it argues, Poland would have a double legal basis for the VAT reduction.

35. I do not find this argument convincing, however.

36. Article 128 of Directive 2006/112 is a special provision for Poland derogating from the general provision in Article 115 and replacing it with regard to the application of the reduced rate for housing construction. Whereas Article 115 of Directive 2006/112 permits the application of a reduced rate to housing for an unlimited period of time provided that the rate was being applied on 1 January 1991, the special rule in the Act of Accession, which was adopted in Article 128 of Directive 2006/112, restricts the temporal application of a reduced rate until 31 December 2007. However, the derogation for Poland is changed in Article 128 of the directive in that it is not linked to the existence of such a reduction on 1 January 1991 but also applies to reduced rates of tax that were introduced later on.

37. Since, unlike the position with regard to housing, there is no specific rule on the supply of children's clothing and children's footwear, the derogation in Article 115 of Directive 2006/112 applicable to all of the Member States remains unchanged in this respect. If the parties to the Treaty had also wanted to change or even completely exclude the application of that provision for Poland it would have needed a corresponding provision to be included in the Act of Accession.

38. The *acquis communautaire* that Poland adopted on its accession does therefore also immediately extend per se to the derogation in Article 115 of Directive 2006/112.

39. The question is, however, whether there is anything in the content and telos of Article 115 to indicate that the provision should nevertheless not apply to a State in Poland's situation because it was not already a Member State of the Community on 1 January 1991.

40. As the Court observed in *Optimus–Telecomunicações*, however, in the case of accession, a reference to a date laid down in Community law, in the absence of a provision to the contrary in the Act of Accession or some other Community document, applies equally to the State which is acceding, even if that date is earlier than the date of its accession. [7]

41. As already stated, the Act of Accession does not contain any mention of the fact that Article 28(2)(d) of the Sixth Directive (or Article 115 of Directive 2006/112) does not apply to the States that are acceding.

42. Nor is anything different to be concluded from the wording of the said provisions themselves. They state that Member States which were already applying a reduced rate to the goods at issue on 1 January 1991 can continue to apply it. The provision does not require the Member State concerned to also have been a Member State on the date of reference, namely 1 January 1991, even though use is definitely made in Directive 2006/112 of such temporal specification of a particular date for Member States. [8] The absence of such a temporal specification indicates that, in principle, Article 115 also applies to Member States that only later accede to the European Union if they applied such a rule on the date of reference.

43. On a purely literal interpretation, therefore, the provision does apply to Poland. Where the wording of a Community law provision is clear and is not open to contradictory interpretations in the different language versions, a literal interpretation is a strong indication as to the correct meaning of the provision. [9]

7 — Case C-366/05 *Optimus-Telecomunicações* [2007] ECR I-4985, paragraph 32.

8 — See Article 379(1) of Directive 2006/112, which is based on point 2(m) of Part 9 of Annex XV to the Act on the accession of Austria, Finland and Sweden (OJ 1994 C 241, p. 335 and OJ 1995, L 1, p. 1).

9 — See the Opinion delivered by Advocate General Sharpston on 25 January 2007 in *Optimus–Telecomunicações*, point 45.

44. The interpretation conclusion arrived at above with regard to the application of the provision to Poland must also, however, be gauged against the objective of the directive pursued by the Community legislator, which was to create a common system of value added tax.

45. As the Court has repeatedly held, [10] the provisions of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person are to be interpreted strictly.

46. Article 115 of Directive 2006/112 constitutes a derogation which perpetuates a state of affairs conflicting with the objective of the directive, that is to say the application of reduced rates of VAT to turnover other than that provided for in the directive. It is therefore doubtful whether the findings arrived at by the Court in *Optimus–Telecomunicações* [11] in relation to Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [12] are directly applicable to the present configuration. In that case, unlike the present case, the issue was the linking of the legal position to a date prior to accession in order to achieve a legal situation closer to the harmonisation objective of the directive.

47. Nor does a narrow interpretation of the provision preclude its application to Poland, however. The directive is based on a procedure in stages, since the harmonisation of turnover taxes leads in Member States to alterations in tax structure and appreciable consequences in the budgetary, economic and social fields. [13] Other Member States may also currently apply a reduced rate to the goods at issue, so that the objective of complete harmonisation has not yet been achieved in every case, irrespective of the application of the provision to Poland.

48. Furthermore, application of the derogations to Poland is also suggested by their spirit and purpose: despite advancing harmonisation, the citizens of Member States are still to be able to benefit from certain social advantages to which they have adapted. The

10 — See Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 34; Case C-384/01 *Commission* v *France* [2003] ECR I-4395, paragraph 28; Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraphs 15 and 16; and Case C-251/05 *Talacre Beach Caravan Sales* [2006] ECR I-6269, paragraph 23.

11 — Cited in footnote 7.

12 — OJ, English Special Edition 1969 (II), p. 412, as amended by Council Directive 85/303/EEC of 10 June 1985 (OJ 1985 L 156, p. 23).

13 — See recital 6 in the preamble to Directive 2006/112.

directive expressly allows the perpetuation of this situation, which in itself runs contrary to the harmonised system, in order to avoid social upheaval.

49. Immediate abolition of the reduced rate of VAT on children's clothing and children's footwear would have led to an abrupt increase in the burden of VAT on families with children. In order to avoid this the Member States were granted a concession in 1992 allowing them to retain their socio-politically motivated reduction in VAT on the supply of those goods, which had been in existence on the relevant date. On the date of its accession Poland was in a position comparable with that of States that had already been members of the Community in 1992.

50. This might admittedly bring about a competitive advantage to Polish economic operators because their turnover would receive a fiscal benefit. However, their position would be no different to that of taxpayers in other Member States that had already applied a reduced rate in 1991. Indeed, failure to apply the derogation to States acceding at a later date would result in those States receiving unequal treatment. They would, in principle, be subject to greater harmonisation than those that were Member States on the date of adoption of the legislation.

51. In the opinion of the Commission such greater harmonisation is justified in relation to new Member States because the later acceding Member States also adopted the *acquis communautaire* at a later stage. Application of the special arrangement to the Member States acceding in 2004 would diminish the degree of harmonisation achieved.

52. In so far as Poland has applied a corresponding reduced rate of VAT to the goods at issue since 1 January 1991, however, it is in the same position as the former Member States, the only difference being that such taxation in Poland was initially based solely on national law whilst the old Member States were allowed to continue to apply their corresponding arrangements by virtue of the authorisation given in the directive. Application of Article 115 of Directive 2006/112 to Poland in these circumstances leads neither to a reduction in the degree of harmonisation nor to increased harmonisation; it simply maintains the status quo.

53. Although it might appear desirable to abolish the numerous derogations permitted by the directive, the abolition should affect all Member States in the same way where their

situation is comparable with regard to any former arrangements.

54. The interim conclusion to be arrived at is therefore that Article 115 of Directive 2006/112 also affords Poland the right to continue to apply a reduced rate to the supply of clothing and clothing accessories for babies and of children's footwear if Poland was applying it on 1 January 1991.

1. Situation provided for in Article 115 of Directive 2006/112

55. It is therefore necessary to examine whether the conditions laid down in Article 115 of Directive 2006/112 for the application of a reduced rate to the supply of the goods at issue here are indeed satisfied in Poland.

56. The Commission has not lodged any submissions on this question in the application originating the proceedings – even in the alternative.

57. The Polish Government stated in its defence that a reduced rate of VAT applied to children's clothing and children's footwear in Poland on 1 January 1991 pursuant to the provisions of the Law on value added tax of 16 December 1972. The system of value added tax that was introduced as a result of the Law of 8 January 1993 on Goods and Services Tax was modelled on the Community system of VAT. In applying that legislation Poland has consistently applied a VAT rate of 7% to the goods at issue.

58. The Commission has waived its right to submit a pleading in reply because the defendant has not submitted any new arguments and the Commission has already gone into all of the grounds of defence raised to date. Poland's submission could therefore be deemed conceded by the Commission. Any later submission by the Commission would therefore, in principle, have to be rejected under Article 42(2) of the Rules of Procedure as being out of time.

59. However, in certain circumstances the Court has to examine the credibility of the defence submitted by the Polish Government even if the Commission has not disputed that submission. In order therefore to obtain further clarification on the legal position in Poland since 1 January 1991 the Court asked both parties to lodge written observations on whether the conditions governing the application of Article 115 of Directive 2006/112 in Poland had been fulfilled. They were to explain, in particular, the extent to which the tax levied in Poland on 1 January 1991 could be considered value added tax within the meaning of Article 115 of the directive and

whether a reduced rate applied at that time to the goods in question here.

60. The explanations provided by the Polish Government and the Commission in the course of that clarification measure by the Court cannot be considered pleas in law out of time under Article 42(2) of the Rules of Procedure and must therefore be taken into consideration in the following examination of the credibility of the Polish defence pleading.

61. It is therefore necessary to examine, first, whether the Polish turnover tax levied on 1 January 1991 on the supply of the goods at issue could be characterised as VAT for the purposes of Directive 2006/112. Secondly, it is necessary to clarify whether a reduced rate of tax has been applied since the relevant date.

B — *Characterisation of the tax as VAT for the purposes of the directive*

62. The Court of Justice has laid down the following essential characteristics of the common system of value added tax in its case-law on Article 33(1) of the Sixth Directive (now Article 401 of Directive 2006/112): [14]

— the value added tax applies generally to all transactions relating to goods or services;

— it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied;

— it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place;

— the amounts paid during the preceding stages of the process are deducted from the value added tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer.

63. As soon as a national tax fails to display one of these characteristics Article 3(1) of the Sixth Directive does not preclude its charge alongside value added tax. [15]

14 — Case C-475/03 *Banca popolare di Cremona* [2006] ECR I-9373, paragraph 28, and Joined Cases C-283/06 and C-312/06 *KÖGÁZ and Others* [2007] ECR I-8463, paragraph 37.

15 — *Banca popolare di Cremona* (paragraph 27) and *KÖGÁZ and Others* (paragraph 36).

64. However, this is to be considered in the context of the provision in Article 33(1). The spirit and purpose of that provision is to preclude the distortions of competition and breaches of the functioning of the single market which would arise if a national tax with the same characteristics were to be raised alongside harmonised value added tax – that is to say a parallel value added tax, as it were. [16]

65. The application of Article 115 of Directive 2006/112 to a Member State in Poland's situation is, by contrast, contingent only on the taxation of children's clothing and children's footwear being a tax on consumption similar to harmonised value added tax and on the social benefit resulting from the reduced rate of that tax consequently having comparable significance to the consumer as the charge to value added tax within the meaning of Directive 2006/112 at a reduced rate.

66. It must therefore be a general tax on the supply of the goods at issue the amount of which is proportional to the price and the final burden of which rests ultimately on the end consumer. On the other hand, the questions whether and in what manner the neutrality of the tax is assured at the various stages of the commercial chain prior to the supply to the end consumer are not issues of vital significance.

16 — See in this context *Banca popolare di Cremona* (paragraphs 21 and 24) and *KÖGÁZ and Others* (paragraphs 29 and 33).

67. It is apparent in this connection from the information regarding the legal position in Poland, which the Court has received from the written replies to its question and at the oral hearing, that the turnover tax charged on 1 January 1991 was a general tax that was assessed according to the value of the supply. The tax was admittedly levied on the basis of two laws – one on the taxation of supplies by State undertakings and one on the taxation of supplies by private undertakings. In both cases, however, the tax was configured in the same way.

68. In so far as the Commission in this context raises the objection that certain supplies were not subject to the tax, such as artistic or scientific work, for instance, this does not preclude the general nature of the tax. Directive 2006/112 ultimately also provides numerous tax exemptions based on socio-political grounds.

69. Nor is it relevant in this context that it was not until 1993 that Poland introduced a system of value added tax that, like the system under the directive, guaranteed fiscal neutrality of intermediate transactions until the supply is made to the end consumer by way of an input tax deduction mechanism. Before that, Poland applied a system of exemption for inputs in order to avoid the cumulation of VAT at different stages of the commercial chain.

70. As already mentioned, an evaluation of the tax relief depends solely on the end consumer perspective. From that point of view it is irrelevant what approach to regulation is employed to ensure that he has to pay a tax that is proportional to the added value applicable to the goods in the supply chain. What is more, in a few cases the directive also allows the Member States to apply certain derogations from the general machinery for the deduction of input tax. [17]

71. It is also necessary to examine whether a reduced rate of tax has been applied since 1 January 1991 to the supply of the goods at issue here.

72. It is to be concluded from the information available that the supplies in question were initially totally exempt from tax, that a tax rate of 5 % was applied from 4 May 1992 to 16 December 1992 and that the rate of tax since then has been 7 %. Furthermore, the normal rate was 20 % or 22 % respectively.

73. In that connection it must be noted, first of all, that the application of a tax exemption can also, in a wider sense, be equated with taxation at a rate of tax reduced to zero. The directive itself equates the *zero rating* found in some Member States, that is to say exemption with entitlement to deduct input tax, with the application of a reduced rate of tax that is lower than the minimum rates provided for under the directive. [18] The exemption applicable in Poland on 1 January 1991 for the supply of clothing and clothing accessories for babies and of children's footwear can therefore also be considered the application of a reduced rate within the meaning of Article 115 of Directive 2006/112. [19]

74. Nor is reliance on Article 115 precluded by the fact that Poland has not consistently applied a reduced rate in the same amount but charged the rate in two stages from 0 % to its present 7 %.

75. In that context, the Court has held that any national measure adopted after a date laid down by Community law is not, by that fact

17 — See, for example, Article 175(2)(2), Article 180 and Article 372 of Directive 2006/112.

18 — See, for example, Article 28(2)(a) and (b) of the Sixth Directive and Articles 110 and 113 of Directive 2006/112. For more detail on the concept of *zero rating* see my Opinion of 4 May 2006 delivered in Case C-251/05 *Talacre Beach Caravan Sales* [2006] ECR I-6269, points 22 and 23, and my Opinion delivered on 13 December 2007 in Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, point 27.

19 — As already stated, there was as yet no system for the deduction of input tax in force in Poland on that date. A multiple charge to tax was assured by an exemption for inputs, however, so that it is comparable here with *zero rating*.

alone, automatically excluded from the derogation laid down in the Community measure in question. [20] Where, after the relevant date, the legislation of a Member State is amended so as to reduce the scope of existing exemptions and thereby brings itself into line with the objective of Directive 2006/112, that legislation must be considered to be covered by the underlying derogation. [21]

76. Consequently, no objection can be raised if Poland has reduced the amount of the reduction since 1991 and thereby brought its taxation more into line with the normal rate of tax on the turnover in question provided for, in principle, by the directive.

77. In conclusion, the Republic of Poland is authorised under Article 115 of Directive 2006/112 to apply a tax rate of 7 % on the supply of clothing and clothing accessories for babies and of children's footwear. The proceedings brought by the Commission alleging that the Republic of Poland has infringed Article 98 of Directive 2006/112 must therefore be unsuccessful.

V — Costs

78. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Republic of Poland has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission should be ordered to pay the costs.

20 — See Case C-460/07 *Puffer* [2009] ECR I-3251, paragraph 85, referring to the judgment in Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 41.

21 — See in this context the judgment in *Puffer* (paragraph 85) referring to the judgments pronounced on Article 17(6) of the Sixth Directive in Case C-345/99 *Commission* v *France* [2001] ECR I-4493, paragraph 44, and Case C-409/99 *Metropol and Stadler* [2002] ECR I-81, paragraph 45. See also Case C-414/07 *Magoora* [2008] ECR I-10921, paragraphs 35 to 37.

VI — Conclusion

79. I therefore propose that the Court should:

'1. Dismiss the action;

2. Order the European Commission to pay the costs.'