JUDGMENT OF THE COURT (FIRST CHAMBER)
10 JUNE 1982 [1]

R. A. Grendel GmbH v Finanzamt für Körperschaften in Hamburg (reference for a preliminary ruling from the Finanzgericht Hamburg)

(Direct effect of directives — Value-added tax — Exemption)

Case 255/81

Tax provisions — Harmonization of laws — Turnover tax — Common system of value-added tax — Exemptions provided for in the Sixth Directive — Exemption for credit negotiation transactions — Possibility of individuals' relying on the appropriate provision in the event of the directive's not being implemented — Conditions (Council Directive 77/388, Art. 13 B (d) 1.)

As from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 B (d) 1. of Directive 77/388 to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply and the State could not claim, as against him, that it had failed to implement the directive.

In Case 255/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Hamburg for a preliminary ruling in the case pending before that court between

R. A. GRENDEL GMBH, represented by its Manager, Renate Grendel, residing in Hamburg,

1 — Language of the Case: German.

FINANZAMT FÜR KÖRPERSCHAFTEN IN HAMBURG [Tax Office for Corporations in Hamburg], Hamburg,

on the interpretation of Article 13 B (d) 1. of the Sixth Council Directive 77/388 of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

In the Federal Republic of Germany turnover tax is charged on any supplies or other services effected for consideration within the territory of a country by a person acting in the course of his business.

Article 4 (8) of the law on turnover tax [Umsatzsteuergesetz] of 16 November 1973 (Bundesgesetzblatt 1973 I, p. 1682) exempted from turnover tax *inter alia* the granting of credit, the negotiation of transactions involving securities and legal tender, and the management of credit; it did not grant exemption in respect of credit negotiation. The latter transaction was exempted from the charge to turnover tax from 1 January 1980 by the insertion of a new Article 4 (8) (a) by the law on the new version of the law on turnover tax and on the amendment of other laws (Gesetz zur Neufassung des Umsatzsteuergesetzes und zur Änderung anderer Gesetze) (Bundesgesetzblatt 1973, I, p. 1953).

R. A. Grendel GmbH, whose registered office is in Hamburg, negotiates credit of every kind. As such it was liable in 1979, under the legislation in force at the time, to pay turnover tax on the income which it received in the form of commissions for its activity as a credit negotiator. By notice of assessment of 3 September 1980, the Finanzamt für Körperschaften, Hamburg, fixed the turnover tax in respect of those services. After an unsuccessful objection against the notice of assessment R. A. Grendel GmbH brought an action on the grounds that according to Community law its turnover was no longer subject to turnover tax. It based its claim on Article 13 B (d) 1. of the Sixth Council Directive 77/388 of 12 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1).

That provision, which falls under Title X of the directive, dealing with exemptions, provides as follows:

"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse: . . .

(d) . . .

1. The granting and the negotiation of credit and the management of credit by the person granting it;".

R. A. Grendel GmbH submits that the obligation thus imposed on the Member States by that provision to exempt *inter alia* credit negotiation transactions from turnover tax was incorporated in German law as from 1 January 1979, since the final date for the actual implementation of Directive 77/388 in all the Member States, originally laid down by the directive itself as 1 January 1978, was postponed for the Federal Republic of Germany and six other Member States until 1 January 1979 by the Ninth Council Directive 78/583/EEC of 26 June 1978 on the harmonization of the laws of the Member States relating to turnover taxes (Official Journal 1978, L 194, p. 16).

The Finanzamt für Körperschaften in Hamburg did not accept that argument because as a matter of principle the Community directives did not give individuals a direct right to be treated in accordance with the directives. Such a legal right existed only where a directive did not allow the Member States any scope for the exercise of a discretion. That was not however the case as regards the contested turnover of R. A. Grendel GmbH.

By order of 4 September 1981 the Second Senate of the Finanzgericht Hamburg stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

"Is Article 13 B (d) 1. of the Sixth Council Directive of 17 May 1977 (77/388/EEC) to be interpreted as conferring on a taxable person, as from the date on which it took effect, a direct legal right to exemption from tax in respect of the transactions referred to therein, even where exemption is (not yet) provided for under national law on turnover tax?"

The order of the Finanzgericht Hamburg was lodged at the Court Registry on 18 September 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Government of the French Republic, represented by Mrs M. Aulagnon, Member of the Secretariat General of the Inter-Ministerial Committee for Questions of European Economic Cooperation in the Prime Minister's office, the Commission of the European Communities, represented by its Legal Adviser, P. Karpenstein, the Finanzamt für Körperschaften in Hamburg, the defendant in the main action, represented by its director, Mr Bültmann, and the Government of the Italian Republic, represented by A. Squillante, Head of the Department for Contentious Diplomatic Affairs, Treaties and Legislative Matters.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By order of 3 February 1982 the Court, pursuant to Article 95 (1) and (2) of the Rules of Procedure, referred the case to the First Chamber.

II — Written observations submitted to the Court pursuant to Article 20 of the Statute of the Court of Justice of the EEC

The *Finanzamt für Körperschaften* takes the view that taxable persons do not have direct rights under Community directives. An individual may rely on a duty imposed on a Member State by a directive only if it is a question whether the Member State has kept within the limits of discretion given it in implementing the directive. In the present case however the person concerned is requiring the direct application of a directive even before the Member State has incorporated it into its national law.

Even if (contrary to its view) a directive could give an individual a personal right this would not be so in the present case because the introductory sentence to Article 13 of Directive 77/388, like Part C (b) of that article, confers a discretion on Member States.

According to the first provision Member States may lay down the conditions for the purpose of ensuring the correct and straightforward application of exemptions and of preventing any possible evasion, avoidance or abuse. So long as those conditions are not laid down there the exemption cannot be granted under the law of the Member States and therefore cannot have "direct effect".

Article 13 C (b) of Directive 77/388 provides that Member States may allow taxable persons a right of option for taxation. They may also restrict the scope of such right of option and fix the details of its use. If the directive were held to be directly applicable even before its implementation by the Member States the latter would be deprived of the opportunity of granting the right of option.

The Finanzamt puts forward further arguments against holding that the taxable person has a personal right to exemption from tax. Those arguments are derived from the fact that the exemption is part of a system of tax charges and that the direct application of the Community directive without the adoption of national provisions would lead to legal uncertainty and ambiguity.

It emphasizes that liability to tax may according to the circumstances of the particular case sometimes be more favourable to the credit negotiator than exemption from tax.

Furthermore, exemption *a posteriori* for the transactions of credit negotiators would have far-reaching consequences both for the negotiators themselves and for the persons to whom the services are supplied since the negotiator would have to pay the turnover tax shown, albeit wrongly, on his invoices for the period of assessment to tax but his clients would lose the right of deduction and have to alter their records and tax declarations.

The direct application of Article 13 B (d) (1). of the directive would mean different taxation for whole series of transactions. Tax-payers ought not to be left in uncertainty as to the tax burden with which they have to reckon as would be the case if the taxation of the turnover of credit negotiators depended on a subsequent ruling by the European Court of Justice.

The *Government of the French Republic* takes the view that the question put to the Court by the Finangericht Hamburg should be answered in the negative.

It considers that the principle of direct applicability of Community directives as stated in certain judgments of the Court is not general in scope but is intended solely to ensure the "effectiveness" of directives. That means that direct applicability is confined to the "particular circumstances" and is not subject in particular to the more or less mandatory terms of the obligations imposed by the directives. Thus, for example, where a Member State has failed to take the requisite implementing measures for a directive within the prescribed period only provisions containing "unconditional and sufficiently precise obligations" are capable of being directly applied.

The caution exhibited in the decisions of the Court is particularly justified in the field of taxation in which, save in relation to customs duties, no provision is contained in the Treaty which is capable of having direct effect in the internal legal order of the Member States. In the same way the directives concerned with taxation are intended to harmonize the laws of the Member States and not to substitute a Community taxation system for the national systems. It is thus normal to find in those directives, alongside certain precise and mandatory provisions whose uniform implementation must be ensured, provisions the conditions for the implementation of which are left to the discretion of the Member States and which are, consequently, not intended to receive uniform application. Nor can uniformity be achieved in the latter cases

by means of direct applicability which is in no way justified by any reference to the "effectiveness" of such provisions.

Directive 77/388 leaves certain options to the Member States. Whether or not they have been the subject of national implementing measures the provisions of the directive cannot be directly applicable before the courts of the Member States.

The French Government moreover wonders whether the directive as a whole is not incapable of being directly applicable in the Member States before the adoption of the necessary national measures since the options left to the Member States are so numerous and inseparable from the other provisions.

Further, direct applicability was implicitly but necessarily denied by the Council when it took the view in adopting the Ninth Directive in relation to value-added tax on 26 June 1978 that it could, after the period for implementing Directive 77/388 had expired, extend the period by one year.

In any event direct effect cannot be attributed to Article 13 B and C (b). Those provisions imply that for the principle of exemption (or option) in respect of transactions carried out by credit negotiators to be respected Member States must on the one hand lay down the condition for the "correct and straightforward application" thereof and on the other hand fix if necessary the details for the use of the option. Those are clearly not "unconditional" and "sufficiently precise" obligations.

The French Government supplements its observations with the answer it gave in Case 8/81 *Becker* to a question put by the Court relating to the legal value of the declaration noted by the Council in the minutes of its meeting of 26 June 1978 on the occasion of the adoption of the Ninth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes which allow certain States to derogate from the period for implementing Directive 77/388. That declaration is as follows:

"The Council observes that the present directive cannot affect the vested rights of taxable persons between 1 January 1973 and the entry into force of this directive."

The French Government challenges the Commission's view that the Council has neither implicitly nor necessarily dismissed the possibility of giving, where appropriate, direct effect to certain provisions of Directive 77/388. It maintains that a simple perusal of the wording of the declaration shows that such cannot be the correct interpretation of the Council's intentions. The declaration in no way accords with the Commission's original proposal and bears no trace of the Council's intention to safeguard vested rights which may have been acquired before the entry into force of Directive 77/388. Moreover if certain provisions of that directive could have direct effect the derogation granted by the Council to seven Member States by means of the Ninth Directive would

be deprived of its effectiveness. Finally in the view of the French Government the legal value of a declaration recorded in minutes can in no way be compared with that of a mention in the directive.

The *Government of the Italian Republic* also suggests that the question put by the Finanzgericht Hamburg should be answered in the negative.

According to the Italian Government, although in a general way there can be no question of directives' having direct effect, it is nevertheless permissible in certain exceptional cases to attribute to provisions of a directive, not direct applicability which is exclusively a characteristic of regulations, but the possibility of giving rise to indirect effects in favour of individuals. In the case for example of a Member State which has failed to fulfil its obligations to implement a directive that State cannot assert against parties rights or powers under the national law which has not been adapted to the directive and conflicts with it. What is concerned is not however personal rights possessed by individuals which may be considered to be directly based on the provisions of the directive but rather an indirect effect residing in the fact that the Member State in default is prevented from asserting against parties national provisions which do not comply with the directive.

This negative and restrictive effect of directives with regard to Member States which have failed to fulfil their obligations to implement Community law is moreover subject to definite and precise conditions, namely:

It must be possible to consider the provision in question separately and independently of the rest of the directive;

The obligation which is imposed on the Member States must be clear and precise in every respect and not subject to conditions and must not leave the Member States any discretion with regard to its implementation.

In order to determine whether the said conditions are satisfied in this case the Italian Government considers it necessary to describe by way of a preface the common system of value-added tax as outlined in Directive 77/388.

The characteristic feature of the system is the complete neutrality of the tax in trade between taxable persons. Such neutrality is obtained by reason of the mechanism of deduction and passing on downwards as a result of which it is the ultimate consumer who has to bear the levy in favour of the tax authorities and who may not pass any of it on.

Under the system the provisions for exemption do not cease to have effect on application and it is therefore necessary to regulate their repercussions on the chain of fractioned payments and to introduce sufficient mechanisms for adaptation.

The first problem is to determine whether deduction continues to be allowed also on exempted transactions. In that regard, the Italian Government observes that apart from certain exceptions the Community directives have opted for a negative solution.

That solution has however a notable disadvantage: exempted products (and services) would ultimately be burdened with a hidden charge representing the

previous residual tax which cannot be deducted and would thus be more heavily burdened than they would have been had there been no exemption. That is one of the reasons for the approach adopted by the directives which is to restrict as far as possible the number of exemptions. Ultimately it must not be forgotten that the introduction of an exemption with the consequent exclusion of deduction involves considerable technical difficulties when an undertaking simultaneously engages in taxable and non-taxable transactions, and also has important consequences in respect of the "instrumental" obligations (accounting, invoicing and so forth) laid upon taxable persons.

In the view of the Italian Government the above considerations enable two important statements to be made:

They lead first of all to the observation that the common system of value-added tax established by Directive 77/388 constitutes an organic and indivisible whole so that its individual parts have a meaning only in the context of the system. The various provisions contained in the directive can in no event be interpreted as having independent meaning.

If reference is made to the directive as an indivisible whole any question of its possible direct effect can only be answered in the negative since the directive does not create sufficiently precise and unconditional obligations but leaves the Member States a wide discretion with regard to its implementation.

The answer could not be different even assuming that it were possible to break the organic unity of the system and to consider in isolation a single provision of the directive, in particular Article 13 B (d) 1. That article does not create sufficiently precise and unconditional obligations. It follows from that provision, according to which exemptions are granted by the Member States "under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse", that the directive does not intend exemption to be granted unconditionally, that is to say in such a way as to create the risk of fraud, evasion or abuse. The Community provision cannot therefore be said to have direct effect before the enactment of the provision of national law which is indispensable to its perfection.

The Italian Government observes further that the impossibility of relying, as against individuals, on a national rule which conflicts with a directive is subject to the condition that the national rule puts individuals in a worse situation than they would have been in had the directive been implemented. Exemption may nevertheless be favourable or unfavourable to the person concerned according to the circumstances as is shown by the fact that the directive has left it to the Member States whether they allow taxable persons to opt for taxation. It is certainly not possible to accept that the direct effect of a provision of a directive depends on the circumstances of each particular case. The only

acceptable solution is to exclude in all cases any direct effect of the provision.

The *Commission of the European Communities* considers that the question put for a preliminary ruling must be answered in the affirmative.

It recalls that on the adoption of the Ninth Directive it had expressly made its proposal for extending by one year the period for incorporating Directive 77/388 into national law subject to the reservation that "this derogation shall not prejudice the effects of the provisions of Directive 77/388/EEC [that is to say the Sixth Directive] which do not require the adoption of national implementing measures, if those effects have been produced before the date of notification of the present directive".

Although the Council did not expressly incorporate that reservation in the text of the Ninth Directive (which provided for extension) it nevertheless stressed in the declaration in the minutes that "... this derogation ... cannot affect the vested rights of taxpayers between 1 January 1978 and the entry into force of the Ninth Directive."

It did not therefore rule out that certain provisions of Directive 77/388 might have produced effects in national law even before the incorporation of the said directive into national law.

According to the Commission a careful reading of the wording of Article 13 B (d) 1. shows that no discretion is left to the Member States. A distinction should be drawn between the obligation to exempt, properly so called, and the measures which the States may take to ensure the correct application of the exemptions. Power to legislate is not granted to the States generally but solely "for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse". The use of those words clearly shows the aims to be pursued by the Member States. The measures which the said States may adopt are therefore only such as are necessary to achieve those aims, as for example the need to maintain separate accounts or additional obligations in respect of declarations or preservation which cannot alter the unconditional and mandatory nature of the exemptions. The German authorities themselves moreover did not consider that there was any discretion to qualify the exemption provided for in Article 13 B (d) 1.

The Commission is also of the opinion that it is not possible to infer from the right of option provided for in Article 13 C (b) any argument against the possibility of relying directly on the provision in Article 13 B (d) 1.

Although it is true that the States are free to introduce if they wish an additional benefit consisting in the possibility to opt, where appropriate, for taxation, that in no way affects the unconditional nature of the obligation to exempt. The option would have no meaning if it allowed Member States to decide also whether exemptions would be appropriate.

Finally the Commission considers that the opportunity to rely on the exemption provided for by the directive before its transposition into the national law of a Member State in no way involves any disadvantage for individuals who still

have the possibility of choosing the solution provided for by the national law which has not yet been adapted (in the present case: taxation subject to a right of deduction) if such a solution appears more favourable.

The clients of the credit negotiator, too, should not suffer from any disadvantage since even if the tax has been demanded by the negotiator it would be fair to allow them to deduct it. That solution has moreover been adopted by the relevant German authorities so that it is not possible to argue that Article 13 B (d) 1. does not have direct effect because it would involve disadvantages for the clients of credit negotiators.

The Commission proposes that the following answer should be given to the Finanzgericht Hamburg:

"Article 13 B (d) 1. of the Sixth Council Directive of 17 May 1977 on value-added tax must be interpreted as meaning that credit negotiators may rely on the exemption from tax contained therein before national authorities and courts at least as from 1 January 1979."

III — Oral procedure

By letter received at the Court Registry on 15 January 1982 the Council of the European Communities asked to intervene in this case. It was allowed to intervene for the purposes of the oral procedure since the written procedure had already been concluded.

The Commission, represented by its Legal Adviser, Mr Karpenstein, acting as Agent, and the Council, represented by its Legal Adviser, Mr Sacchettini, acting as Agent, presented oral argument at the sitting on 6 May 1982.

The Advocate General delivered his opinion at the same sitting.

Decision

1 By order of 4 September 1981, which was received at the Court on 18 September 1981, the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 13 B (d) 1. of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1).

2 According to Article 1 of the directive the Member States has to adopt the necessary laws, regulations and administrative provisions by 1 January 1978 at the latest. Since several Member States including the Federal Republic of Germany were not in a position to make, in good time, the necessary adaptations to their system of value-added tax, the Council, by the Ninth Council Directive 77/583 of 26 June 1978 on the harmonization of the laws of the Member States relating to turnover taxes, extended the said period until 1 January 1979.

3 It was not until the adoption of the Law of 26 November 1979 (Bundesgesetzblatt I, p. 1953), which took effect on 1 January 1980, that the Federal Republic of Germany implemented the Sixth Directive.

4 It is apparent from the order making the reference that the undertaking Grendel, which carries on business in Germany as a credit negotiator, was by notice of assessment of 3 September 1980 issued by the Finanzamt für Körperschaften [Tax Office for Corporations] in Hamburg, assessed to turnover tax on the income received in 1979 by way of commission for that activity, in accordance with the German law in force until 31 December 1979.

5 The undertaking objected and claimed exemption form the tax, relying on Article 13 of the Sixth Council Directive which, it alleged, was directly applicable. Article 13 B (d) 1. thereof provides that "the granting and the negotiation of credit" and "the management of credit by the person granting it" are to be exempt from tax. The Finanzamt took the view that the directive did not create a right capable of being asserted directly by an individual and refused to grant the exemption.

6 The Finanzgericht Hamburg before which the matter was brought stayed the proceedings and referred the following question to the Court for a preliminary ruling:

"Is Article 13 B (d) 1. of the Sixth Council Directive of 17 May 1977 (77/388/EEC) to be interpreted as conferring on a taxable person, as from the date on which it took effect, a direct legal right to exemption from tax in respect of the transactions referred to therein, even where exemption is (not yet) provided for under national law on turnover tax?"

7 The plaintiff in the main action did not appear in the proceedings before the Court. Its view was supported by the Commission which argued before the Court to the effect that individuals are entitled to claim the relevant exemption from tax. The Council too, which took part in the oral procedure, supported the plaintiff's view, albeit with certain reservations.

8 On the other hand the Finanzamt, supported by the Governments of the French and Italian Republics expounded a number of arguments designed to show that for the period, namely the tax year 1979, during which the national legal provisions implementing the directive in the Federal Republic of Germany had not yet entered into force, it was not possible to rely on the provision in question.

9 It must be pointed out that the questions raised in this case have already been resolved by the Court in its judgment of 19 January 1982 in Case 8/81 *Becker* [1982] ECR, which was concerned with the same issue.

10 The French Government and the Commission have confined themselves to repeating their observations in Case 8/81. The parties who were not involved in Case 8/81, namely the Italian Government and the defendant in the main action, have not put forward in their pleadings new arguments which were not considered in the above-mentioned judgment.

11 In those circumstances it is necessary to refer to the Court's ruling in its judgment of 19 January 1982, namely that as from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 of Directive 77/388 to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply, and that the State could not claim, as against him, that it had failed to implement the directive.

12 The judgment of the Court of 19 January 1982 in Case 8/81 *Becker* is to be annexed to the present judgment by way of supplement.

Costs

13 The costs incurred by the Government of the French Republic, the Government of the Italian Republic, the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the question submitted to it by the Finanzgericht Hamburg by order of 4 September 1981, hereby rules:

As from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 B (d) 1. of the Sixth Directive 77/388 of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment — to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply, and the State could not claim, as against him, that it had failed to implement the directive.

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 10 June 1982.

For the Registrar

H. A. Rühl
Principal Administrator

G. Bosco
President of the First Chamber