OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 4 December 1984 [1]

Mr President,
Members of the Court,

1. Subject-matter of the case

The subject-matter of this case is summarized in the Report for the Hearing as follows:

The case concerns a reference to the Court under Article 177 of the EEC Treaty by the London Value-Added Tax Tribunal for a preliminary ruling in the proceedings pending before that tribunal between Direct Cosmetics Ltd and the Commissioners of Customs and Excise on the interpretation of Article 27 (5) of the Sixth Council Directive (No 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.

The facts and written procedure

1. Article 27 of the Sixth Council Directive (No 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 L 145, p. 1), which comes under Title XV (Simplification procedures), provides:

'(1) The Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.

(2) A Member State wishing to introduce the measures referred to in paragraph (1) shall inform the Commission of them and shall provide the Commission with all relevant information.

(3) The Commission shall inform the other Member States of the proposed measures within one month.

(4) The Council's decision shall be deemed to have been adopted if, within two months of the other Member States' being informed as laid down in the previous paragraph, neither the Commission nor any Member State has requested that the matter be raised by the Council.

(5) Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph (1) above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph (1) above.'

2. In order to bring its fiscal legislation into line with the Sixth Directive, the United Kingdom *inter alia* amended paragraph 2 of Schedule 3 to the Finance Act 1972 by means of the Finance Act 1977, enacted on 29 July 1977. The latter act renumbered paragraph 2 and amended it to read as follows:

1 — Translated from the Dutch.

'3. Where it appears to the Commissioners:

(a) that the whole or part of a business carried on by a taxable person consists in supplying to a number of individuals goods to be sold, whether by them or others, by retail; and

(b) that those individuals are not taxable persons; and

(c) that it is necessary for the protection of the revenue to exercise their powers under this paragraph,

they may by notice in writing give directions to the taxable person for securing that the value by reference to which tax is charged on any such supply by him after the giving of the notice or after such later date as may be specified therein shall be determined as if the consideration given by any such individual for the supply were equal to the price at which the goods are sold by retail.'

3. On 28 December 1977 the United Kingdom, in accordance with Article 27 (5) of the Sixth Directive, notified the Commission of seven measures which it intended to retain, after the entry into force of the directive on 1 January 1978, as 'special measures for derogation' of the kind permitted by Article 27 (1). Among the measures listed were 'Special Anti-avoidance Valuation Provisions'. In an annex to its letter of notification, the United Kingdom explained those provisions in the following terms:

In the United Kingdom certain companies, in the field of cosmetics for example, sell their products to individuals who are outside the tax net for re-sale to the consumer. The Commissioners of Customs and Excise have power under Schedule 3, paragraph 2, of the Finance Act 1972 to prevent avoidance of tax on the retail margin by requiring sales to these individuals to be taxed on their retail value.

4. Paragraph 3 of Schedule 3, as set out in the Finance Act 1977, was further amended by section 14 (1) of the Finance Act 1981, which repealed subparagraph (c), and thereby, the condition concerning 'the protection of the revenue'.

5. Direct Cosmetics Ltd is a company which specializes in so-called 'direct' sales of cosmetic products which, in what are called 'special' situations, cannot be sold on the ordinary retail market. The cosmetics are essentially obtained from surplus stocks, goods which have not been sold, leftovers from special offers, discontinued lines and products wrapped or packaged for a particular occasion, such as Christmas, but which were not sold by the date on which the occasion occurred. Direct Cosmetics Ltd buys those products at low prices from manufacturers or wholesalers and re-sells them, in particular in hospitals, factories and offices, through a network of agents, generally women, on the following conditions: the product is sold to the agents at Direct Cosmetics' catalogue price; the agents sell the product to private customers at the same price, but if the sale price is paid within 15 days, the agents retain a 20% discount.

Since their turnover is below the minimum level at which liability to tax is incurred, Direct Cosmetics' agents are exempt from value-added tax. They therefore sell without charging value-added tax.

6. On 7 December 1982, a direction was made on Direct Cosmetics Ltd by the

Commissioners of Customs and Excise under paragraph 3 of Schedule 3 to the Finance Act 1972, as amended by section 14 of the Finance Act 1981, indicating that the value by reference to which Value-Added Tax would be charged on the goods which it sold to its agents would be taken to be its open market value on a sale by retail.

7. Direct Cosmetics Ltd challenged the legality of that direction before the London Value-Added Tax Tribunal, contending that the amendment to the Finance Act 1972 effected by the Finance Act 1981 constituted a major modification of domestic law and as such amounted to a new special measure within the meaning of Article 27 (1) of the Sixth Directive which should have been notified to the Commission under Article 27 (5). That failure to notify made the provision in question invalid.

8. By decision of 9 November 1983, the London Value-Added Tax Tribunal stayed the proceedings pending a preliminary ruling by the Court of Justice under Article 177 of the EEC Treaty on the following questions:

(1) Where national legislation notified under Article 27 (5) of Directive No 77/388/EEC of the Council 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) is amended by the deletion of a reference to the criterion of protection of the national revenue, does this amendment constitute a 'special measure' within the meaning of Article 27 (1) requiring the Member State to inform the Commission under Article 27 (2)?

(2) If the answer to the first question is in the affirmative, where a Member State fails to comply with Article 27 (2) of the directive by not informing the Commission of a special measure derogating from the provisions of Article 11 A 1. (a) of the directive requiring the authorization of the Council under Article 27 (1), does that failure give rights to an individual which may be relied on before the national courts of a Member State which rights would be founded directly upon the provisions of Article 11 A 1. (a)?

For a proper understanding of the case, the decision referring those questions to the Court and the other documents submitted to the Court by the London Value-Added Tax Tribunal must also be studied.

2. Written and oral observations submitted to the Court during the proceedings

The written observations submitted to the Court, which are set out in summary form in the Report for the Hearing, may be broadly summarized as follows:

On the basis of a narrow interpretation of Article 27 of the Sixth Directive — which the Court also applied in its judgment of 10 April 1984 in Case 324/82, *Commission* v *Belgium* — Direct Cosmetics Ltd comes to the conclusion that the first question should be answered in the affirmative. On the basis of relevant settled case-law, it concludes that the second question should also be answered in the affirmative.

In its written observations the Commission arrives at a rather ambiguous answer to the first question but, like Direct Cosmetics, concludes that the second question should be answered in the affirmative. The rather ambiguous nature of its answer to the first question becomes more comprehensible when considered against the background of the decision referring the questions to the Court and in the light of its arguments at the hearing.

The United Kingdom submits that both the first question and the second question should be answered in the negative.

The Court requested the parties to devote particular attention in their oral argument at the hearing to the question of the meaning to be attributed to the phrase 'special measures . . . n order to . . . revent certain types of tax evasion or avoidance' in Article 27 (1) of the Sixth Directive and, more particularly, to give their views on the question whether the entrusting by a taxable trader of the sale by retail of his products to persons lawfully exempt from taxation under Article 24 of the said directive may be said to constitute tax evasion or avoidance. The parties were further requested to take into consideration in their argument the Court's judgment of 10 April 1984 in Case 324/82, *Commission* v *Belgium*, to which I have referred.

At the hearing Direct Cosmetics pointed out with regard to those questions, first, that a completely orthodox and lawful form of trade was involved whereby normal competitive prices (competitive with those of a mail-order firm) were charged and that it was clear from the decision referring to the preliminary questions to the Court that there was also no intention at all to avoid or to reduce the VAT paid. It further relies on the narrow interpretation of the scope of Article 27 which the Court gave in Case 324/82 to support the view that Article 27 applies only to measures which are strictly necessary to prevent tax evasion or avoidance. As a result of the legislative amendment of 1981 it became clear that the measure in question had nothing more to do with those aims. In this regard Direct Cosmetics also relies on the national tribunal's finding that the measure was not designed to prevent tax evasion or avoidance but to protect 'the interests of the United Kingdom's Exchequer, the Communities' own resources and the orthodox retail trade'. The derogation from Article 11 of the directive established in this case was therefore not covered by Article 27 and Direct Cosmetics was therefore entitled to the application of a taxable base that was in accordance with Article 11 of the directive. Finally, Direct Cosmetics argued that, according to the national tribunal's decision and the United Kingdom authorities cited therein, the 1981 amendment clearly contained a substantive modification of the previous text notified to the Commission in 1977 because all reference to tax evasion or avoidance (whether objectively established or subjectively intended) had disappeared. In its reply it further pointed out that the competent United Kingdom tribunal found that its pattern of trading did not distort competition and that in any case (having regard also to the exemptions conferred, which all distort competition) distortion of competition by itself did not justify application of Article 27.

At the hearing the representative of the United Kingdom argued in the first place that no tax evasion was involved in this case, only tax avoidance within the meaning of Article 27 of the directive. In particular, tax was avoided in the sense that Direct Cosmetics' practices, though *per se* within the bounds of the law, caused a loss of revenue to the Exchequer. It was clear, he argued, from the preparatory work on the directive, referred to in paragraph 26 of the much-cited judgment of the Court in Case 324/82, that this form of tax avoidance was covered by Article 27 of the directive. Unless a direction was served on Direct Cosmetics, tax would be collected on a sales price lower than the normal retail price and this amounted to tax avoidance within the meaning of Article 27 of the directive. If there were no tax avoidance within the meaning of Article 27 of the directive and

no tax evasion either, there would be no special measure within the meaning of Article 27. Any system of trading with a sound commercial basis which made it impossible for the revenue authorities to charge tax at the final consumption stage on the taxable amount defined in Article 11 of the directive would then be valid. As far as the Court's judgment in Case 324/82 was concerned, the facts in this case were so different from the very general measure at issue in that case, which applied to an entire branch of trade, that it could not be applied by analogy in this case. The specific measures adopted in specific cases were entirely proportionate to the loss of revenue, that is to say, the difference between the tax on the supply of goods by Direct Cosmetics to its agents and the tax on the value of the goods, supplied by ordinary retailers to the final consumer. The provision at issue was itself not a general measure as dealt with in the judgment in Case 324/82. Its application was restricted to the individual cases in which the revenue authorities decide to issue a direction because of a tax risk and the provision was exactly proportionate in its practical effect to the objective of recovering the identified revenue lost. The United Kingdom also takes the view that the trading pattern of Direct Cosmetics is not in accordance with the basic principles of the First Directive on VAT, particularly the principle of neutrality and of freedom from distortion of competition or with the aim of covering all stages of the production and distribution of goods and the provision of services up to and including the retail stage. Regular sales to consumers through unregistered traders or agents or even sales found to be effected exclusively through such persons ought to be liable to VAT if, in accordance with Article 24 of the Sixth Directive, those intermediaries also qualify for tax exemption in the United Kingdom. In the reply the representative of the United Kingdom made it clear once again, as a very general point, that any trading pattern which excludes the final retail stage justifies the serving of a direction of the kind at issue in this case. In answer to a question which I asked at the end of the hearing he confirmed that the general philosophy of the VAT system of the United Kingdom is in fact that, except for incidental sales through unregistered traders, goods should be sold through registered retailers. As regards the interpretation of the expression 'for the protection of the revenue' (which was deleted by the 1981 legislative amendment), the representative of the United Kingdom admitted that the difference of opinion between the administration and the tribunal highlighted in the decision submitting the preliminary questions existed and that, in the tribunal's view, it was necessary under the 1977 text to prove an intention to avoid tax. In the tax authorities' view, if it is actually proven that there is an unintentional avoidance of tax, in the sense indicated above, this was sufficient for a direction to be issued.

At the hearing the Commission argued first of all that the expression 'tax avoidance' appearing in Article 27 of the Sixth Directive must be interpreted in its national context and that it is not a concept of Community law. It considered that a general definition of the expression 'special measures' was not possible either. It was possible, however, to establish general criteria — such as the rule of proportionality laid down by the Court in Case 324/82

— by means of which the validity of special measures of the kind in question must be judged. Another criterion, and one which plays an important part in the present case, is whether the measure is compatible with the fundamental principles of the Sixth Directive. Adopting its own practice of referring back to national law, the Commission considers that the interpretation advocated by the United Kingdom in this case is acceptable. Since Article 24 of the directive gives the Member States only a *right* to exempt small undertakings, it does not prevent exceptions to an exemption conferred in accordance with that article from being made in respect of certain kinds of commercial constructions, such as those in question in this case. As far as concerns the requirement under Article 27 (2) of the directive to notify special measures, the Commission admitted that the Court may decide whether an amendment of a notified provision is so different in substance that it turns the provision into a *new* special measure which thus requires fresh notification. Since the United Kingdom tribunal considered an amendment of the kind in question to be substantive, the Commission considered it difficult to maintain the different position it had adopted at an earlier stage in the procedure. At the time when it was notified, the Commission understood the 1977 text as having the sole aim of taxing undertakings such as Direct Cosmetics at the retail level, which the Commission considered to be in accordance with the aims of Article 27 of the Sixth Directive. Since the national tribunal takes the view that in 1981 a substantive change was made to the legislation and that the 1977 text was less far-reaching in its effect than the United Kingdom had told the Commission [2], the Commission could only conclude that the 1977 notification was defective, that therefore there was no valid derogation under Article 27 (5) and that therefore Article 11 of the directive was directly applicable.

Finally, another document necessary for a proper understanding of the scope of the provision in question is the report of the debate held on the provision by a Committee of the House of Commons a copy of which was sent to the Court by the United Kingdom representative in the proceedings by letter dated 18 October 1984 in compliance with the request made by the Judge-Rapporteur at the hearing. The report confirms, first of all, that in principle the provision in question has a very general scope covering many very different trades in which goods are regularly sold to the public through channels excluding registered retailers (i.e. not exempt from VAT). During the debate the Commons asked many questions on this matter which were partly along the same lines as the questions asked by the Members of the Court at the hearing. Secondly, the explanations provided by the Government during the House of Commons debate confirm that, besides being intended to yield the maximum possible revenue (in accordance with the aims of the law), the provision is also intended to protect registered retailers against competition from other distributers. It is also meant to protect manufacturers or wholesalers who sell goods through the usual trade channels against competition from manufacturers or wholesalers who sell goods through unregistered persons.

2 — I refer in this regard to p. 7 of the annex to the letter by which the national tribunal referred the questions to the Court.

3. The answers to the questions submitted

3.1. *The specific circumstances of the instant case*

In the previous part of my opinion I set out in relatively great detail the most important observations made at the hearing because they throw more light on the relevant questions than the written observations. Furthermore, the oral arguments advanced in support of the various positions of the parties could not, of course, be included in the Report for the Hearing.

The task of answering the preliminary questions in a way useful to the national tribunal is naturally made more difficult by the fact that they were influenced by very specific factual circumstances, three successive specific pieces of legislation, the specific direction served on Direct Cosmetics, to which the national proceedings relate, and a number of judgments on the particular point and on the interpretation of the relevant provisions. The questions must be understood against that complicated background of facts and national law and will need to be appropriately translated into an abstract form in the answers to be given by the Court.

As far as the facts of the case are concerned, I think that it is essential to draw an abstract distinction between situations in which a taxable person, without a direction being served on him, is taxed on the basis of his own published prices and situations in which a taxable person, without a direction being served on him, is taxed only on the price which he actually receives from his re-sellers (not being registered retailers) at the time of supply. In my view, the Court does not need to decide to which of those categories Direct Cosmetics actually belongs.

As far as concerns the three successive texts of the provision in question, adopted in 1972, 1977 and 1981, the first important point to note is that, according to the documents, the first text was applicable only where a *subjective intention* to evade or avoid tax was shown. The second text (adopted in 1977) applied a criterion for authorizing the issue of directions which was meant to be *objective*; they had to be 'necessary for the protection of the revenue'. However, that criterion was construed by the courts no differently than the subjective criterion previously applied (p. 7 of the decision submitting the preliminary questions). After that, the 1981 amendment removed all restrictions on the power to serve directions to cases in which there was a subjective intention to evade the tax law in question or in which, objectively speaking, such a consequence actually ensued. I share the Commission's view that this last amendment must undoubtedly be regarded as a major substantive modification of the 1977 provision. Unlike the Commission, however, I would draw that conclusion not only from the relevant decisions of United Kingdom courts but also from paragraph 2 of Schedule 3 of the Finance Act 1972, as amended in 1981. That provision now reads as follows:

'Where it appears to the Commissioners:

(a) that the whole or part of a business carried on by a taxable person consists in supplying to a number of individuals goods to be sold, whether by them or others, by retail; and

(b) that those individuals are not taxable persons,

they may by notice in writing give directions to the taxable person for securing that the value by reference to which tax is charged on any such supply by him after the giving of the notice or after such later date as may

be specified therein shall be determined as if the consideration given by any such individual for the supply were equal to the price at which the goods are sold by retail.'

It is clear from that text and the United Kingdom's explanatory comments that sales of goods to the public effected wholly or in part through channels other than the registered retail trade may be taxed as if they were sold by registered retailers. In my view, that could mean in this particular case that, when granting discounts to its re-sellers, Direct Cosmetics is taxed in such a way that a standard retail margin usual for the relevant goods is added to its actual sales price (catalogue price less discount granted) in order to calculate the taxable amount. It could even be concluded from the direction actually given to Direct Cosmetics (see p. 2 of the decision referring the preliminary questions to the Court) that in its case the taxable base may turn out to be even higher because the direction defines the taxable amount as the 'open market on a sale by retail'. That could mean that, in the case of bargain goods purchased by Direct Cosmetics at bargain prices, the retail sale value is calculated as if the goods were not bargain goods but similar kinds of goods obtained in the ordinary way by register retailers from the manufacturer or from the ordinary wholesaler dealing in his goods. However, in his answer to my last question at the hearing, the representative of the United Kingdom took a different and indeed a more reasonable view which is also to be found in the last paragraph of Part A of the decision referring the preliminary questions to the Court (p. 11). That view is that Direct Cosmetics should be taxed on the basis of its own catalogue prices. As I shall explain more fully later, such a view is contrary to Article 11 of the directive only in two situations. The first situation is where the discount is given to the non-taxable agent on the catalogue price immediately on supply and not thereafter and the second situation is where the agent charges the consumer a price which is lower than the catalogue price.

3.2. *The relevant Community provisions*

In this case, as in Case 324/82, Article 11 of the Sixth Directive is particularly relevant besides Article 27. The general aims of the First Directive referred to by the representative of the United Kingdom (which I cited earlier) also came into the argument.

In my view, it must be inferred from Article 11 A. (3) that, when the taxable amount is calculated for an undertaking such as Direct Cosmetics, its normal published price (catalogue price) must be used, thus without deducting discounts which it grants to its re-sellers only after the time of supply (which, from the documents, seems to be the case in this instance). Furthermore, I can find no support in Article 11 for the United Kingdom's view that — except for the exemptions provided for in Article 24 of the directive — goods should be sold to consumers through the orthodox (taxable) retail trade. In my view, Article 11 does not in any way bar direct sales of goods to consumers by manufacturers or wholesalers or their use of other, less expensive or more efficient sales channels than the orthodox

retail trade for selling goods to the final consumer. In that event it is of course possible under Article 27 for legal provisions ensuring that the last taxable person in the sales chain is taxed on a basis which includes the actual earnings of unregistered agents to be approved. As I have stated, I think that this is quite possible through the application of Article 11 (3) to situations such as those found in Direct Cosmetics' case, very often without resort to special measures within the meaning of Article 27. It is different in the presumably more frequent situations in which the last taxable person in the sales chain supplies goods to the next non-taxable agent or retailer at a price lower than the published price.

Furthermore, I cannot see why sales to the public through such other trade channels than ordinary registered retailers should be contrary to the basic principles of the First Directive, which, according to the preamble to the Sixth Directive, form the basis of the later directive as well. As is clear from the history and scheme of the First Directive, the aim of the principle laid down therein that the tax system should be neutral is precisely to ensure that, irrespective of the number and nature of the stages in the manufacturing and trading chain, the consumer evenutally has to pay tax only on the aggregate value actually added at all those stages. The big objection to the earlier 'cascade' system was that efficient intermediary stages were fiscally penalized whilst their integration — which was not necessarily efficient — attracted an artificial fiscal benefit (even if the total manufacturing and marketing costs were in fact made higher by integration). In setting out to prevent distortion of competition (not only in the limited sense of the term 'distortion' in Articles 101 and 102 of the Treaty), the sole aim behind the directive was not to allow benefits in manufacturing and distribution costs to be fiscally discouraged, as happened under the cascade system. Even if the 'orthodox' retail trade must operate with higher margins, its protection against other forms of distribution cannot possibly be considered an aim of the First Directive or of the Sixth Directive. When the fifth recital of the preamble to the First Directive states that VAT must be applied to the retail trade it is clear from the aforementioned aims that it means *every* form of retail trade and not only *one* specific form of retail trade.

As far as Article 27 of the directive is concerned, it is clear to me that the purpose of this provision is in particular to introduce procedures (which are different for existing and new special measures) to ensure that no derogations from the normal system laid down in the directive (namely in Article 11) are made which do not meet the criteria laid down in Article 27. Those safeguards should naturally also cover national measures such as that now in question which merely authorize the adoption of individual decisions for the purpose *inter alia* of preventing tax evasion or avoidance. Therefore a Member State cannot escape the application of those criteria by enacting a general enabling provision, allowing derogations from the normal system, whose practical effect can be determined only by applying the criteria laid down in Article 27 to the individual decisions adopted thereunder. Furthermore, where an existing provision notified to the Commission under Article 27 (5) and enabling steps to be taken

solely against practices whose aim or effect is the evasion or avoidance of tax is replaced by an enabling provision from which that restriction on its application has been removed, this clearly constitutes a *new* measure which must be notified under Article 27 (2). The same applies where a measure notified under Article 27 (5) later proves to be different in substance than was stated by the Member State concerned at the time of notification and is then replaced by a measure with a different wording. Furthermore, as the Commission rightly argued at the hearing, in some circumstances the original notification must then be considered invalid or at least of no legal effect under Article 27 (5). However, the national tribunal has not asked the Court any question on that point and I therefore consider it unnecessary for its answers to the preliminary questions to be cluttered with that additional complication.

Since a new measure may derogate from Article 11 (or from other provisions) of the directive only after the criteria laid down in Article 27 have been applied and the Council has subsequently given its authorization, new measures which derogate from Article 11 without having been notified or authorized under Article 27 (1) may not be applied to taxable persons. This legal consequence ensues from the consistent line of decisions of the Court on national measures derogating from applicable directives of which various examples were mentioned at the hearing.

As far as concerns the actual criteria laid down in Article 27 (1), I do not agree with the Commission that they are not concepts of Community law which can be uniformly construed by the Court. The Court will recall that this point was discussed at the end of the hearing with one of its members and that it emerged *inter alia* that not all the Member States have such concepts in their legislation. In my view, it is not the wording of the national measures concerned which matters; it is a question of comparing their text, avowed objectives and actual effects with the criteria laid down in Article 27. I agree with the Commission that the aim and effect of a national measure of the kind at issue in this case must be examined in the light of the text and scheme of the national law and that it is not advisable to lay down a general definition of the concept of 'special measures to prevent certain types of tax evasion or avoidance'. I think that a case-by-case approach is more effective, too. However, this certainly does not mean that the concepts involved are not concepts of Community law. It simply means that it must be possible for each special measure with which a Member State derogates from the Sixth Directive or each new special measure with which it intends to derogate from that directive to be examined by the Commission or the Council and, if necessary, by the Court on its own merits with reference to Article 27 of the directive. Furthermore, besides testing the special measure against Article 27 and the principle of proportionality laid down by the Court in its judgment in Case 324/82, it will also be necessary in my view to consider the basic principles of the Sixth Directive. It may also be necessary, however, to consider directives other than the Sixth Directive and the EEC Treaty itself. In this regard, the representative of the United Kingdom

considered, rightly in my view, that consideration of the First Directive was relevant in this case.

When testing the provision at issue against Article 27 I think that one is bound to conclude that a provision authorizing derogations from the provisions of the directive in individual cases may be authorized by the Council only if the 'types of tax evasion or avoidance' which it is intended to prevent and is capable of preventing are clear from its text. Since the provision at issue confers an unlimited power to adopt derogations from the directive in the sense indicated therein, this 'special measure' cannot be tested against the criteria laid down in Article 27 or against the principle of proportionality laid down in the Court's judgment in Case 324/82 or against the basic principles of the Sixth Directive or of other directives or of the EEC Treaty itself.

As far as concerns the reference to the principle of proportionality and the basic principles of the Sixth Directive, I think that reference to Articles 11 and 24 of the directive is of most importance in this case. If it is possible under Article 11 A. (3) of the Sixth Directive for an undertaking such as Direct Cosmetics to be taxed on the basis of its own published prices (without deduction of the discount granted to the agents *after* the time of supply), the application of the higher taxable amount prescribed by a provision such as that in question is, in my view, contrary to the principle of proportionality laid down in the Court's judgment in Case 324/82. Moreover, as I have stated, in so far as a provision of that kind also has the effect, or even the aim, of protecting the competitive position of registered retailers against less costly means of distribution, I consider it contrary to the principles first incorporated in the First Directive but which also underlie the Sixth Directive. I take a different view of a special measure which tends solely to tax the last taxable stage before the goods are sold to the non-taxable consumer, for example the wholesale stage, on the basis of an amount which includes (contrary in this respect to Article 11) the unregistered retailers' average trade margin (or, if this margin is lower, the average trade margin of the registered retailer) besides the actual price at which the wholesaler sells the goods to the unregistered retailer. In my view, Article 24 of the directive, which merely authorizes, but does not require, exemptions to be granted to the small undertakings referred to in that article, does not prohibit the revenue lost as a result of such exemptions from being shifted in the way described to the last previous taxable stage. Furthermore, I would in fact allow the Council discretion, under Article 27, to accept such measures to prevent proven loss of revenue as a result of such exemptions. The expression 'certain types of tax evasion or avoidance' could thus in fact be widely construed in the way suggested by the United Kingdom. However, I repeat that the cases I have considered here, which, to judge from the argument at the hearing and the debate in the House of Commons Committee, are probably the most numerous, are fundamentally different from cases such as those in which Direct Cosmetics is involved in which the last taxable person has his own published prices on which he grants a discount, on certain conditions, to the

selling agents only at a later stage (*after* the time of supply). In such a case derogation from Article 11 of the directive cannot be justified. Consequently, a provision granting unlimited discretion, such as that now at issue, may, in some circumstances, lead to possibly acceptable derogations from the basic principles of the First and Sixth Directives but in other circumstances to derogations from those principles which are without question unjustified.

3.3. *The questions submitted*

If I now compare all the important legal questions dealt with at the hearing and examined in this opinion with the questions raised by the national tribunal, the first point to note is that the second question is framed too narrowly. The provision at issue derogates not only from Article 11 A 1. (a) of the Sixth Directive but also enables derogations to be made from Article 11 A 3 of the directive. Furthermore, where Article 27 is concerned, the justification for possible derogations from the provisions of the directive must be investigated, although, in a case such as this and probably in most cases, the most important inquiry will probably be into the justification for derogations from Article 11. Therefore, in my view, the second question needs to be reformulated on those points in order for the Court's answer to be of use.

The wording of the first question presents greater difficulty. As appears from the many aspects of the case touched on during the proceedings, this question focuses closely on specific factual circumstances and specific provisions of United Kingdom law and decisions of United Kingdom courts. This does not make it easy to reformulate it in a more abstract form. Secondly, its wording does not fully reflect the important general legal questions which emerged from the hearing and my analysis thereof as decisively important for the eventual decision of the national tribunal. I therefore suggest that the Court should understand the national tribunal's first question as asking whether 'the amendment of national legislation notified under Article 27 (5) of Council Directive No 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) consisting in the deletion of the restriction contained therein on its scope to certain forms of conduct defined therein and regarded — rightly or wrongly — as tax evasion or avoidance (such as conduct which harms the legitimate interests of the revenue) constitutes a new "special measure" within the meaning of Article 27 (1) of the Sixth Directive requiring the Member State to inform the Commission under Article 27 (2)'. I consider all the elements of that reformulation essential in order to take account of all the relevant legal points raised.

3.4. *Suggested answer*

In conclusion, I suggest that the reformulated questions should be answered by the Court as follows:

The first question, in its reformulated form, should be answered in the affirmative.

The second question should be answered as follows:

'If a Member State has not given the relevant notification required by Article 27 (2) of the Sixth Directive and not obtained authorization under Article 27 (1), that Member State cannot rely, as against a taxable person, on the relevant national provisions if they derogate or authorize derogations from the provisions of the directive and in particular from Article 11.'