OPINION OF ADVOCATE GENERAL JACOBS
delivered on 13 July 1995 *

1. This case comes by way of a reference for a preliminary ruling by the Commissione Tributaria Centrale (Central Tax Court) which asks the Court to interpret Article 10(2) of the Sixth Council Directive of 17 May 1977 (77/388/EEC) 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 Directive'). [1] It concerns the moment at which value added tax (VAT) is chargeable for services rendered. The principal issue is whether national legislation which provides that the VAT on *all* services is chargeable at the moment of payment for the service is compatible with the Directive.

Relevant Community law

2. The Directive seeks, as its title indicates, to lay down a uniform basis of assessment of VAT. In particular, it seeks to lay down in so far as possible a common definition of the moment at which VAT becomes chargeable. It makes a distinction between 'the chargeable event', which is defined by Article 10(1)(a) of the Directive as 'the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled', and the date on which the tax becomes chargeable, which is defined by Article 10(1)(b) as 'when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay [...]'. The first subparagraph of Article 10(2) lays down the general rule that the chargeable event occurs and the tax becomes chargeable when the goods are delivered or the services are performed. However, by way of a derogation the third subparagraph of Article 10(2) allows Member States in some circumstances to delay the date when the tax becomes chargeable. That provision reads as follows:

'By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either:

— no later than the issue of the invoice or of the document serving as invoice, or

* Original language: English.
1 — OJ 1977 L 145, p. 1.

— no later than receipt of the price, or

— where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.'

3. The following provisions of the Directive are also relevant:

Article 11(C)(1) which provides:

'In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

However, in the case of total or partial non-payment, Member States may derogate from this rule.'

Article 22(3) which provides as follows:

'(a) Every taxable person shall issue an invoice, or other document serving as invoice in respect of all goods and services supplied by him to another taxable person, and shall keep a copy thereof.

Every taxable person shall likewise issue an invoice in respect of payments on account made to him by another taxable person before the supply of goods or services is effected or completed.

(b) The invoice shall state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions.

(c) The Member States shall determine the criteria for considering whether a document serves as an invoice.'

National legislation

4. The Italian law regulating the charging of VAT on the supply of services is found in the Decree of the President of the Republic No 633 of 26 October 1972 ('the DPR'). Article 6, third indent, provides:

'The supply of services is regarded as effected upon payment of the consideration.'

5. Article 21, fourth indent, states:

'The invoice must be issued in duplicate by the person who carries out the transfer or supplies the service, at the time of effecting the transaction, as determined by Article 6 ... .'

6. Article 41, fourth indent, states:

'A transferee or principal who, in the exercise of his activity, trade or profession, has acquired goods or services, without the issue of an invoice, or with the issue of an irregular invoice by the person having the obligation to draw up the invoice, must regularize the operation in the following manner:

(a) if he has not received the invoice within four months of the operation being effected, he must present within 30 days thereafter, at the competent office dealing with the matter, a document in duplicate in accordance with Article 21, and must at the same time pay the corresponding tax;

[...]'

The referring court has pointed out in its order for reference that, by an amendment to the DPR which was made in 1993 and which does not apply in the present proceedings, there is now a maximum period of one year 'after delivery' for issue of the invoice.

Facts

7. Italittica SpA, the applicant in the main proceedings, is an Italian limited company engaged in aquaculture. It commissioned the construction of a building by Sangiovanni Industrie Riunite ('Sangiovanni') to be used for its fish farming business. The companies concluded two contracts between the end of 1977 and 1979. The total cost of the construction was LIT 544 477 718. Sangiovanni issued three invoices for a total amount of LIT 206 262 058. On 17 October 1980, it issued a *pro forma* invoice for LIT 338 215 680, the outstanding amount. That invoice did not mention the VAT payable by Italittica and thus the relevant amount of VAT was not available for deduction. In fact, the *pro forma* invoice was used to obtain a grant for the construction costs from the regional authorities. In its balance sheet as at 31 December 1980, Italittica included the value of the works carried out and under the heading 'outstanding invoices' it included the debt payable to Sangiovanni in the amount shown on the *pro forma* invoice.

8. The Guardia di Finanza inspected Italittica's books and made a report dated 15 April 1982. Italittica subsequently paid the debt shown on the *pro forma* invoice and Sangiovanni issued an invoice in due form, showing the VAT, on 3 May 1982. The local VAT office in Trapani rectified Italittica's annual return for 1980 by a notice dated 31 July 1982 and imposed a pecuniary penalty of LIT 94.7 million for a breach of Article 41, fourth indent, paragraph (a), of the DPR. Sangiovanni was under a primary obligation to charge VAT to Italittica and to pay it to the VAT office, but by virtue of Article 41, fourth indent, paragraph (a), of the DPR Italittica was under a secondary obligation to pay the tax to the VAT office if an irregular invoice which did not mention the VAT had been issued, even though Italittica was the recipient, not the supplier, of the service. Italittica did not pay the tax because it believed that it was not chargeable until it paid the amount outstanding. Italittica was fined for a breach of that secondary obligation.

9. Italittica appealed against that fine to the Commissione Tributaria di Primo Grado (Tax Court of First Instance). It submitted, relying upon the third indent of Article 6 of the DPR, that the tax was not chargeable because it had not yet paid the amount outstanding. The Commissione Tributaria di Primo Grado upheld the appeal. The Commissione Tributaria di Secondo Grado (Tax Court of Second Instance), Trapani, confirmed the judgment of the Commissione Tributaria di Primo Grado. It held that, as Italittica had not paid the balance of the debt, according to Article 6 of the DPR the supply of services had not been 'effected' and therefore Article 41, fourth indent, paragraph (a), of the DPR did not apply.

10. The VAT office appealed to the Commissione Tributaria Centrale (Central Tax Court). That court considered that Article 6(3) of the DPR might be incompatible with the Directive, and in particular Article 10(2) thereof, because:

(a) its scope is not limited to 'certain transactions' or to 'certain categories of taxable persons' and it lays down in general terms that the fact of paying the consideration due for the service constitutes part of the chargeable event or at least the event which renders the tax chargeable;

(b) it lays down no maximum limit for the period between payment and the chargeable event for the tax and thus *de facto* allows the supplier and the principal, possibly by agreement between them, to place the moment at which the tax becomes chargeable within the tax period most convenient to them (which may also have an impact on other taxes);

(c) it lays down no rules concerning documentation and recording of the services completed and of amounts which have become 'payable' but have not been paid, and thus it may undermine the effectiveness of the supervision carried out by the administration and the tax authorities;

(d) it might deprive the 'chargeable event' of importance and change the time at which the tax debt actually arises, and this may have numerous repercussions (e.g. in insolvency proceedings);

(e) it might lead to distortions in the intra-Community market for services, in view of the differences between national provisions.

11. Accordingly, the Commissione Tributaria Centrale stayed the proceedings and referred the following questions to the Court:

(1) Whether Article 10(2) of Council Directive 77/388/EEC allows the Member States to determine that the 'receipt of the price' is to be regarded as the event which, for all supplies of services, renders the tax 'chargeable';

(2) Whether a Member State which avails itself of the 'derogation' provided for in Article 10(2) is required to lay down 'a specified period from the date of the chargeable event' within which the invoice or document serving as invoice must be issued even where 'receipt of the price' has not yet occurred;

(3) Whether a Member State which avails itself of the abovementioned 'derogation' is required to lay down detailed rules for documentation and recording of the completed service and the payment for it whenever the invoice or document serving as invoice has not been issued or 'receipt of the price' has not occurred.

The interpretation of the Directive

The first question

12. The first question asks whether a Member State is entitled, under the derogation contained in Article 10(2) of the Directive, to make tax chargeable upon receipt of the price for *all* supplies of services. That is the effect of Article 21 of the DPR, which requires that the invoice be issued at the moment when the service is effected, combined with Article 6 of the DPR, which provides that that moment is the time of the receipt of payment. Article 6 of the DPR applies to all services.

13. The Italian, French and United Kingdom Governments all submit that a true construction of Article 10(2) of the Directive allows a Member State to make tax chargeable upon receipt of the price for all services. (Although the Italian Government concludes that all the questions referred should be answered in the negative, it is clear from its submissions that it proposes that the first question should be answered affirmatively.)

14. Only the Commission submits that Article 10(2) of the Directive must be interpreted in a manner which precludes a Member State from providing for a derogation in the same terms as Article 6 of the DPR. It submits that the Italian legislation fails to distinguish between the 'chargeable event' and the moment when the tax becomes chargeable. According to the Commission, the derogation in Article 10(2) permits Member States to change the date when tax becomes

chargeable for some services only. The Italian legislation, on the other hand, has made a general rule of the exception and thus runs counter to the Directive.

15. At first sight it might be thought that the text of Article 10(2), in speaking of a 'derogation' from the general rule and in referring to 'certain transactions', supports the narrower interpretation. However, there is in my view nothing in the language of Article 10(2) which restricts the choice of Member States.

16. The use of the term 'derogation' can be explained, as the United Kingdom points out, by the fact that most Member States were content to apply the general rule, namely that the tax becomes chargeable when the goods are delivered or the services are performed. That choice therefore became the general rule. If certain Member States chose to apply an alternative criterion within the range of those authorized by Article 10(2), that can still be properly regarded as a derogation from the rule generally applied by other Member States.

17. Nor can it be argued that the reference in Article 10(2) to 'certain transactions' or 'certain taxable persons' necessarily means that only some, but not all, transactions or persons can be brought within the scope of the derogation. While the expression 'certain transactions' is indeed capable of meaning 'some but not all transactions', it can also mean 'clearly defined transactions', without implying any limit. As the United Kingdom points out, the word 'certain' is used elsewhere in the Sixth Directive, in one case in a sense intended to apply to some but not all cases, in another case in a sense plainly not intended to exclude all cases. The first case is Article 22(9), where (in all the nine language versions which were authentic at the material time) the expression 'certain obligations' is explicitly contrasted with the expression 'all obligations'. The second case is Article 27(1), whereby the Council may authorize Member States to introduce special measures in order 'to prevent "certain" types of tax evasion or avoidance'. (The German and Spanish texts use slightly different language.) That provision can hardly mean that Member States may not prevent all types of tax evasion; it must be taken to mean that the Member State which wishes to derogate must make it clear which types of tax evasion it is seeking to prevent.

18. It may be noted that a similar ambiguity can be found in a different context in the Treaty itself. Article 168a of the Treaty

provided for the establishment of a court of first instance. Before its amendment by the Treaty on European Union, it enabled that court to be given jurisdiction over 'certain classes of action or proceeding brought by natural or legal persons'. The question could therefore have arisen whether *all* actions brought by natural or legal persons could be transferred to the Court of First Instance.

19. In the present case, the ambiguity well illustrates the point that, even in the case of fiscal legislation, a textual approach is unhelpful. It is necessary therefore to resort to other means of interpretation.

20. The Commission bases its narrow interpretation of Article 10(2) of the Directive on the legislative history of that provision. It referred at the hearing to the provisions which Article 10(2) replaced, namely Article 6(4) of the Second VAT Directive. [2] The latter provided:

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

The Court held in *Mazzalai* v *Ferrovia del Renon* [3] that:

'Article 6(4) of the Second Council Directive [...] cannot be interpreted as permitting the moment when the service is provided to be identified with that when the invoice is issued or a payment on account is made if these transactions take place after the service has been carried out.'

The Court reached that conclusion because 'the paragraph in question makes no mention of the possibility of deferring that moment beyond the moment when the service or services are provided in full'. [4]

2 — Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of a common system of value-added tax (OJ, English Special Edition 1967, p. 16).

3 — Case 111/75 [1976] ECR 657.

4 — *Ibid.*, at paragraphs 15 and 16 of the judgment.

21. The Commission submits that it sought to adhere strictly to the principle that the tax became chargeable on performance of the service by allowing few exceptions to that principle in the proposal it made to the Council for the Sixth Directive. [5] Article 10(2) of the Directive, which replaces Article 6(4) of the Second Directive, should, according to the Commission, be interpreted in the light of that legislative history.

22. However, it seems to me that the Commission's argument could support the opposite conclusion. The very fact that the Council adopted Article 10(2) of the Directive without the limited exceptions which were contained in Article 6(4) of the Second Directive, as interpreted restrictively by the Court in *Mazzalai* and in the Commission's proposal, strongly suggests that the Council sought to allow the Member States much greater latitude to determine when the tax was chargeable. The French Government submitted at the hearing that the Council adopted Article 10(2) of the Directive as it is currently drafted so that certain Member States, such as Italy and France, could retain their legislation which provided that the tax on services was chargeable on payment.

23. There is a further reason for regarding the broader interpretation as correct. If the word 'certain' were taken to mean 'some but not all' instead of 'clearly defined' a serious problem would be created not only for Member States but also for taxpayers. The Directive nowhere specifies what the certain transactions or classes of taxable person are. It is thus impossible to know precisely what the Directive means if that interpretation is taken. It would also be impossible to decide on the sole basis of the Directive what proportion of transactions may fall within the derogation. Even if a proportion is somehow arrived at, it is impossible to learn from the Directive which transactions are meant to fall within the derogation, and which may not. Those difficulties are obviated by placing the other construction on 'certain' and taking it to mean 'clearly defined'. As long as a Member State makes it clear which supplies of goods and services come within the derogation, taxpayers will have the certainty that the categories selected to be within the derogation do so in compliance with the Directive.

24. The Commission submits that the Italian legislation fails to distinguish expressly between the chargeable event and the moment when the tax becomes chargeable and that such a failure means that the legislation makes a rule out of the exception. I disagree. I do not consider that the distinction between the chargeable event and the

5 — Supplement 11/73 to the Bulletin of the European Communities, page 13.

moment when the tax becomes chargeable is relevant to the exercise of the option in question, namely the one contained in Article 10(2), third subparagraph, second indent, of the Directive. That option is unlike the option contained in the third indent of that subparagraph, which expressly states that the chargeable event marks the start of a period at the end of which the tax is chargeable. The former option refers only to the moment at which tax is chargeable and does not mention the chargeable event. Reference to the chargeable event becomes redundant where that option is exercised since under the scheme of the Directive the moment at which tax is chargeable assumes sole significance. It determines the rate of tax applicable to a transaction (Article 12(1)(a)) and the moment at which the customer's right of deduction arises (Article 17(1)). It also determines the tax return on which the supplier and the customer are required to record the transaction (Article 22(4)) and hence the date for payment of tax by the supplier (Article 22(5)). Where a Member State opts to make tax chargeable on all services at the moment of payment, it is therefore unnecessary for it to make an express distinction in its legislation between the chargeable event and the moment when tax becomes chargeable.

25. The scheme of the Directive does not lead to the conclusion that the different options contained in Article 10(2), third subparagraph, should be given a strict interpretation. The general rule in Article 10(2) of the Directive is that the moment at which the tax becomes chargeable is when the goods are delivered or the services performed. The third subparagraph of Article 10(2) sets out a number of alternatives as to when the Member States may determine that the tax is chargeable not in the event of the delivery of the goods or the supply of services but at some other time. There is no reason to give preference to one alternative by interpreting the others strictly. Indeed, as the French Government submits, it may be more practical to provide that the tax on services becomes chargeable at the time of payment rather than at the time of the provision of the service. In many cases the tax authorities may find it easier to determine the date of payment than the date of performance of the service. A strict interpretation of the options in Article 10(2), third subparagraph, may thus prevent a Member State from selecting the most practical solution.

26. The referring court considered that a provision fixing the moment at which the tax becomes chargeable for all services at the time of payment enables the parties to the supply contract to choose the date when tax becomes chargeable. I do not consider that such an objection has any force. As the United Kingdom points out, until the tax becomes chargeable, it does not become deductible. Therefore the taxpayer has no incentive to delay the moment at which it

becomes chargeable if he wishes to benefit from any deductions. The French Government rightly observes that the time of payment is a matter of negotiation and agreement between the parties and it is most unlikely that the suppliers would wish to delay payment for services they have supplied. The choice of the date of payment as the moment when the tax becomes chargeable removes any incentive for the provider of services to delay liability to tax. The service provider himself can decide when services are performed, or he may do so in agreement with the other party. That means that he can, of his own volition or in agreement with the other party, decide when the tax becomes chargeable according to the general rule laid down in Article 10(2), first subparagraph, of the Directive.

27. The Commission submits that the wording of Article 11(C)(1) of the Directive supports its interpretation of Article 10(2) according to which the Italian legislation takes too broad a view of the derogation. I do not agree. I consider that the terms employed in Article 11(C)(1) are of no assistance in the interpretation of Article 10(2) in one way or another. Article 11(C)(1) concerns the reduction of the taxable amount and not the chargeable event or when the tax becomes chargeable.

28. Likewise, I do not consider that the obligation in Article 22(3)(a) of the Directive to issue an invoice (or other document serving as an invoice) is incompatible with setting the date at which tax becomes chargeable as the date of payment, as has been suggested. Those two matters are entirely independent. There is no logical nexus between the obligation to issue an invoice and determining that the tax is chargeable on the payment of a service. In any event, no matter how narrowly Article 10(2) is construed Member States may exercise the option in relation to some transactions: in those circumstances the obligation under Article 22(3)(a) to issue an invoice persists. In my view, Article 22(3) is entirely consistent with receipt of payment being the moment at which the tax becomes chargeable.

29. Even if on a proper interpretation of Article 10(2) the derogation cannot apply to all transactions, it would not follow that the Italian legislation is incompatible with the Directive. The French Government submits that the provision of services is a subcategory of the operations covered by the Directive, namely the supply of goods and services. In its view, whatever construction is placed on the word 'certain', Article 6 of the DPR complies with Article 10(2) of the Directive. It points out that French law also makes tax chargeable on the provision of services from the moment that payment is

made. I agree with the tenor of that submission. Article 6 of the DPR provides, as regards the supply of goods as opposed to services, that the tax becomes chargeable at the time of delivery of the goods (subject to a number of specific exceptions). Therefore, Article 6 of the DPR contains one rule for the supply of goods and another, different rule, for determining when the tax is chargeable for the supply of services. It is clear that the Italian provision treats services as a subcategory of the taxable transactions defined in Title V of the Directive and to which Article 10(2) applies.

30. Finally, it does not appear that the operation of the Italian legislation has any deleterious effects on the Community's own resources or on conditions of competition within the Community.

31. Accordingly, in my opinion, Article 10(2) of the Directive allows Member States to determine that receipt of the price is to be regarded as the event upon which, for all supplies of services, tax becomes chargeable, as Italy has done in Article 6 of the DPR.

The second question

32. By its second question, the referring court asks whether there is a maximum period by which the issue of the invoice can be delayed. It will be recalled that Article 21, fourth indent, of the DPR provides that the invoice must be issued at the time of effecting the transaction, which time is determined by Article 6 of the DPR. The combination of Articles 6 and 21 of the DPR means, in the case of the supply of services, that the invoice should be issued at the time of payment. No other time-limit is set for the issue of the invoice.

33. The referring court considers that the absence of any other time-limit for the issue of the invoice allows the parties to choose the most convenient moment for the payment of the tax. I am of the view that such an objection carries no force for the reasons set out above (paragraph 26).

34. The French Government submits that, since Article 22(3) of the Directive, which

contains provisions on invoices, does not expressly lay down a time-limit for its issue, the invoice should be issued on the occurrence of the chargeable event. It submits that practical considerations may dictate that Member States allow taxable persons to issue an invoice at a later stage. If a Member State departs in that manner from the general rule that the invoice should be issued on the occurrence of the chargeable event, it should lay down expressly the time within which it must be issued. It also submits that that is so independently of whether a Member State has availed itself of the possibility of the derogation contained in Article 10(2) of the Directive.

35. I do not share the French Government's view on this point. It may be noted that the Directive defines precisely the moment when the chargeable event occurs and the moment when the tax becomes chargeable. As I have already explained, those moments are important under the scheme of the Directive since they determine the rate of tax, the return on which the supplier must record the transaction and hence the date of payment and the moment when the customer's right of deduction arises. By contrast the Directive does not define the precise moment when an invoice must be issued. Article 22(3) merely provides that an invoice must be issued by a taxable person in respect of all goods or services supplied by him to another taxable person and in respect of payments on account received by him from another taxable person. The absence of any indication of the moment when an invoice must be issued reflects the fact that that moment is generally of secondary importance under the scheme of the Directive. Taxable persons are required to issue invoices in respect of supplies made to taxable persons in order to ensure that documentary evidence is available in the records of suppliers and their customers supporting the entries which they make on their tax returns for a given period with respect to output tax chargeable on supplies and input tax deductible on purchases. Since under the second subparagraph of Article 10(2) tax becomes chargeable on payments on account notwithstanding the fact that no supply has yet been made, taxable persons are also required to issue an invoice in respect of such payments. The requirements regarding invoices are linked to the general obligation imposed on taxable persons by Article 22(2) to keep accounts in sufficient detail to permit application of the tax and inspection by the tax authority. It may be presumed that taxable persons will keep contemporaneous records, and in any event they should, at the very latest by the date on which they are obliged to submit their periodic tax returns, have in their possession copies of sales invoices and purchase invoices justifying their declared net liability to tax. I do not however see any reason to interpret the Directive as laying down a specific date by which an invoice must be issued or as requiring a Member State to lay down such a date. Nevertheless, as the United Kingdom suggests, Member States may do so under Article 22(8), which confers a general power on Member States to impose other obligations which they deem necessary for

the correct levying and collection of the tax and for the prevention of fraud.

36. The question nevertheless arises whether, where a Member State exercises its option under the first indent of the third subparagraph of Article 10(2) to link the moment when the tax becomes chargeable to the invoice date, it should specify the date by which an invoice must be issued; the same question arises in relation to the second indent of that subparagraph since delaying the issue of an invoice would normally delay the moment of payment and hence the moment when tax becomes chargeable under that provision. However, those provisions do not expressly require Member States to lay down a date for the issue of invoices. Nor does it seem essential for them to do so. First, a Member State may, if it so wishes, exercise its option under the third indent of the same subparagraph to lay down a time-limit upon expiry of which the tax becomes chargeable whether or not an invoice has yet been issued. Secondly, from a practical viewpoint the rapid issue of an invoice will generally be in the interests of the supplier, whose main concern will be to receive payment as quickly as possible. A taxable customer will be reluctant to pay a supplier until he has received an invoice in due form entitling him to deduction of the tax charged. It is true that in the event of a change of tax rates there might be scope for avoidance of tax by manipulation of the moment at which tax becomes chargeable. However, Article 12(2) of the Directive makes express provision for this by allowing Member States to effect adjustments in the cases provided for in the second and third subparagraphs in Article 10(2) in order to take account of the rate applicable at the moment when the goods or services were supplied.

37. There seems therefore to be no compelling reason for interpreting the Directive as stipulating a date for the issue of invoices or requiring a Member State to lay down such a date. Accordingly, it is sufficient to leave the Member States a degree of discretion in this matter, subject to compliance with their general obligation to ensure proper application of the tax. That is particularly so since invoicing arrangements may vary widely according to the undertaking or category of trade concerned. A restrictive view of the Directive might interfere unduly with normal commercial practice.

38. Accordingly, I am of the view that a Member State which avails itself of the derogation contained in Article 10(2) of the Directive is not under any obligation to specify a date by which an invoice must be issued.

The third question

39. The third question asks whether the Directive requires a Member State to lay down rules concerning documentation of the performance of services and of payment where it avails itself of the derogation contained in Article 10(2) of the Directive.

40. Article 22 of the Directive, concerning obligations of persons liable for payment in domestic transactions, lays down few specific rules concerning the documentation to be kept by taxable persons. Apart from certain requirements regarding the issue and content of invoices and returns, it merely imposes on taxable persons the general obligation in Article 22(2) to keep accounts in sufficient detail to permit application of the tax and inspection by the tax authority. In addition Article 22(8) confers on the Member States the power to impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.

41. The Directive therefore confers upon the Member States considerable discretion in formulating the rules necessary for the proper application of the tax. That broad discretion seems appropriate since Member States will need to take into account a variety of considerations in formulating their rules, including differences in the size of undertakings and type of business activity and particular requirements relating to accounting records laid down by company law or legislation on direct taxation. In addition to formulating rules on accounting records, Member States may be expected to carry out periodic inspections to ensure that taxable persons comply with such rules. They may, particularly in the case of smaller undertakings which do not have satisfactory internal accounting controls, wish to supplement their inspections by the use of techniques for the analysis of accounts.

42. Against that background it would make little sense for the Court to interpret the Directive as requiring a Member State to impose particular requirements not expressly provided for in the Directive. What is important is that the Member State should ensure, as far as possible, that taxable persons record and account for tax on all their supplies of goods and services and claim deduction of VAT only on legitimate business expenditure. In my view the Directive should be interpreted as leaving them considerable discretion in formulating rules to achieve that aim.

43. Accordingly, I am of the view that the Directive does not require a Member State to

lay down rules for documentation and recording of the completed service and the payment for it other than to require the issue of an invoice in accordance with Article 22(3). Whether or not the Member State has availed itself of the derogation in Article 10(2) is, in my view, without bearing on this question.

The consequences of any incompatibility of the Italian legislation

44. It follows in my view that the Italian legislation is not incompatible with the Directive. Even if it were, it would not be open to the Italian authorities to invoke the Directive in order to justify imposing a penalty on Italittica where Italittica had complied with the Italian legislation.

45. It is clear that directives may only be relied upon by individuals against the organs of the State, in the absence of proper implementing legislation, not *vice versa*. The administration of a Member State cannot therefore disregard its own legislation which it considers incompatible with a directive in order to impose an obligation on an individual. The Court confirmed in *Faccini Dori* v *Recreb* [6] that, in the absence of measures of transposition, a directive may not be relied upon by an individual to claim a right against another individual and enforce such a right in a national court. *A fortiori*, the State and its organs cannot invoke a directive so as to impose obligations upon individuals in the absence of proper implementing measures. [7]

46. Moreover it cannot be suggested that, contrary to its apparent meaning, the Italian legislation must be construed so as to be consistent with the Directive. The general rule that national courts are required to interpret their national law in the light of the wording and purpose of a directive does not apply where the effect of interpreting national legislation in that way would be to impose criminal liability in circumstances where such liability would not arise under the national legislation taken alone. The reason for that limitation is that an extensive interpretation of penal legislation runs counter to the fundamental principle of legality (*nullum crimen, nulla poena sine lege*). [8]

6 — Case C-91/92 [1994] ECR I-3325.

7 — Case 14/86 *Pretore di Salò* v *Persons Unknown* [1987] ECR 2545, paragraphs 19 and 20 of the judgment.

8 — Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13 of the judgment and my Opinion in Joined Cases C-206/88 and C-207/88 *Vessoso and Zanetti* [1990] ECR I-1461, paragraphs 24 to 26.

Conclusion

47. Accordingly I am of the opinion that the questions referred should be answered as follows:

(1) Article 10(2) of Council Directive 77/388/EEC allows the Member States to determine that the receipt of the price is to be regarded as the event which, for all supplies of services, renders the tax chargeable.

(2) A Member State which avails itself of the derogation provided for in Article 10(2), third subparagraph, second indent, is not required to lay down a specified period from the date of the chargeable event within which the invoice or document serving as invoice must be issued even when the price has not been paid.

(3) A Member State which avails itself of the abovementioned derogation is not required to lay down detailed rules for documentation and recording of the completed service and the payment for it whenever the invoice or document serving as invoice has not been issued or the price has not been paid.