OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 20 March 1997 *

1. The Court is asked in these joined preliminary references to determine the compatibility with Community law, and particularly with the Sixth VAT Directive, of a form of preventive attachment exercised by a national fiscal authority over the reimbursement of amounts of value added tax (hereinafter 'VAT') ostensibly overpaid by a taxable person for certain declared VAT periods. [1] Does such an attachment come within the scope of the Sixth Directive, or should it instead fall to be classified as a tax collection measure within the exclusive competence of the Member States? Central to all of the references is the potential application of the Community-law principle of proportionality.

I — Legal background

A — *Community legislation*

2. The relevant provisions of the Sixth Directive are contained essentially in Title XI, entitled 'Deductions', comprising Articles 17 to 20. Under Article 17 a taxable person is entitled to deduct from the VAT which he is liable to pay on his taxable supplies the VAT due or paid in respect of the goods and services supplied or to be supplied to him by another taxable person. The rules governing 'the exercise of the right to deduct', which I shall quote as far as relevant, are set out in Article 18. Article 18(1) deals with the formal evidential requirements, such as the obligation to hold the relevant invoices. Article 18(2) provides that:

'The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.'

Where the requirements of Article 18(1) and (2) are not respected, Article 18(3) permits the Member States to 'determine the conditions and procedures whereby a taxable person may be authorized to make a deduction'. Paragraph 4, which is central to the instant cases, provides:

* Original language: English.

1 — 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 (hereinafter 'the Sixth Directive'); OJ 1977 L 145, p. 1.

'Where for a given tax period the amount of authorized deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.'

3. Title XIII of the Sixth Directive concerns the 'obligations of persons liable for payment'. Article 22 deals with taxable persons' 'obligations under the internal system', and includes obligations regarding record-keeping, tax returns and accounting. The first subparagraph of Article 22(4) obliges taxable persons to 'submit a return within an interval to be determined by each Member State', which 'may not exceed two months following the end of each tax period'. The second subparagraph of Article 22(4) provides that:

'The return must set out all the information needed to calculate the tax that has become chargeable and the deductions to be made, including, where appropriate, and in so far as it seems necessary for the establishment of the tax basis, the total amount of the transactions relative to such tax and deductions, and the total amount of the exempted supplies.'

Under Article 22(5) the taxable person is obliged in principle to 'pay the net amount of value added tax when submitting the return', unless the Member State has specified a different payment date. Article 22(6) permits Member States to require taxable persons 'to submit a statement, including the information specified in paragraph 4, ... concerning all transactions carried out the preceding year [and which] must provide all the information necessary for any adjustments'. Article 22(8), which is of particular relevance as regards national tax collection measures, provides:

'Without prejudice to the provisions to be adopted pursuant to Article 17(4), *Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud*' (emphasis added).

4. Article 27, the sole article of Title XV, entitled 'Simplification Procedures', of the

Sixth Directive, provides a procedure whereby Member States may apply for derogations from the provisions of the Directive. Article 27(1) is worded as follows:

'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 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.'

B — *Belgian legislation*

5. Article 18(4) of the Sixth Directive is implemented in Belgian law primarily by Article 47 of the BTW-Wetboek (VAT Code, hereinafter 'the Code'), which provides that the excess of authorized deductions over VAT due for a particular tax period shall be carried forward to the following tax period. Article 76(1)(1) of the Code, as amended by the Law of 28 December 1992, [2] provides for the refund, where it is requested by the taxable person, of any excesses which are outstanding at the end of the calendar year in accordance with the conditions to be established by royal decree. Under subparagraph (2), the Crown may permit, subject to such conditions as it sees fit, the grant of refunds even before the end of the calendar year. Subparagraph (3) is central to the disputes involved in the present references and is worded as follows:

'With respect to the requirements laid down in the first and second subparagraphs, provision may be made by Royal Decree for a withholding in favour of the VAT, Registration and Property, Authority, [3] with the effect of a preventive attachment within the meaning of Article 1445 of the Judicial Code.'

6. The new form of attachment was introduced by Article 7 of the Koninklijk Besluit (Royal Decree) of 29 December 1992, [4] which inserted, *inter alia*, a new Article 8/(1)(3) into what is known in Belgium as Koninklijk Besluit nr. 4 of 20 December 1969 on refunds in respect of VAT (hereinafter 'Royal Decree No 4'). [5] For the purposes of the present references, the two most important amendments concerned subparagraphs (4) and (5) of Article 8/(1)(3).

7. However, it is important to note that, under subparagraph (1) of Article 8/(1)(3) of Royal Decree No 4, any excess claimed as being due by a taxable person based upon his return is deemed to be claimed only subject

2 — *Belgisch Staatsblad*, 31 December 1992.

3 — *Administratie van de B. T. W., Registratie en Domeinen*, hereinafter 'the VAT administration'.

4 — *Belgisch Staatsblad (vierde uitgave)*, 30 December 1992. The French-language text was subsequently amended and is now set out in the version inserted by Article 6 of the Royal Decree of 14 April 1993 (*Moniteur Belge*, 30 April 1992). The amended Royal Decree No 4 became effective on 1 January 1993 in accordance with Article 13 of the Royal Decree of 30 December 1992.

5 — *Belgisch Staatsblad*, 31 December 1969.

to payment of any unpaid tax debts. Article 8/(1)(3), subparagraph (4) provides:

'If the tax debt referred to in the first paragraph does not constitute, in favour of the administration, a claim which is, in whole or in part, certain, payable and definite, which is *inter alia* the case where it is disputed or has given rise to a distress warrant within the meaning of Article 85 of the Code execution of which is opposed by an objection within the meaning of Article 89 of the Code, the tax credit shall be retained by the Administration up to the amount of the tax claimed. That retention shall take effect as a preventive attachment until the dispute has been definitively resolved, either in the administrative procedure or by a final court judgment. The condition laid down by Article 1413 of the Judicial Code shall be deemed to have been satisfied as regards the implementation of that retention.' [6]

Article 8/(1)(3), subparagraph (5) provides:

'If, with regard to the balance refundable resulting from the declaration referred to in Article 55(1)(3) of the Code, and in respect of which the taxable person has or has not opted for a refund, there are either serious grounds for suspecting or evidence that the aforesaid declaration or declarations concerning previous periods contain inaccurate information and if those grounds or evidence point to the existence of a tax debt the actual existence of which cannot, however, be established before the time for the payment order or for the operation equivalent to payment, no payment order shall be made in respect of the balance nor shall the balance be carried forward to the following tax period, and the tax credit shall be retained in order to permit the administration to verify the accuracy of the information.'

The effect of the application of a retention or withholding ('inhouding') under either subparagraph (4) or (5) is to attach provisionally the VAT debt which would otherwise either be carried forward to the next VAT period or refunded to the taxable person in accordance with Article 8/(1)(2).

8. Under subparagraph (6), the serious presumption or evidence referred to in subparagraph (5) must be established by 'processen-verbaal' ('(official) minutes') [7] drawn up in accordance with Article 59(1) of the Code. [8] Subparagraph (7) provides that the retention referred to in subparagraphs (4) and (5) shall have the effect of a preventive attachment and shall continue until the proof contained in the minutes referred to in subparagraph (6) is refuted or until the accuracy of the relevant transactions emerges from information obtained from other Member States under the cooperation mechanisms established by Community law. Subparagraphs (8) and (9) deal with the notification and entry into effect of a preventive attachment. The

6 — Article 1413 of the Judicial Code would appear to concern the onus of establishing the urgency of interim measures when they are sought.

7 — There is no precise English translation of the notion of a 'proces-verbaal' (procès-verbal being the equivalent term in the French text of the Belgian legislation). It may variously be translated as an official report, record or minute, but it is important to note its evidential value which is described in footnote 8 below. I have chosen for the purposes of this Opinion to adopt the translation 'official minute(s)', since 'minutes' is the term used in the translation of 'procès-verbal' that appears in the English version of Article 47 of the Rules of Procedure of the Court.

8 — Under Article 59 of the Code a 'proces-verbaal' is presumed to be authentic until the contrary is proved.

affected taxable person may contest the attachment in accordance with Article 1420 of the Judicial Code before a *beslagrechter* (judge hearing attachment proceedings). [9] Nevertheless, a *beslagrechter* is not permitted under subparagraph (10) to order the lifting of such an attachment where the evidence contained in the relevant official minutes has not been refuted, where information requested from other Member States has not been obtained, or during an investigation by either the *Parket* (office of the Public Prosecutor) or an *onderzoeksrechter* (examining magistrate). Under subparagraph (11), when the attachment of the tax credit is lifted, it may be set off in accordance with subparagraph (2), without any formalities being necessary, against a certain, payable and definite tax debt due to the administration.

II — Factual background and procedure

A — *The facts*

9. The factual circumstances of each of the references are different. Hence, in the interests of clarity, I shall set out briefly an individual description of each case.

(i) Case C-286/94 *Garage Molenheide*

10. The plaintiff company operates a garage business in Antwerp. It submitted a VAT declaration for the period 1 January 1993 to 31 March 1993 claiming the right to a deduction in the sum of BFR 2 598 398. However, an inspection carried out at the plaintiff's premises led the local VAT administration to raise serious doubts about the truthfulness of the VAT declaration. The plaintiff was informed by an official minute sent to it by registered letter on 15 June 1993 that, in view of the doubts which had arisen, the tax collector was going to retain any ostensible VAT refund due on the basis of the plaintiff's declaration. On 16 June 1993 the plaintiff received a notice of retention from the relevant tax collector, alluding to serious grounds for suspecting the accuracy of one or more of the declarations submitted by the plaintiff. Essentially, the VAT administration suspects the plaintiff of having engaged in fictitious circular sales which artificially created an apparent credit for the first quarter of 1993. The retention affecting the sum claimed as a credit by the plaintiff was stated to be protective. In effect, it froze the sum pending a definitive administrative or judicial determination of whether the supposed credit was genuine. The legal basis of the retention was the amended version of Article 8/(1)(3)(5) of Royal Decree No 4.

11. On 23 July 1993, the plaintiff brought an unsuccessful appeal against the retention to the Rechtbank van Eerste Aanleg te Antwerpen (Court of First Instance, Antwerp) with a view to setting aside the attachment. It then appealed to the Hof van Beroep te Antwerpen (Court of Appeal, 13th Chamber, hearing civil matters, hereinafter 'the national court'). The plaintiff submitted that the

9 — The equivalent expression in the French version of the Decree is 'juge des saisies'. For convenience, and having regard to the fact that Dutch is the language of procedure, the Dutch expression will hereinafter be employed. The plural form, *beslagrechters*, will, where necessary, be used.

attachment prescribed in Article 76(1)(3) of the Code and in Royal Decree No 4 was contrary to Articles 18(4) and 27 of the Sixth Directive. Having heard the opposing arguments of the Belgian State advocate, the national court decided to refer the following question to the Court for a preliminary ruling:

'On a proper construction of Article 18(4) of the Sixth VAT Directive, may a Member State refrain from refunding substantial VAT credits of its residents or carrying them forward to a following tax period, and instead attach them as a protective measure under national rules owing to the existence of serious grounds for suspecting tax evasion, without creating a definitive legal title in that respect and without the Member States having received any authorization under Article 27 of the Sixth VAT Directive?'

(ii) Case C-340/95 *Schepens*

12. The plaintiff owns a garage business. He submitted a VAT return in respect of the period 1 January 1993 to 31 March 1993 claiming a refund of an alleged credit of BFR 3 311 438. Inspections of the plaintiff's accounts effected in May 1993 by a chief inspector and an auditor from the VAT administration resulted in the administration forming the view that there were serious grounds for doubting the accuracy of the plaintiff's return and evidence that the return contained false and/or incomplete particulars. Accordingly, on 15 June 1993 an official minute containing the findings of the inspections was drawn up. In a statement sent by registered letter on 16 June 1993, the plaintiff was informed of the administration's findings. He was also given a copy of the official minute and informed that, under the fifth subparagraph of Article 8/(1)(3) of Royal Decree No 4, as amended, it was intended to proceed with a retention of any possible refund due to the plaintiff. The relevant withholding notice was drawn up and sent to the plaintiff on 18 June 1993. A similar procedure was followed concerning the plaintiff's VAT return for the second quarter of 1993, which, on its face, indicated a VAT credit of BFR 2 419 078. Following an inspection carried out on 15 September 1993, an official minute was prepared on 20 September 1993 which again indicated that there were serious reasons for suspecting that the return was based on false particulars. The plaintiff was informed of this second official minute by registered letter on 22 September 1993 and a withholding notice based on Article 8/(1)(3)(5) of Royal Decree No 4 was sent to him on the same day. [10]

13. The VAT administration essentially suspects the plaintiff of having participated in fraudulent circular sales. In his case, this

10 — A further official minute concerning the plaintiff's second quarterly return, containing additional findings, was drawn up on 26 October 1993.

allegedly comprised buying various (expensive) cars on foot of invoices showing considerable amounts of VAT to be payable as part of the purchase price paid by the plaintiff — but in respect of which the administration had no record of having ever received the relevant sums of VAT from any of the plaintiff's suppliers — and selling the same cars to buyers located in other Member States on foot of invoices showing that no VAT was paid. The result was that the plaintiff's VAT returns showed substantial tax credits due to him, although he was unable to prove, for example, that any of the cars sold to non-Belgian purchasers ever, in fact, left Belgium.

14. The plaintiff appealed to the *Beslagrechter* at the Rechtbank van Eerste Aanleg te Antwerpen, who, by decision of 8 March 1994, refused to lift the attachment. The plaintiff then appealed to the Hof van Beroep te Antwerpen (Third Chamber, hearing civil appeals, hereinafter 'the national court'), which, in the light of the conflict between the plaintiff and the Belgian State advocate regarding the compatibility of the Belgian legislation with Articles 18(4) and 27 of the Sixth Directive, referred the following questions to the Court:

'1. Do Articles 18(4) and 27 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (VAT Directive 77/388/EEC) have direct effect in the national legal systems of the Member States and thus in Belgian law?

2. If so, does Article 18(4) of the Directive preclude a Member State from refusing to refund to a taxable person a VAT credit in relation to a specific period or periods during which that credit arose or to carry it over to a subsequent tax period, and instead withholding it by means of the Belgian withholding procedure, which has the effect of a preventive attachment within the meaning of Article 1445 of the Belgian Judicial Code, as long as no definitive entitlement has arisen in that regard and only up to the amount of the demand relating to that tax period or earlier periods, where the demand is disputed by the taxable person?

3. Is Article 18(4) of the Directive applicable, given that, according to the Belgian State, such withholding is a debt-recovery procedure?

— If so, is Article 27 of the Directive applicable if such withholding were to form part of the "conditions" (modalités)?

— If not, is Article 27 applicable, on the assumption that such withholding is a debt-recovery procedure?

4. If Article 18(4) of the Directive is applicable to the Belgian withholding procedure, does that procedure infringe the principle of proportionality as defined by the Court of Justice?'

(iii) Case C-401/95 *BRD Decan*

15. Unlike the *Garage Molenheide* and *Schepens* cases, this case concerns an attachment effected on the basis of Article 8/(1)(3)(4) of Royal Decree No 4. The order for reference indicates that by registered letter of 26 September 1995 the VAT administration informed the company BRD Decan (hereinafter 'the plaintiff') that, pursuant to Article 8/(1)(3)(4), it was going to retain the supposed VAT credit of BFR 705 404 owing to the plaintiff on foot of its VAT return for the period 1 June to 30 June 1995. The plaintiff applied to the Rechtbank van Eerste Aanleg te Brussel (Brussels) (hereinafter 'the national court') to set aside the attachment. According to the national court, the attachment related to a sum which is disputed by the plaintiff, noted in an official minute of 26 May 1994, in respect of which the VAT Administration served a distress warrant on 10 October 1995 for an amount of BFR 784 305, plus BFR 130 500 by way of a penalty and BFR 232 064 being interest calculated to 20 October 1995.

16. It appears from the written observations of the plaintiff and the Belgian State that the plaintiff's earlier alleged VAT debt related to the period 1 September 1990 to 30 August 1992. The State alleges that the plaintiff used an inflated pro rata method for calculating the deductions claimed. A regularization notice asserting that the plaintiff in fact owed the sum of BFR 784 306 (and a fine and interest) was issued on 30 August 1993 by the VAT administration. However, it was formally contested by the plaintiff on 16 September 1993. The administration, consequently, drew up on 26 May 1994 the official minute referred to by the national court. An attachment order concerning the sum of BFR 705 404 was ultimately adopted pursuant to Article 8/(1)(3)(4) of Royal Decree No 4 on 26 September 1995 (and apparently notified the same day). [11]

17. On 13 October 1995, the plaintiff brought its application before the national court which, in the light of the Community-

11 — The written observations of the Belgian State refer also to another (first) Article 8/(1)(3)(4) attachment order of 15 June 1994, which was notified by registered letter to the plaintiff on 16 June 1994, and which concerned a sum of BFR 118 984 standing to the credit of the plaintiff in a special account for the period 31 January 1992 until 30 April 1992.

law arguments, decided to refer the following questions to the Court:

'1. Must Article 18(4) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes be interpreted as permitting a Member State to refuse to refund a VAT credit from a specific tax period or to carry it forward to a following period, yet to retain it on the ground that, and for so long as, it has a claim against the taxpayer in question relating to a previous tax period, if that claim is disputed by the taxpayer and thus does not yet constitute a definitive title, where the Member State has not received any authorization under Article 27 of the Sixth VAT Directive?

2. If Question 1 is to be answered in the affirmative, must Article 18(4) of the Sixth VAT Directive, in conjunction with the principle of proportionality, be interpreted as permitting the Member State to lay down that the necessity or urgency of the retention may not be contested in any way and that the retention may in no way be replaced by a guarantee or annulled so long as the disputed VAT claim has not been made the subject-matter of a final judicial decision?'

(iv) Case C-47/96 *Sanders*

18. Notwithstanding an initial allegation of fraud, this case also concerns an attachment effected under Article 8/(1)(3)(4) of Royal Decree No 4. [12] According to the order for reference, an official minute established by the *Bijzondere Belastingsinspectie* (Special Tax Inspectorate) on 30 January 1992 alleges that the plaintiff company is liable to the Belgian State for the sum of BFR 370 791 in VAT (plus a fine of BFR 741 582 and interest from 21 January 1988). This relates, firstly, to the purchase from another company without invoices of 227 000 kg of flour, and, secondly, to having acted as agent in the supply by that other company of 403 710 kg of flour to third parties. These activities allegedly took place in 1987. The plaintiff was notified by registered letter of 23 November 1994 that the relevant tax collector was about to effect a retention concerning a credit balance of BFR 236 215 in favour of the plaintiff on 31 October 1994. It is clear from the written observations of the plaintiff and the Belgian State — to which copies of the relevant notice and attachment are annexed — that the State effected this retention on the basis of Article 8/(1)(3)(4). [13] On 5 January 1995 the plaintiff applied, *inter alia*, to have the attachment set aside. The application was referred to the *Beslagrechter* at the Rechtbank van Eerste Aanlag te Brugge (Bruges)

12 — The plaintiff states that criminal proceedings were initially instituted against the managers of Sanders. However, the prosecuting authorities later decided to seek a non-suit, which was granted by court order of 10 December 1991. It was only then that attachment proceedings were initiated.

13 — The plaintiff points out in its written observations that on 7 March 1996, the VAT administration also retained (apparently on the basis of Article 8/(1)(3)(4)of Royal Decree No 4) the sum of BFR 121 106, which was the sum standing to the credit of the plaintiff in respect of December 1995, in respect of the same alleged debt as is at issue in the main proceedings in *Sanders*.

(hereinafter 'the national court'), who, having regard to the parties' differing arguments regarding Community law and noting the pending reference in *Garage Molenheide*, decided to refer the following questions to the Court:

'1. Must Article 18(4) of the Sixth VAT Directive be interpreted as permitting a Member State, instead of refunding to a taxable person a VAT credit for a given tax period, or carrying it forward to a subsequent tax period, to "withhold" the same by way of protective attachment on the basis of an additional demand in respect of an earlier tax period, where that additional demand is contested in law and is thus not based on any definitive entitlement, and where the Member State has not obtained authorization pursuant to Article 27 of the VAT Directive?

2. In the event that Question 1 is answered in the affirmative:

Do the principle of proportionality enshrined in Community law and Article 18(4) of the Sixth VAT Directive permit the Member State to provide:

(1) that the taxable person may contest the attachment (as validated by the "withholding" measure) only by adducing evidence rebutting the allegations made by the Treasury in the official report, and not by challenging the actual need for, and urgency of, that measure;

(2) that withholding may not be replaced by another form of security nor lifted pending the delivery of final judgment on the contested demand for payment made by the Treasury?'

B — *Procedure before the Court*

19. Since the written procedure in *Garage Molenheide* was already at an advanced stage when the reference in *Schepens* was made and since the Community-law issues raised in both cases were very similar, the procedure in *Schepens* was suspended pending judgment in *Garage Molenheide*. However, during the oral hearing in *Garage Molenheide* (hereinafter 'the first hearing'), counsel representing the plaintiff contended that the practice of the Belgian VAT administration and the lack of discretion which *beslagrechters* perceived themselves as having with regard to setting aside attachments, coupled with the imminent arrival of two further preliminary references concerning another type of retention operated in Belgium by the VAT administration, cast doubt on the proportionality of the entire system of retention under the new version of Article 8/(1)(3) of Royal Decree No 4. The plaintiff stated that it would have no objection to the delay which a joinder of the various references

would entail. Consequently, by orders of 22 March 1996, the Court ordered the re-opening of the oral procedure in *Garage Molenheide*, while the President ordered, firstly, the joining of the three other references for the purposes of the written and oral procedures and judgment, and, secondly, the joining of *Garage Molenheide* to the other cases in respect of the oral procedure and judgment. [14] For convenience, where the context so requires, the various national courts and plaintiffs in the four references will collectively be referred to respectively as 'the national courts' and 'the plaintiffs'.

III — Synthesis of the questions referred

20. Not surprisingly, there is a considerable overlap between the questions referred in the four cases. In my opinion, the essential Community-law issues raised are threefold. They concern the direct effect of Articles 18(4) and 27 of the Sixth Directive; the availability and scope of the preventive retention in the circumstances provided for in Article 8/(1)(3) of Royal Decree No 4 and its compatibility with the right of deduction conferred on taxable persons by Article 18(4) of the Sixth Directive; the extent of such a retention, and particularly whether the apparently limited interim bases upon which it can be suspended are compatible with the Community-law principle of proportionality.

14 — These orders were adopted, respectively, on the basis of Articles 61 and 43 of the Rules of Procedure.

IV — Observations

21. Written and oral observations were submitted on behalf of all of the plaintiffs, with the exception of Mr Schepens. Written observations were submitted by the Kingdoms of Belgium [15] and Sweden, the Hellenic and Italian Republics and the Commission, all of whom, save Sweden, also submitted oral observations. [16] Those observations may, for convenience, essentially be summarized as follows.

A — *The plaintiffs*

22. The plaintiffs contend that the provisions of Article 18(4) of the Sixth Directive are sufficiently clear, precise and unconditional to be capable of direct effect within

15 — The 'Belgian State' is actually formally the defendant in each of the references. However, for convenience, I shall simply hereinafter refer to the defendant as 'Belgium'.

16 — Greece and Sweden presented written observations on the *Schepens*, *BRD Decan* and *Sanders* cases, whereas Italy, which had initially submitted written observations on the *Garage Molenheide* case, also submitted written observations on *Schepens* and *BRD Decan*.

the national legal orders of the Member States. Furthermore, they contend, essentially, that the retention provided under the Belgian legislation is incompatible with the right conferred by Article 18(4). Once the right to a deduction arises in accordance with the provisions of Articles 17 and 18(1) to (3), national VAT administrations may not subject it to any other conditions but must either make a refund or carry the excess forward to the next VAT period.

23. *BRD Decan* and *Sanders* also contend that under Article 18(2) of the Sixth Directive the balance of deductible VAT must be calculated by reference to a specific deduction period. Hence the administration cannot maintain that no reimbursement is due because, in relation to a wholly separate period, the taxable person is allegedly indebted to it. They point out that the administration is not obliged to accept the amount of the excess indicated unilaterally in the taxable person's declaration but, on the contrary, may examine whether that declaration is correct. [17] In addition, all the plaintiffs submit that, although the first paragraph of Article 18(4) permits the Member States to determine the conditions concerning the refund, they are not permitted to subject the right to that refund to supplemental substantive conditions. They contend that the English text, which uses the word 'conditions', digresses from the other language versions where words corresponding to the notion in English of 'details' or 'arrangements' are used. [18] In the light of the need to adopt a harmonious Community-law interpretation of the provision, they contend that, notwithstanding the possible ambiguity of the English text, Member States have no competence to lay down substantive conditions governing the refund, the latter being laid down exhaustively in Articles 17 and 18(1) to (3). Accordingly, the plaintiffs submit that the retention system operated in Belgium constitutes an impermissible additional condition. Moreover, even if the Belgian withholding system falls within the powers of the Member States concerning the administration of the VAT system, the plaintiffs submit that it must, none the less, respect the Community-law principle of proportionality. [19] They contend that the system constitutes a disproportionate limitation on the right to deduct guaranteed by the Sixth Directive. Firstly, this is so because the authorities are permitted to attach, almost automatically, outstanding balances in favour of the taxable person without having to prove necessity and without being obliged to accept alternative securities or undertakings from the taxable person in circumstances where no damages are paid if the attachment is ultimately found to be unjustified, and because, in that eventuality, interest is only paid with effect from 1 April of the year following that when attachment was exercised. Secondly, the taxable person has no effective remedy against the attachment, because the

17 — The judgment of the High Court of England and Wales in *Regina* v *Customs and Excise Commissioners*, ex parte *Strangewood Ltd* [1987] STC 502 was cited in support of the proposition that the VAT authorities must carry out this examination within a reasonable period.

18 — Reference is made to the Dutch ('regeling'), German ('Einzelheiten'), French ('modalités'), Italian ('modalità') and Spanish ('modalidades') texts. The English version uses the same word, 'conditions', in both Article 18(3) and (4), whereas several of the other language versions use different words in each of these provisions.

19 — Reference is made, amongst many others, to the judgments concerning VAT in C-276/91 *Commission* v *France* [1993] ECR I-4413 and Case C-10/92 *Balocchi* [1993] ECR I-5105.

beslagrechter has no competence to make a genuine assessment of either necessity or its merits. At the second oral hearing (hereinafter 'the second hearing'), the plaintiffs contended that even if, contrary to the view adopted in most, if not all, of the relevant Belgian case-law and based on the apparently unambiguous wording of Royal Decree No 4, the *beslagrechter* could, as contended by Belgium, suspend the attachment pending judgment on its merits, the uncertainty of such a remedy would infringe the principle of legal certainty.

B — *Belgium and the other Member States*

24. Belgium, with the support of Greece, Italy and Sweden, submits that, although Article 18(4) deals with VAT refunds, a retention of tax credits merely relates to the collection of taxes and falls outside the scope of the Sixth Directive. It states that Article 76(1) of the Code deals separately with the different legal concepts of *refund* and *retention of tax credits*. Whereas a tax refund is regulated by Article 76(1)(1) and 76(1)(2) and must satisfy certain substantive and formal conditions, the retention of tax credits is governed by Article 76(1)(3) of the Code and by Royal Decree No 4 and constitutes an autonomous legal concept. In its view, the Sixth Directive has two essential purposes: (i) the harmonization of taxes; (ii) the mutual integration of economies in order to achieve and expedite the common market for the free movement of persons, goods, services and capital. That harmonization is achieved by determining a common scope for the application of VAT throughout the Community. Each Member State may establish its own collection system while ensuring that those objectives are achieved.

25. Member States are free to regulate the collection of VAT, including measures to combat tax evasion or fraud. Belgium relies on Article 22(8) of the Sixth Directive (quoted in paragraph 2 above), which permits Member States to adopt necessary VAT 'levying and collection' measures. This interpretation accords with the principle of subsidiarity expressed in Article 3b of the Treaty. In the alternative, if the Sixth Directive were to be interpreted as covering matters relating to collection, Belgium submits that the retention at issue in the present proceedings falls within the scope of Article 18(4), which gives Member States a wide discretion when determining the conditions governing refunds. [20]

20 — In *Molenheide*, Belgium maintained that it was this discretion which precludes Article 18(4) from having direct effect. In its observations on the three subsequent references, this contention was not (at least expressly) maintained.

26. The retention procedure does not operate so as to render practically impossible the exercise by taxpayers of the rights conferred by Article 18(4) of the Sixth Directive, but, rather, merely postpones the repayment of overpaid VAT until the veracity of the declaration upon which the putative overpayment is based can be verified. It does not infringe Article 18(4), because it merely attaches provisionally a sum which is still recognized as being an 'asset' of the taxpayer and which remains subject to restitution, unless the taxpayer's declaration is ultimately shown to be false or inaccurate. Accordingly, Belgium submits that Article 27 of the Sixth Directive is of no relevance since the collection of VAT does not fall within the scope of the Sixth Directive.

27. Belgium developed the above observations and its explanations of Article 8/(1)(3) in its written observations on the later references. The traditional attachment procedure, since it does not permit provisional attachments, did not offer the administration sufficient protection in circumstances where putative tax credits had either to be refunded or carried forward within three months of the relevant VAT declaration, even where there was a disputed debt owing to the VAT administration in respect of an earlier period. Without actually disputing the veracity of the alleged tax credit, the new 'preventive' attachment renders that credit provisionally unavailable. Its purpose is, thus, clearly to ensure that VAT, which may be owing by the taxable person, is in fact paid. At the second hearing, Belgium, supported by Italy and Greece, asserted that, to ensure the proper collection of VAT, fiscal authorities should be entitled to view their relationship with the taxable person as constituting a form of current account, since to view each tax period separately would ignore the fact that a current (even undisputed) credit might only have arisen because of earlier false or inaccurate declarations.

28. Belgium accepts that tax collection measures must not effectively undermine rights conferred by the Sixth Directive but, with the support of Italy, Greece and Sweden, contends that the impugned Belgian measures respect the principle of proportionality. Responding to questions posed during the first hearing, Belgium maintained that, whatever might have been the prevailing practice, *beslagrechters* could, pursuant to Royal Decree No 4, set aside, on an interim basis, even attachments based on Article 8/(1)(3)(5) if they were not satisfied about the allegations concerning fraud or substantive irregularity. Belgium subsequently elaborated upon those initial observations. It submits that, under subparagraph (4) of Article 8/(1)(3), not only is the *beslagrechter* obliged to verify compliance with all the applicable procedural safeguards, [21] but he may also assess the prima facie reliability of the allegations grounding the retention. He has, as Belgium put it, a right to engage in a 'marginal' review of the attachment. As to attachments based on serious presumptions

21 — For example, the investigation and ultimate decision to attach are not taken by the taxable person's local VAT office, but by specialized outside officials of the VAT administration.

of fraud under subparagraph (5) of Article 8/(1)(3), Belgium accepted that the power of a *beslagrechter* to lift such a retention is considerably more circumscribed; in effect, no lifting may be ordered unless the *beslagrechter*, having apprised himself of all the relevant information concerning the case, is satisfied that its maintenance is no longer justified. [22] At the second hearing, Belgium insisted, however, that this did not preclude the grant of a provisional lifting of a retention granted under subparagraph (5). It contended, generally, that, despite the perhaps 'misleading' wording of subparagraph (7) of Article 8/(1)(3), an attachment could be lifted provisionally by a *beslagrechter*.

C — *The Commission*

29. The Commission contends that the Sixth Directive entrusts the fight against fraud to the Member States, which is evidenced by several references to their power to adopt such measures. [23] Regarding Article 18(4), and, in particular, the interpretation of the expression 'the amount of authorized deductions', the Commission submits that the exercise of the right to deduct may be governed only by the conditions laid down by the Sixth Directive; it cannot be subject to approbation by national VAT authorities. However, the Commission contends that the Belgian retention measures constitute tax collection measures and, thus, fall outside the scope of the Sixth Directive. Consequently, Belgium was not obliged to seek an authorization pursuant to Article 27(1).

30. Nevertheless, Member States' tax collection measures must not undermine the principles underpinning the common Community system of VAT. The Commission draws an analogy with the case-law of the Court concerning Article 27 of the Sixth Directive. [24] Under that procedure, the Commission enjoys the advantage of being fully apprised in advance of the proposed measures and is thus in a position to ensure that they respect the principle of proportionality, [25] which, it says, also applies to the collection measures involved in this case. In the Commission's opinion, the Court should

22 — Although subparagraph (5) does not use the word 'fraud', counsel for Belgium submitted at the second hearing that acts of retention based on subparagraph (5) were, in practice, limited to cases of fraud. They concern suspected 'inaccurate information' resulting in the possibility of a tax debt, whose extent cannot readily or expeditiously be determined. This, the counsel contended, would not be the case with potential debts based on mere inaccuracies or calculation oversights in previous tax returns, the level of which could be calculated with relative ease.

23 — It refers, in particular, to Article 22(8) and also to Articles 13A(1), 13B(1), 14(1) and 15.

24 — The Commission refers, in particular, to Case 324/82 *Commission* v *Belgium* [1984] ECR 1861 and Case 196/85 *Commission* v *France* [1987] ECR 1597.

25 — Reference is also made to the case-law concerning the proportionality of sanctions for the infringement of VAT regulations: Case 299/86 *Drexl* [1988] ECR 1213; and Case C-276/91 *Commission* v *France* [1993] ECR I-4413. At the second oral hearing, reliance was also placed on the recent judgment in Case C-29/95 *Eckehard Pastoors, Trans-Cap* v *Belgian State* [1997] ECR I-285.

limit itself to establishing certain criteria whose concrete application must be for the national court. In the case of attachments effected to secure an earlier disputed tax debt, the measures may be presumed to be disproportionate. This should not, however, be the case with attachments based on serious doubts or evidence of fraud. In its written observations, the Commission enumerates a number of criteria which, in its view, the national court should consider when applying the proportionality principle. They are, essentially, the existence of procedural guarantees at the pre-retention stage; the existence of an effective judicial remedy against the retention; a relationship between the sum attached and the alleged tax debt; the possibility of the acceptance by the authorities of alternative guarantees offering comparable security. In the light of the contradictory observations submitted regarding the competence of the *beslagrechter*, the Commission submitted at the second hearing that a relevant factor should be whether, in imposing the retention, the VAT administration is obliged to take a substantive legal action regarding the alleged tax debts. However, it argued that it would be overly formalistic to require national fiscal authorities to treat each VAT period separately.

V — Analysis

A — *Direct effect*

31. In *Schepens* the Court is asked expressly whether Articles 18(4) and 27 of the Sixth Directive have direct effect. In the light of the possible conflict between the system of preventive retention operated in Belgium and the right conferred on taxable persons by Article 18(4), the relevance of this question is clear and should, in my opinion, be answered by the Court. [26] However, the relevance of the direct effect or otherwise of Article 27, which has not been invoked by Belgium, to the resolution of the *Schepens* case is less clear. I do not think that the Court need answer that question.

32. The Court has consistently held that, even where the implementation period has expired, a non-implemented or incorrectly implemented directive must be both sufficiently precise and unconditional before its provisions can be directly invoked by an individual before the courts of a Member State. [27] The right of individuals to rely upon the Sixth Directive has been consistently upheld in the case-law of the Court. [28] In *BP Supergas* the Court stated: [29]

'It follows from that case-law that, despite the relatively wide discretion enjoyed by

26 — Although Article 76(1), subparagraphs (1) and (2) of the Code appear to implement the right conferred by Article 18(4) of the Sixth Directive in Belgium, the scope of those provisions is limited by Article 76(1)(3) of the Code and by Royal Decree No 4.

27 — See, *inter alia*, Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629 and, more recently, Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

28 — See, for example, Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53 and Case C-62/93 *BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion* v *Greek State* [1995] ECR I-1883.

29 — *BP Supergas*, loc. cit., paragraph 34 of the judgment.

Member States in implementing certain provisions of the Sixth Directive, individuals may effectively plead before national courts the provisions of the directive which are sufficiently clear, precise and unconditional.'

The Court ruled, *inter alia*, that the provisions of Article 17(1) and (2) dealing with the right to deduct 'satisfy the abovementioned criteria and therefore confer rights on individuals which they may invoke before a national court in order to challenge national rules which are incompatible with those provisions'. [30] Those provisions are closely linked with Article 18(4), which, in my view, for the reasons stated below, satisfies the same criteria.

33. Where a taxable person's authorized deductions exceed his tax liability, Article 18(4) of the Sixth Directive requires Member States either to 'make a refund or carry the excess forward to the following period', unless 'the amount of the excess is insignificant'. In its written observations, *Garage Molenheide* submits that the text is absolutely clear. Once the sum involved is not insignificant, the tax authority is obliged to do one of two things. Although the Belgian State initially contested the direct effect of Article 18(4) before the national court in *Garage Molenheide*, that position was not maintained in Belgium's observations to this Court. Responding to the express question referred in *Schepens*, the Commission, quite correctly, submits that Article 18(4) is sufficiently clear and precise to have direct effect and may be invoked directly before national courts.

34. Differences of opinion as to what may constitute an 'insignificant' overpayment cannot, in my opinion, prevent a national court from being able to identify in most cases a significant tax excess which must be refunded or carried forward. Moreover, since the objective of the Sixth Directive in respect of deductions is to ensure that the 'right to deduct shall arise at a time when the deductible tax becomes chargeable', [31] it is clear that the Member States' freedom to refuse a refund of 'insignificant' excesses is very limited. Accordingly, in my view, to invoke the second subparagraph of Article 18(4) as a basis for denying direct effect to that article would 'confuse the issue of direct effect with that of the discretion available to Member States in transposing the directive into national law'. [32]

30 — Loc. cit., paragraph 35 of the judgment.

31 — See Article 17(1) of the Sixth Directive.

32 — See the Opinion of Advocate General Mancini in Case 71/85 *Netherlands v Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 17 of the Opinion, p. 3867.

35. All of the plaintiffs submit that the discretion afforded to Member States by the first subparagraph of Article 18(4) of the Sixth Directive does not permit them to prescribe substantive conditions for the exercise of the right to a refund. I think that the Member States are merely permitted under the first sentence of Article 18(4) to establish the necessary procedures or detailed arrangements concerning such refunds. [33] Indeed, even the fact that a 'multiplicity of alternatives' [34] may be available for the purpose of implementing an obligation imposed by a directive does not prevent it from having direct effect, 'once its content can be determined sufficiently precisely on the basis of the provisions of the directive alone'. [35] Consequently, I am satisfied that the obligation imposed by Article 18(4) is clear, precise and unconditional and capable of direct effect.

B — *The scope of Article 18(4) of the Sixth Directive*

(i) Introduction

36. The quality of 'neutrality' has frequently been attributed to the VAT system. [36] Only the final consumer bears the total cost of the tax, and the basis of the system is that VAT 'is chargeable on each transaction only after deduction of the amount of value-added tax borne directly by the cost of the various price components'. [37] Each intervening trader passes on the VAT element in his purchases to the next trader (or the consumer). In this system, the right to deduct VAT inputs is pivotal. [38] In the long run, each trader neutralizes these inputs by deduction and recovers the tax on the added value attributed to himself by adding it to the price charged to his customers. Cash flow may operate favourably or unfavourably for the trader but, essentially, only temporarily. Where, for a given taxable period, his inputs exceed his outputs, cash flow is adversely affected, since he is, albeit temporarily, required to bear the burden of the VAT on his supplies until he can recover it in part from his customers and in part from the fiscal authorities. Claims for repayment should

33 — In *Nederlandse* v *Federatie Nederlandse Vakbeweging*, the Court was asked whether Article 4(1) of Council Directive 79/7/EEC of 9 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1978 L 6, p. 24) was directly effective. Doubt centred on the directive's non-discrimination principle, since there were (at least) four different ways in which the Netherlands alone could have implemented it. The Court, however, rejected the view that such options detracted from the unconditionality of the obligation imposed by the relevant provision.

34 — The phrase used by the Court to describe Ireland's objection to the direct effect of Directive 79/7 in Case 286/85 *McDermott and Cotter v Minister for Social Welfare and Attorney-General* [1987] ECR 1453, paragraph 15 of the judgment.

35 — Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, paragraph 17 of the judgment. In *BP Supergas*, loc. cit., the Court held that Article 11A(1) and B(1) and (2) and Article 17(1) and (2) of the Sixth Directive were directly effective, 'notwithstanding the discretion accorded to the Member States by Article 11(B)(2) to adopt as the taxable amount for imports the value defined in Regulation No 803/68' (Opinion of Advocate General Jacobs, paragraph 48), because 'they do not leave the Member States any discretion as regards their implementation' (paragraph 35 of the judgment).

36 — See, for example, Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655, paragraph 16 of the judgment, and Case 50/87 *Commission* v *France* [1988] ECR 4797, paragraph 15.

37 — See Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, paragraph 10 of the judgment.

38 — It is described as a 'basic element' of the system in *Rompelman* v *Minister van Financien*, paragraph 16 of the judgment.

be infrequent; they imply trading at a loss or, at least, on the basis of a negative balance of input and output invoices, for a particular accounting period, with possible serious cash flow implications. Article 18(4) of the Sixth Directive essentially allows Member States two options, once the right to a refund is established for a given taxable period. They may either make an immediate repayment or they may postpone it until the end of the following taxable period. In many cases, this postponement will eliminate the need for any repayment because the trader returns to a profit in that subsequent period. The right conferred on taxable persons by Article 18(4) prohibits Member States, however, from withholding repayment for more than one period and certainly from doing so indefinitely, in the hope or mere expectation of the return of profitable trading.

(ii) Opinion

37. I do not think that the direct effect of Article 18(4) of the Sixth Directive, taken on its own, is sufficient to establish the incompatibility of the impugned Belgian measures. The plaintiffs rightly submit that the foundation of the right to 'authorized deductions', within the meaning of Article 18(4), is contained in Articles 17 and 18(1) to (3) and that, 'in the absence of any provision empowering Member States to limit the right of deduction granted to taxable persons', the taxpayer must be permitted to exercise that right 'immediately in respect of all the taxes charged on transactions relating to inputs'. [39] Member States are, therefore, only authorized to limit the *right* of deduction 'where they may rely on one of the derogations provided for in the Sixth Directive'. [40] In case of an excess of authorized deductions over tax due, the neutrality of the Community VAT system means that the taxable person has the right to a refund. However, Member States are not precluded from adopting precautionary measures designed to ensure the veracity of the apparent excess of deductions arising from the information contained in the underlying declaration made by the taxable person. A system of control designed to verify 'authorized' deductions within the meaning of Article 18(4) before making payment is not a repudiation of the taxable person's right to deduct.

38. In *Jeunehomme and Others v Belgian State*, [41] the Court, referring to Article 22(8), held that Member States, when requiring an invoice to contain certain information, other than that required by Articles 18(1)(a) and 22(3)(b), are not required to have recourse to the procedure laid down in Article 27 in order 'to ensure the correct levying of value-added tax and permit supervision by the tax

39 — See Case C-97/90 *Lennartz* [1991] ECR I-3795, paragraph 27 of the judgment.

40 — *Lennartz*, ibid., paragraph 29 of the judgment.

41 — Joined Cases 123/87 and 330/87 [1988] ECR 4517.

authorities'. [42] If Member States are entitled to specify the information to be contained in invoices grounding a right to deduct, they should also be entitled to adopt precautionary measures designed to ensure the proper collection of taxes.

39. This view finds further support in the recent judgment of the Court in *Reisdorf*. [43] In that case, which again concerned invoices, the Court confirmed the consistency with the Sixth Directive of the 'power of Member States ... of ensuring that VAT is levied and collected, under the supervision of tax authorities ...'. [44] Moreover, it also held that 'Article 18, in accordance with its heading, deals only with the exercise of the right of deduction and does not govern proof of that right after it has been exercised by a taxable person'. [45] I am satisfied that Member States are competent, within the framework of their national VAT collection systems, to adopt measures to protect themselves against the risk of making repayments where no genuine VAT credit exists. The adoption of precautionary, control measures enables the interests of the national treasury to be balanced against the interest of a taxable person in obtaining expeditious payment of any amount to which he appears, prima facie, to be entitled under Article 18(4). I think that this interpretation of Article 18(4) is consistent with its reference to the Member States' obligation to effect the deduction 'according to the conditions which they shall determine'. Alternatively, Article 22(8) permits 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'. It does not seem to me to matter whether the Belgian rules fall outside the scope of the matters harmonized by the Sixth Directive, or fall in principle within its scope but are authorized by Article 22(8) thereof. In either event, they must be submitted to the test of proportionality to the extent to which they are capable of infringing the Directive (see paragraphs 42 to 54 below).

40. At the second hearing, counsel representing *BRD Decan* and *Sanders* submitted that Article 18(4) must be interpreted in the light of Article 18(2), and that, accordingly, once a Member State has verified that a tax credit is genuinely owing in respect of a particular tax period, the Member State is obliged to permit the taxable person immediately to exercise the right to deduct in

42 — Ibid., paragraph 16 of the judgment. Advocate General Sir Gordon Slynn expressly recognized that the 'Sixth Directive was not a complete harmonization of all rules relating to the administration of the VAT scheme' and that 'the Council left it to Member States to require other matters to be stated in the invoice which were necessary for the administration of the scheme, so long as the provisions pursued the aims of the Directive, did not create exceptions to the Community scheme and did not limit its scope'; [1988] ECR 4517, p. 4533.

43 — Case C-85/95 *Reisdorf* v *Finanzamt Köln-West* [1996] ECR I-4517.

44 — Ibid., paragraph 24 of the judgment.

45 — *Reisdorf*, paragraph 26 of the judgment.

respect of that credit. I agree with the Commission, whose agent described this approach as too formalistic. It is more realistic to regard the relationship between the taxable person and the national VAT authorities as being akin to a current account. The plaintiffs refer, *inter alia*, to *Commission* v *France*, [46] where the Court held that, 'in the absence of any provision empowering the Member States to limit the right of deduction granted to taxable persons, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs'. [47] In that case, the impugned French decree permitted only a fraction of the VAT charged on the purchase or construction of immovable property to be deducted where the property was let for a rent which was less than one-fifteenth of its value. The Belgian retention rules, by contrast, do not restrict the right to deduct; they merely provide that payment of the refund may, provisionally, be postponed. If Member States were entirely precluded from postponing refunding even undisputed tax credits arising in one tax period because of a serious dispute regarding an earlier period, their financial interests could often be significantly jeopardized. Nor do I think that Article 18(4) should be interpreted as limiting Member States' right to oppose a refund to cases where they have obtained a final judgment in respect of the taxable person's indebtedness regarding an earlier period, or of the fraudulent nature of the supposed VAT credit. Moreover, I do not think that the compatibility of a provisional retention of a payment due under Article 18(4) should depend on proof of a causal link with a debt or underpayment for an earlier period.

41. As the Court acknowledged in *BP Supergas*, Member States enjoy a wide discretion in implementing the provisions of the VAT system. There are two aspects to this. Firstly, the routine details of provisions relating to the collection of the tax, which are typically to be found in national law, are not regulated by the Sixth Directive at all. I would say, almost as an aside, for example, that there could be circumstances in which a Member State, without putting in question the application of Article 18(4), would not strictly speaking repay an established credit. If there is a clearly established counter-debt for VAT due from the taxable person with the result that there are clear and certain amounts due both from and to the taxpayer, it would be pointless to make a repayment, when one can be set off against the other. This might arise if there was an underpayment from an otherwise uncontested earlier VAT return either by accident or by reason of shortage of funds. More generally, the responsibility for managing the entire VAT system is left to Member States. As already stated (paragraph 39 above), it is not necessary to decide whether this arises because those matters fall outside the scope of the Sixth Directive or are expressly authorized, for example, by Article 22(8). However, measures coming within the scope allowed by Article 22(8) may inevitably have an impact on the obligation of the Member State to make an immediate repayment under Article 18(4), in which event those measures will (for the reasons set out below) need to be assessed for their proportionality in accordance with Community law; in other words, for their appropriateness in view of the aim which they seek to achieve.

46 — Case 50/87 [1988] ECR 4797.

47 — Ibid., paragraph 16 of the judgment.

C — *The application of the principle of proportionality*

42. If the operation of a retention of the type impugned in the present references does not, in itself, infringe Article 18(4) of the Sixth Directive, it does not necessarily follow that it is compatible with Community law. Although Member States may remain competent to determine their own systems of VAT collection, they are nevertheless required to operate those systems in conformity with the Sixth Directive, and especially its fundamental provisions such as the right of deduction.

(i) The aim of retention measures

43. I think that it is clear that retention measures of the sort at issue in the present references pursue a genuine aim. The Member States who have submitted observations rightly observe that, since the benefit of VAT receipts accrues almost entirely to the Member States, they clearly have a legitimate interest in taking appropriate steps to protect their financial interests. This, in my opinion, is essentially also what Article 22(8) of the Sixth Directive recognizes. As I stated above (paragraph 38), Article 22(8) does not permit Member States to contravene, in the interests of preventing fraud or ensuring effective tax collection, other provisions of the Sixth Directive. In this respect, Article 27 expressly provides a procedure whereby Member States may apply to the Council for an authorization to apply, *inter alia*, national measures designed to counteract 'tax evasion or avoidance' which conflict with the Sixth Directive. The Court has consistently held that such measures must respect the principle of proportionality. Thus, for example, in *Commission* v *Belgium*, [48] it held that measures notified pursuant to Article 27 must be of such a nature 'as to prevent tax evasion or avoidance and that in principle they may not derogate from the basis for charging VAT laid down in Article 11, except within the limits strictly necessary for achieving that aim'. [49] I think that the Commission is, therefore, correct in contending that national measures which, though not based on an Article 27 authorization, may affect rights granted by the Sixth Directive must comply with the principle of proportionality. In brief, where it is necessary to reconcile potential conflicts between the application of national tax collection measures, such as preventive retention in Belgium, and the fundamental right to deduct excess VAT guaranteed by the Sixth Directive, the relevant

48 — Case 324/82 [1984] ECR 1861.

49 — Ibid., paragraph 29 of the judgment. It should be noted that the measures at issue in that case were in existence on 1 January 1977 and, thus, fell within the scope of the transitional arrangement set out in Article 27(5). There is no reason, however, to suppose that the Court would have adopted a different view had Article 27(5) not been applicable: see, in this respect, my Opinion of 27 February 1997 in Case C-63/96 *Finanzamt Bergisch Gladbach* v *Werner Skripalle* [1997] ECR I-2847, and particularly paragraphs 25 to 28 thereof.

national measures must not go beyond what is necessary to achieve their aim.

44. This view is supported by the case-law of the Court. Thus, for example, in *Balocchi*, it held that the facility granted to Member States under Article 22(5) to oblige taxable persons to make interim payments of VAT during the course of a tax period did not permit them to require the payment of a fixed percentage (65%) of the amount payable for an unexpired period. [50] It follows that Member States do not have unlimited discretion in operating their tax collection systems.

(ii) Effective judicial control

45. In such a situation, as a first step, the effectiveness of judicial control required by Community law imposes an obligation on the authorities of the Member States to give reasons for their decisions. [51] In the present case, this function is performed by the 'official minute' which must be drawn up and duly notified to the taxable person in order that the VAT authority may exercise its right to withhold its payment. In so far as Belgian law, in that respect, provides for adequate notification and statement of reasons to be given to a taxable person whose right to refund is delayed, it complies with that aspect of the requirements of Community law. At the second hearing, the adequacy in practice of the pre-retention procedural safeguards was questioned by the counsel representing *BRD Decan* and *Sanders*. This, however, is a matter for the national court, which alone has the jurisdiction and the capacity to interpret the relevant Belgian rules.

46. The Member States' obligation to ensure effectiveness of judicial control requires, in addition, that national courts be provided with an adequate range of powers to ensure a proper balance between the rights of the taxable person and the rights and interests of the VAT authority. Of course, the nature and extent of the judicial remedy is conditioned by the context and the type of danger against which a measure is intended to protect. For example, in *Werner* and *Leifer*, [52] Advocate General Jacobs, treating of an altogether different subject, expressed the opinion that 'the nature of the issues that arise where the external security of a Member State is at stake will usually prevent a court of law from adopting a strict proportionality test'. In view of the fact that assessments were made on the basis of intelligence information which could not be checked by the Court, he thought it difficult to ensure full judicial review. The present cases do not fall within that exceptional category.

50 — *Balocchi*, cited in footnote 19 above.

51 — Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, paragraphs 14 and 15 of the judgment.

52 — See Case C-70/94 *Werner* v *Germany* [1995] ECR I-3189 and Case C-83/94 *Leifer and Others* [1995] ECR I-3231; the Opinion of Advocate General Jacobs, [1995] ECR I-3191, paragraph 65.

47. Subparagraphs 4 and 5 of Article 8/(1)(3) of Royal Decree No 4 cover a range of cases and practical situations. At one extreme, covered by subparagraph 5, there are serious allegations of fraud supported by credible objective evidence. At the other, there will be cases of genuine disputed issues of fact and legal interpretation leading, at most, to a disputed claim by the fiscal authorities. In the present sort of case, where the Court is, essentially, called upon to provide criteria to permit the national court, in performing *its* task of judicial control, to assess whether the application of the impugned national measures is liable, in practice, to undermine the effectiveness of the right conferred by Article 18(4) of the Sixth Directive, the Court should not, in my opinion, lay down detailed rules. It should, instead, give broad guidance as to the nature of the discretion which should be conferred on the relevant national courts.

(iii) Opinion

48. Firstly, I would emphasize that Community law should not impose an inflexible need for the provision of a full substantive review of the facts and merits of the claim of the fiscal authority at the stage of judicial control of the withholding decision. As is apparent, in the present cases, from the terms, in particular, of subparagraph 4 of Article 8/(1)(3) of Royal Decree No 4, final determination of the disputed fiscal claim must await a definitive court judgment. The latter implies a detailed examination of the contested factual and legal issues with the possibility of appeals within the hierarchy of the national legal system. This necessarily takes time and, indeed, some emphasis was laid at the second hearing, on behalf of *Garage Molenheide*, on the fact that many of these claims remain outstanding for years. That is not surprising. The present case is, however, concerned with provisions for withholding of payment on a provisional basis as a conservation measure. In its nature, this type of measure does not lend itself to final determination of issues. I do not think that the *beslagrechter* can be expected to determine finally, but rather only on an interim basis and as a matter of urgency, disputed and complex issues of fact and law.

49. The *beslagrechter* should, however, in principle have power to order the lifting of the retention. In the observations submitted, particularly at the second hearing, there was considerable disagreement between counsel for the plaintiffs, on the one hand, and for Belgium, on the other, as to the extent or existence of any discretionary power residing in the *beslagrechter*. Indeed, this situation of uncertainty seems to be reflected to some extent in the varying behaviour of different *beslagrechters*. Some were described as being very strict in the interpretation of their powers, while others appear to have been more

liberal. These matters of Belgian law cannot, of course, be determined by this Court, which can merely indicate, as stated above, the nature of the discretion, which must exist, *and be known generally to exist*, if due protection is to be accorded to rights conferred by Community law.

50. The fundamental test is, of course, that the measure taken be proportional to the end to be achieved. In other words, it should not go further than is strictly necessary in the pursuit of that purpose, namely the protection of the VAT authority itself in its duty to ensure the financial integrity of the system and to collect the tax. I would apply, by analogy, the principle enunciated by the Court in *Commission* v *Belgium*, [53] in the case of a derogation pursuant to Article 27 of the Sixth Directive, that measures adopted 'to prevent tax evasion or avoidance' may not derogate from the basis for charging VAT laid down in Article 11, 'except within the limits strictly necessary for achieving that aim'. This approach enables some broad principles of guidance to be adopted. I agree with the approach suggested by the Commission at the second hearing; namely, that in cases such as those covered by subparagraph (4) of Article 8/(1)(3) of Royal Decree No 4 — broadly speaking cases of disputed debts — the presumption would be against proportionality and that, in the same way, in cases such as those covered by subparagraph (5), especially those establishing serious presumptions of fraud, the presumption would operate in the opposite direction.

51. The decision to be made by a national court regarding the maintenance or lifting of a withholding measure must, like all provisional measures, depend on the particular circumstances of the case. I shall try to indicate the correct approach to a number of those circumstances. I think that the overriding interest must be the need to protect VAT revenues. It would appear that the withholding provision found in Article 8/(1)(3) of Royal Decree No 4 reverses the normal requirement in Belgian law for the existence of urgency, i. e. the urgent necessity to protect the revenue. In my view, the VAT authority must in all cases be able to justify the measures taken on the basis of necessity; that is to say a genuine and urgent necessity to protect tax revenues. In cases falling within subparagraph (5), the official minute must establish, prima facie, the existence of serious presumptions of fraud or, alternatively, the existence of evidence of serious under-declarations for earlier periods to the effect that a debt in favour of the VAT authority can be foreseen. It goes without saying that such an envisaged debt must be of such a size as to justify withholding payment. Subject to that, the existence of evidence based on fraud or serious under-declaration (even if not fraud) could reasonably lead a national

53 — Case 324/82 *Commission* v *Belgium*, loc. cit., paragraph 29 of the judgment.

court to consider that fiscal interests are in need of protection. That need must also, however, take account of any other relevant circumstances. For example, the scale of the enterprise conducted by the taxable person and its financial stability may be such as to satisfy a court that there is no need for the retention. If, on the other hand, that enterprise is shown to be in danger of becoming insolvent or becoming bankrupt, it may reasonably be said that, in an uncertain situation, a debt should not be paid to an enterprise which may enure to the general body of creditors and not be available to satisfy the tax authorities' claim.

52. At the second hearing, the plaintiffs repeatedly contradicted Belgium's assertion that a *beslagrechter* may set aside a retention, particularly in subparagraph (5) type cases. It goes without saying that, notwithstanding the apparent ambiguities of Belgian law, the Community-law principle of proportionality requires the subsistence of a genuine opportunity of judicial control for the taxable person. Thus, 'under the principle of cooperation laid down in Article 5 of the Treaty, it is for the Member States to ensure the legal protection which individuals derive from the direct effect of Community law'. [54] Since there are no Community rules governing the collection of VAT, it is for the domestic legal systems 'to designate the courts and tribunals having jurisdiction and to lay down the detailed rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law'. [55] In the circumstances of the present reference, Belgian courts and, in particular, *beslagrechters*, must ensure that in balancing the rights of taxable persons under Article 18(4) against the treasury, they do not 'render virtually impossible or excessively difficult the exercise of rights conferred by Community law'. [56]

53. Where the *beslagrechter* is concerned with subparagraph (4) type cases, I am of the opinion that the retention should not be allowed to stand unless there is convincing evidence of the need to protect the national treasury. This would not be limited to cases of impending insolvency, though this would be an important matter. Furthermore, I do not think that treasury interests require the adoption of withholding orders that seek, in addition to protecting the payment of alleged tax debts (and interest thereon), also to secure administrative penalties imposed in respect of such supposed debts. A retention of that sort would constitute an unjustifiable interference with the exercise of the right to deduct.

54. In my opinion, the *beslagrechter* must, on the basis of his appreciation of the manifold elements of fact which he may expect to find, be enabled to make a balanced judgment as to the necessity for the withholding measure in the interests of the VAT adminis-

54 — Case C-312/93 *Peterbroeck* v *Belgian State* [1995] ECR I-4599, paragraph 12 of the judgment.

55 — Ibid.

56 — Case C-312/93, loc. cit., paragraph 12 of the judgment.

tration, taking into account: the apparent strength and seriousness of the evidence of fraud or under-declaration; the likelihood of the due recovery of the amount of the claim after complete determination of the dispute; the financial stability of the taxable person; the length of time likely to elapse before resolution of the dispute; and giving due weight to the need of the taxable person for payment of the sum due to him for the continued conduct of his business. As the Court stated in *Factortame and Others*, [57] 'the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law'. Furthermore, a taxable person, who ultimately succeeds in the main action against the VAT authority, must be entitled to effective compensation from Belgium, such as interest from the date the retained refund would otherwise (i. e. but for the retention) have been paid.

VI — Conclusion

55. In the light of the foregoing, I recommend that the Court answer the various questions referred by the three national courts, which have submitted questions in these four joined cases, as follows:

(1) Article 18(4) 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 is sufficiently clear, precise and unconditional to be capable of being invoked directly by taxable persons in the internal legal systems of the Member States;

(2) National provisions that permit the preventive retention of VAT credits supposedly due to a taxable person in respect of a particular tax period are not, in principle, incompatible with Article 18(4) of the Sixth Directive;

57 — Case C-213/89 [1990] ECR I-2433, paragraph 21 of the judgment.

(3) VAT retention measures must, however, not go beyond what is strictly necessary to protect the fiscal interests of the Member States in ensuring the effective collection of VAT and national courts must ensure that a taxable person whose exercise of the right to deduct conferred by Article 18(4) of the Sixth Directive is affected by such retention measures is guaranteed effective procedural safeguards prior to the adoption of the measure, which must include, *inter alia*, reasonable notice of the reasons for the proposed retention and the opportunity of seeking effective judicial control of the measure after its adoption by the VAT administration. In the case of a retention of an undisputed VAT credit based on a disputed earlier VAT debt, national legal provisions which presume the urgency and/or need for the withholding measure must be set aside by the national court before whom an interim application to lift the retention is brought; such a court must have the power to determine for itself on the basis of all the evidence available and all the circumstances of the case, including the availability of effective alternative forms of protection for the VAT administration, whether there is an urgent necessity for the retention. However, such urgent necessity may not extend beyond securing the amount of the disputed debt (plus interest). In the case of a retention based on serious suspicions of fraud or other serious irregularities in the affairs of the taxable person claiming entitlement to a VAT credit, the court or judge hearing an interim application for its suspension must be entitled, where it/he is not satisfied, on the basis of contradictory evidence which must be produced by the taxable person, of the genuineness of the VAT administration's doubts, to lift the retention on such terms as it/he sees fit. In all preventive retention cases, the VAT administration must undertake, in the event of the taxable person being ultimately successful in the main action concerning the retention, to pay interest on the sum retained from the moment when, in accordance with the normal deduction rules applied in that Member State in the implementation of the Sixth Directive, the sum would have been paid to that taxable person.