2. A Member State has adopted a system such as that referred to in the fourth paragraph of Point 2 "Regarding Article 4" of Annex A to Directive No 67/228/EEC if it has laid down in its legislation that turnover tax shall be levied *inter alia* on the supply of goods and services by undertakings, after entering into the consultations to which reference is made in Article 16 of the directive, even though it has not defined the concept of an undertaking otherwise than as "any person who independently carries on business".

In Joined Cases 181 and 229/78

REFERENCES to the Court under Article 177 of the EEC Treaty by the Hoge Raad [Supreme Court] of the Netherlands for a preliminary ruling in the proceedings pending before that court (in Case 181/78) between

KETELHANDEL P. VAN PAASSEN B.V., Wateringen (Netherlands)

and

STAATSSECRETARIS VAN FINANCIËN [Secretary of State for Finance] / INSPECTEUR DER INVOERRECHTEN EN ACCIJNZEN [Inspector of Customs and Excise], The Hague,

and (in Case 229/78) between

MINISTER VAN FINANCIËN [Minister for Finance], The Hague,

and

DENKAVIT DIENSTBETOON B.V., Voorthuizen (Netherlands),

on the interpretation of the Second Council Directive (No 67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16) in particular Article 4 thereof and Point 2 "Regarding Article 4" of Annex A thereto,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Article 4 of the Second Directive on the harmonization of turnover taxes provides:

" 'Taxable person' means any person who independently and habitually engages in transactions pertaining to the activities of producers, traders or persons providing services, whether or not for gain".

The expression "independently" is defined in Point 2 "Regarding Article 4" of Annex A as follows:

"This expression also makes it possible for each Member State not to consider as separate taxable persons, but as one single taxable person, persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial or organizational relationships. Any Member State intending to adopt such a system shall enter into the consultations mentioned in Article 16".

The following provisions are made for those consultations:

"Where a Member State must, in accordance with the provisions of this Directive, enter into consultations, it shall refer the matter to the Commission in good time, having regard to the application of Article 102 of the Treaty".

The Netherlands introduced the measures provided for in the Directive by means of the Turnover Tax Law 1968 [Wet op de Omzetbelasting 1968] Article 7 of which provides that: " 'Undertaking' means any person who independently carries on business".

This concept of an "undertaking", involving also the concept of a "single entity for tax purposes", lies at the root of the two cases which the Hoge Raad has referred to the Court.

In Case 229/78, Minister van Financiën v Denkavit Dienstbetoon B.V., the following facts are common ground:

As from 1973 Denkavit Dienstbetoon B.V., which was formed in 1964 and whose objects include trade in cattle, bought and sold calves in the capactiy of a commission agent on behalf of Denkavit Nederland B.V.. The main activity of the latter company is the production and sale of milk for calves.

The two companies are managed by the same persons, and they both belong to a group of some 20 companies whose shares are held by two family groups (Buys and Pesch). Thus Denkavit Dienstbetoon B.V. (hereinafter referred to as "the Company") bought new-born calves from cattle dealers in its own name but on behalf of Denkavit Nederland B.V., and it sold calves fattened by Denkavit Nederland B.V. to third parties. In the tax period 1973 to 1974, the Company — regarding itself as a separate undertaking pursuant to Article 3 (5) of the Law of 1968, which provides that "goods ... which are supplied through a commission agent or similar undertaking ... shall be deemed to be supplied to and then by that undertaking" — paid turnover tax of 4% on the turnover net of tax, which represents 3.85% of the gross selling price including tax, and it deducted input tax of 4.25% of the purchase price in accordance with the Law. Thus the Company claimed and obtained repayment of an amount equal to the difference between 4.25% and 3.85% of the prices at which it had effected the purchases and sales in question.

The Inspecteur took the view that this repayment was not justified, and imposed an additional assessment contending that he did not consider the Company to be a separate undertaking within the meaning of the Law. In reliance upon Article 3 (5) of the Law, the Company lodged an objection dated 11 May 1976 against this assessment.

The Inspecteur rejected this objection by a decision of 24 June 1976, against which the Company brought an appeal before the Gerechtshof [Regional Court of Appeal] Amsterdam, which upheld the appeal in Judgment No 1298/76 of 5 October 1977. On 20 December 1977 the Minister van Financiën [Minister for Finance] appealed against this judgment on a point of law to the Hoge Raad [Supreme Court of the Netherlands], which by a judgment of 11 October 1978 asked the Court of Justice, pursuant to Article 177 of the EEC Treaty, to give a ruling on four questions concerning the interpretation of the Second Council Directive on the harmonization of turnover taxes:

"1. Has a Member State adopted a system such as that referred to in Point 2 'Regarding Article 4' of Annex A to the Second Directive, if it has laid down by a Law that turnover tax shall be levied *inter alia* on the supply of goods and services by undertakings and if the concept of an undertaking is not subsequently defined in that Law more closely than as 'any person who independently carries on business', while from the preparatory stages of the Law prior to its coming into force it is clear that the concept of an undertaking can also cover a combination of persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial and organizational relationships?

2. If Question 1 is answered in the negative: Are the national courts nevertheless at liberty, in applying the Law, to interpret the concept of an undertaking in the aforesaid manner as intended by the national legislature?

3. If Question 1 is answered in the affirmative: Did the Netherlands enter into the consultations to which reference is made in Point 2 'Regarding Article 4' of Annex A to the Second Directive?

4. If Question 3 is answered in the negative: What are the consequences for the national courts of this lack of consultation? In particular, are they at liberty, in applying the Law, to interpret the concept of an undertaking in the aforesaid manner as intended by the national legislature?".

In Case 181/78, Ketelhandel P. van Paassen B.V. v Staatssecretaris van Financiën [Secretary of State for Finance], the following facts are common ground: Ketelhandel P. van Paassen B.V. (hereinafter referred to as "van Paassen") carries on trade in boilers. It bought its boilers from Circula N.V., Stiens, (hereinafter referred to as "Circula") which was declared insolvent. Through its wholly-owned subsidiary S.K.S. Siller en Jamart N.V., van Paassen owned all the shares in Circula.

In September and October 1971, van Paassen had deducted as input tax the tax included in the price of the boilers sold to it by Circula. After an investigation, the Inspecteur sent van Paassen on 20 December 1973 an additional assessment concerning the amount of the tax which, in his opinion, had been wrongfully deducted because van Paassen and Circula were to be regarded as a "single entity for tax purposes". Van Paassen lodged an objection, which the Inspecteur rejected on 29 November 1974 again on the ground that the two companies constituted a "single entity for tax purposes".

Following the appeal brought by van Paassen on 24 January 1975, the Second Chamber of the Tariefcommissie [administrative court of last instance in revenue matters] on 1 February 1977 upheld the Inspecteur's decision. Van Paassen appealed on a point a law, and by a judgment of 6 September 1978 the Hoge Raad asked the Court of Justice, pursuant to Article 177 of the EEC Treaty, to give a preliminary ruling on the same four questions as in the preceding case.

The judgments referring the cases were lodged at the Registry of the Court of Justice on 13 October and 11 September 1978 respectively.

Written observations were submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC by the two companies (hereinafter referred to as "the Companies"), the Government of the Netherlands, the Commission of the European Communities and the Government of the Federal Republic of Germany.

By an order of 13 December 1978 the Court decided to join the cases for the purpose of the procedure.

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

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

Question 1

The Companies maintain that it follows from the provisions of the Second Directive at issue that Article 4 thereof lays down a fundamental rule, to which

Point 2 of Annex A provides an exception. Thus *everyone* is in principle a separate taxable person, and a Member State can introduce the system of the "single entity for tax purposes" only by expressly applying the special, exceptional provision laid down in Point 2 of Annex A. In reliance upon the case-law of the Court of Justice (in particular the judgments in Cases 94/77 *Fratelli Zerbone* [1978] ECR 99; 79/72 *Commission* v *Italy* [1973) ECR 667; 52/75 *Commission* v *Italy* [1976] ECR 277; 123/76 *Commission* v *Italy* [1977] ECR 1449; 38/77 *Enka* [1977] ECR 2203; and 95/77 *Commission* v *Netherlands* [1978] ECR 863) the Companies submit that the binding nature of directives on the Member States has been acknowledged, and that therefore the Member State in the present case may regard persons who are linked to one another as a single taxable person only if:

— it formally proposed to adopt such a system;

— it entered into the consultations mentioned in Article 16, and the Commission did not raise any objection to the adoption of the proposed system;

— and finally, it expressly adopted such a system.

According to the three conditions laid down in the Directive, the Netherlands had to make express legal provision for any *additional* system which might have been specially adopted.

Furthermore, the Companies consider that the Netherlands Law at issue must in no circumstances be interpreted in terms of the concept of an undertaking contained in the old Netherlands Law of 1954 but only in terms of the Directive, having regard to its binding nature demonstrated above.

If interpretation were in terms of the old Netherlands Law, it would necessarily lead *a priori* to a divergent interpretation in the different Member States. Through the Directive, the concept of an "undertaking" in Article 7 (1) of the present Law was *automatically* given a new content.

The Companies continue their line of argument by reference to German legislation, which made express provision for the "Organschaft" [single entity for tax purposes] in a separate paragraph. Thus the conclusion must be drawn that where there is no express provision on the single entity for tax purposes — such as that contained in Article 2 (2) (2) of the German Umsatzsteuergesetz [Turnover Tax Law] — as is the case with the Netherlands Law, it must be deemed that no system such as that referred to in Point 2 "Regarding Article 4" of Annex A to the Directive, has in fact been adopted.

Finally, the Companies submit that the Netherlands did not even legally propose to adopt a system involving the single entity for tax purposes, since the consultations provided for in Article 16 of the directive did not take place, and that therefore the question should be answered as follows:

"A Member State may adopt a system such as that referred to in Point 2 'Regarding Article 4' of Annex A to the Second VAT Directive only under the conditions as to substance and as to form

which are laid down in that Directive. In the circumstances described by the national court making the reference, such a system cannot be held to have been adopted".

The *Commission* takes the view that the Second Directive left the Member States a wide area of discretion, and that the institution of the single entity for tax purposes appears to be a long standing concept in Netherlands case-law and theoretical writing. Therefore it does not seem necessary for the concept of an undertaking appearing in Article 7 (1) of the Turnover Tax Law 1968 to be defined expressly as is done in Point 2 of Annex A to the directive.

The Commission also points out the Sixth Council Directive on the harmonization of legislation of Member States concerning turnover taxes (No 77/388/EEC, Official Journal 1977 No L 145, p. 1) which empowers Member States to opt expressly for the German system of the "Organschaft", which constitutes an exception to the normal system. In that case it is therefore no longer a question of a broad interpretation of the general concept of a taxable person. Consequently, the Commission considers that Question 1 should be answered as follows:

"It can be acknowledged that the Kingdom of the Netherlands has adopted a system in accordance with Article 4 of and Point 2 'Regarding Article 4' of Annex A to the Second Directive on VAT, even though only the preparatory stages of the Turnover Tax (VAT) Law 1968 show that the definition of the concept of an 'undertaking' in Article 7 (1) of that Law also covers a combination of persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial and organizational relationships".

The *Netherlands Government* makes the preliminary observation that Case 181/78 concerns the retroactive levying of turnover tax in respect of periods in 1971; and that since in its judgment of 2 February 1977 the Hoge Raad has already held that the common value-added tax system defined in the Second Council Directive did not come into force until 1 January 1972, it may well be asked whether the questions raised in the present case merit any attention.

The Netherlands Government answers the first two questions very briefly, by insisting on the need to maintain in its entirety the principle of the single entity for tax purposes, because it constitutes a firmly established concept in the practice of the levying of value-added tax, and expresses the view that the Second Directive in no way prevents that principle from being retained in force.

The *Government of the Federal Republic of Germany* draws the Court's attention to the fact that this question raises complex problems which may result from the relatively broad powers of interpretation of the courts in certain Member States. Thus, having regard to the possibilities for the interpretation of vague legal concepts, the Government of the Federal Republic of Germany takes the view that preliminary consultations cannot be contemplated, because it would be neither reasonable nor practical to enter into consultations on the possible interpretations conceivable in theory which might be developed by subsequent case-law but which at the time of enactment of the law were still entirely uncertain or not even foreseeable.

Question 2

The Companies rely on the theory of the direct effect of directives in order to answer this question.

After recalling the principles developed by the Court in the course of its case-law (Case 34/73 *Variola* [1973] ECR 981; Case 9/70 *Franz Grad* [1970] ECR 825; Case 41/74 *Yvonne Van Duyn* [1974] ECR 1337; Case 51/76 *VNO* [1977] ECR 113; and Case 38/77 *Enka* [1977] ECR 2203, cited above) they apply them to the Second Directive, and conclude that the national court must establish whether the national measure in question exceeds the Member States' margin of discretion. Finally, they recall that in Case 111/75 *(Mazzalai* [1976] ECR 657) Mr Advocate General Reischl stressed that "the value-added tax Directive . . . is intended to bring about the widest possible harmonization of the law on value-added tax. It is therefore to be assumed that the Directive uses the most precise concepts possible and is designed to be as complete as possible"; and that the Court of Justice held in Case 51/76 *(VNO,* cited above) that the interpretation, in general terms, of an expression appearing in the VAT Directive could not be left to the discretion of each Member State.

Consequently, the concept of an "undertaking" must be interpreted strictly according to the provisions of the Directive, and since — as was shown in the answer to Question 1 — the special system in Point 2 "Regarding Article 4" of Annex A was not adopted, the principle of the single entity for tax purposes cannot be applied. All the more so as that principle deprives undertakings of the power to deduct input tax for which provision is made in Article 11 of the Directive and is one of the essential components of the VAT system.

Therefore the Companies conclude that the provisions of the Directive, which have direct effect, give the taxable person the right to deduct input tax in respect of his purchases. That right can be restricted only when, in accordance with Point 2 "Regarding Article 4" of Annex A to the Directive, the Member State has adopted special rules in that connexion for the single entity for tax purposes. As those special rules have not been adopted — if Question 1 is answered in the negative — there is nothing to prevent the exercise of the right to deduct input tax in respect of transactions with linked undertakings, and the national court is obliged to protect the rights which individuals derive from the provisions of that Directive. Therefore the answer should be the following:

"It follows from the binding legal nature of the Second VAT Directive and the direct effect of the relevant provisions of that directive that persons who are linked to one another by economic, financial or organizational relationships must — in the absence of a system such as that referred to in Point 2 'Regarding Article 4' of Annex A — be regarded as separate taxable persons within the meaning of Article 4 and the national courts are not at liberty to interpret the concept of an undertaking in any other manner".

The *Commission* merely states that, as

follows from its observations on Question 1, Article 4 of the Second Council Directive of 11 April 1967, interpreted in the light of Point 2 of Annex A thereto, allows the principle of the single entity for tax purposes to be used in the field of turnover taxes; and it proposes that this question should be answered as follows:

"The Netherlands courts may interpret the concept of an undertaking in the manner indicated in Question 1 as intended by the national legislature, since that concept is not contrary to the provisions of the Second Council Directive of 11 April 1967 concerning VAT".

Question 3

The *Companies* are of the opinion that Questions 3 and 4 must also be dealt with if Question 1 is answered in the negative and Question 2 in the affirmative.

Before giving a direct answer to the question raised, the Companies analyse the case-law of the Court concerning the consultation procedures under the Treaty, and above all the interpretation of Article 102 of the EEC Treaty given by the Court in Case 6/64 *(Costa* v *ENEL* [1964] ECR 585) in which it declined to hold that Article 102 had direct effect. However, they consider that, although Article 16 of the Directive refers to Article 102 of the EEC Treaty, there is otherwise no reason to assume that the consultation procedure within the framework of the Directive has the same optional nature — at least as regards individuals — as that referred to in Article 102 of the Treaty.

Examination of the wording of Article 16 shows that it contains a concrete consultation procedure which does not leave the Member States any discretion regarding the circumstances in which it must be applied. Moreover, in the field of harmonization, the Court has held (Case 33/70 *SACE* [1970] ECR 1213) that directives have legal consequences for individuals.

Consequently, the Companies take the view that even though Article 16 of the Directive refers to Article 102 of the EEC Treaty, it is none the less necessary to examine the consultation procedure within the framework of the binding law of directives; and this opinion is confirmed by the case-law of the Court (Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555; Case 5/73 *Balkan Import* [1973] ECR 1092; Case 31/74 *Galli* [1975] ECR 47).

On the basis of the principles thus defined, the Companies submit that three conditions must be fulfilled before the consultation procedure can be regarded as having been lawfully applied:

(a) The Member State must have expressly referred to the Commission the problem for which consultation is required, and expressly pointed out that it is a question of consultations of the kind concerned.

(b) The Commission — in accordance with the second sentence of Article 102 (1) of the EEC Treaty — must have consulted the other Member States and recommended to the Member State concerned measures as may be appropriate to avoid any distortion.

(c) It must be clearly apparent to those coming under the law that the consultation procedure has in fact been applied, and this must then emerge for example from the preparatory stages of the law in question.

According to the Companies, the importance of express and correct application of the consultation procedure is obvious: first, because the Commission can thus carry out its task; secondly, because every taxpayer must be able to check whether the tax provisions which impose a duty on him have been adopted legally, hence in accordance with the consultation procedure.

The preparatory stages do not reveal anything regarding the consultation procedure, which, in the Companies' submission, is in itself contrary to the fundamental requirement of publicity. The Netherlands Government merely sent the draft law to the Commission without pointing out to the Commission that it specifically wished to consult it over the adoption of a system such as that referred to in Point 2 "Regarding Article 4" of Annex A to the Directive; the Commission does not appear to have made any observation concerning such a system; and those coming under the law were not able to establish whether the consultation procedure had been correctly applied in relation to this specific problem.

Consequently the Companies argue that the mere fact of sending a draft law to the Commission can clearly not replace a consultation procedure on a specific partial problem, because the Commission cannot be required itself to discover from a draft law which is sent to it the points on which consultations are desired. Furthermore, in this way the Member States could in fact evade their obligations to enter into consultations by merely sending the Commission every draft law. In the present case it is also very important to note that the text of the draft law contained absolutely *no rule* on the single entity for tax purposes (see Article 7 (1) of the Law) so that the Commission was not *able* to ascertain that in that case a problem subject to the consultation procedure might arise.

As this appears to be confirmed by the case-law of the Court of Justice (Case 48/72 *Haecht II* [1973] ECR 77; Case 71/74 *Frubo* [1975] ECR 563; Case 61/77 *Commission* v *Ireland* [1978] ECR 417; Case 28/77 *Tepea* v *Commission* [1978] ECR 1391) the answer should therefore be the following:

"The Netherlands did not enter into the consultations to which reference is made in Point 2 'Regarding Article 4' of Annex A to the Second VAT Directive".

The *Commission* states that the Netherlands Government sent it three letters concerning the preparatory stages and publication of the Law of 1968 relating to VAT (which letters it produces as an annex to its statement of observations) and expresses the view that those letters can hardly be regarded as due consultations for the purposes of Article 16 of the Second Directive, since the State concerned did not precisely and expressly point out the provisions of the Directive which made consultations mandatory or the draft measure or the Community rules to which the draft measure provided exceptions. However, in the present case the Commission is of the opinion that the wording of Article 16 of the Second Directive is not very clear as regards a Member State's obligation to enter into consultations where it does not expressly adopt a system involving the single entity for tax purposes but retains in force an existing traditional system, and that therefore the answer should be that:

"The Netherlands did not effectively enter into the consultations preliminary to the adoption of the system mentioned in the fourth paragraph of Point 2 'Regarding Article 4' of Annex A as they were required to do by Article 16 of the Second Directive on VAT. However, it may be doubted whether that consultation procedure was mandatory in this case".

The *Netherlands Government* observes that it informed the Commission several times, and as the Commission never indicated that that correspondence did not satisfy the obligation to enter into consultations, it thus fulfilled its obligation to enter into consultations, all the more so as in its submission that obligation is not subject to any rule as to form. Finally, it refers to the statement lodged by the Commission in Case 126/78, *Spoorwegen,* in which the Commission takes the view that, even if the consultation procedure has not been carried out in due form, the formal defect which results from this nevertheless appears insufficient in itself to justify a finding that the national measure is invalid.

The *Government of the Federal Republic of Germany* observes first that the Court has already held that such questions of fact are inadmissible within the framework of proceedings for a preliminary ruling brought under Article 177 of the Treaty (Case 51/74 *P.J. Van der Hulst's Zonen* [1975] ECR 79); next that the Netherlands Government has already entered into consultations (the three letters); and that thus the question raised should be changed, because in fact it is intended to ascertain whether the consultations — which have been carried out — were carried out in accordance with the provisions of the fourth paragraph of Point 2 of Annex A to the Second Directive.

After pointing out that — since the Second Directive did not enter into force until 1 January 1972 — it is doubtful whether its provisions concerning the consultation procedure apply in the present case, the Government of the Federal Republic of Germany analyses the development of the consultation procedure in the course of the different drafts and amendments of the Commission and the Council, and, comparing it with the procedure provided in Article 13, it draws the following conclusion:

"The consultation procedure to which reference is made in Article 16 of the Second Directive on turnover tax can in no case go beyond the conditions laid down in Article 102 of the Treaty; it merely represents a *less* elaborate 'preliminary stage' which may possibly lead to a subsequent procedure under Article 102."

The Government of the Federal Republic of Germany considers that it follows that Member States in principle fulfil their obligation to enter into consultations under Article 16 of the Second Directive on turnover tax by sending the necessary information to the Commission and, should the need arise, by answering supplementary questions by the Commission.

Thus the answer to Question 3, if it is held to be admissible, should be that:

"A Member State fulfils the requirements pertaining to the obligation to enter into consultations in accordance with the fourth paragraph of Point 2 of Annex A to the Second Directive on turnover tax if it sends the Commission all the information necessary to enable it to assess the legislative measure which it is proposed to adopt. For this purpose, communication of a draft law may suffice in certain cases, if the draft law, accompanied if necessary by a statement of the grounds on which it is based, allows an assessment to be made of the necessity for the procedure under Article 102".

Question 4

The Companies propose the following answer, in reliance on the binding nature and the direct effect of the directive which — in their submission — they have proved above:

"So long as the prescribed consultations have not taken place, the special system provided for in Point 2 'Regarding Article 4' of Annex A to the Second VAT Directive cannot be legally adopted.

In these circumstances, the national courts are not at liberty to consider persons who are linked to one another by economic, financial or organizational relationships as a single taxable person".

Finally, the Companies examine the consequences for Netherlands law in the field of turnover tax.

If the argument — defended by the Companies — that there is no single entity for tax purposes were upheld; the consequence would be satisfactory from all points of view, because the result would be application of the VAT system in accordance with the *fundamental rules* laid down in that connexion by the Second VAT Directive.

On the other hand, if the argument in favour of the single entity for tax purposes were upheld, the consequences would be unsatisfactory:

— first, because that rule was never expressed in writing in the Law;

— secondly, because the old system of the single entity for tax purposes, designed for a multi-stage turnover tax system, would lead to an increase in the tax burden by preventing input tax from being deducted on purchases in certain cases;

— thirdly, because that additional tax burden, which is unforeseeable for the taxpayer, does not conform with the system introduced by the Second Directive since it is contrary to the protection which the constitutions of all the Member States give taxpayers against tax burdens which do not result clearly and foreseeably from the law itself;

— fourthly, the argument of expediency, according to which the Netherlands need the concept of the single entity for tax purposes in order to counteract certain consequences which they consider undesirable, cannot be upheld, on the one hand, because this is no reason to exempt a Member State from obligations arising from a directive and, on the other, because even if correct levying of tax is in fact wholly or partly jeopardized by *abnormal* transactions between linked undertakings, that risk can be removed in the Netherlands by use of the concept of *fraus legis* along the lines of the possibility offered in Germany by Article 42 of the Abgabenordnung [Order on Levies] (abuse of the legal possibilities for arranging transactions) and in France by Article 1649, *quinquies* B, of the Code Général des Impôts [General Tax Code] ("abus de droit"); *a fortiori* as both of the present cases concern ordinary transactions.

The *Commission* doubts whether any formal defect which may result from the failure to consult the Commission can in itself entail the invalidity of the national system, and proposes that the question should be answered as follows:

"The national courts can interpret the concept of an undertaking in the manner intended by the national legislature, provided that they remain within the

margin of discretion left to the national authorities for the implementation of the Second Council Directive of 11 April 1967 concerning VAT".

The *Government of the Federal Republic of Germany* considers that this question exclusively concerns the consequences which a possible breach of the duty to enter into consultations may have for the effects of internal law. It repeats Articles 13 and 16 of the directive, and points out that the procedure provided for in Article 16 was not to receive any binding effect whereas that provided in Article 13 was reinforced by the introduction of a blocking effect [Sperrwirkung]. This fact in itself seems to show that a breach of the duty of consultation laid down in Article 16 cannot alter the effects of national measures, and that thus individuals have no rights which the national courts are obliged to protect.

In the submission of the Government of the Federal Republic of Germany, this view is confirmed by the case-law of the Court of Justice on Articles 102 and 93 of the EEC Treaty (Case 6/64 *Costa* v *ENEL*, cited above) and on Article 115 of the EEC Treaty (Case 27/78, not yet published, and Case 62/70 *Bock* [1971] ECR 897, at p. 917). And since moreover Articles 93, 115 and even 102 are more precise and more binding — because the Commission may decide with binding effect, or at least recommend on the basis of the consultations which have been entered into, that the national measure shall be amended or abolished — it would hardly be consistent with the structure of the Treaty if mere failure to enter into consultations which do not lead to a formal procedure ending in a recommendation by the Commission were in itself to entail the invalidity of the legislative measure under consideration.

The Government of the Federal Republic of Germany goes on to show that even in national law a defect in the legislative procedure makes the law void only where there is a *clear* breach of the constitution (cf. Bundesverfassungsgericht [Federal Constitutional Court] E 34,9). In Community law Article 173 of the EEC Treaty stipulates that only infringement of an essential procedural requirement entails the unlawfulness of the legislative provision.

Furthermore, if the procedural defect could alter the effects of the national law, there would no longer be any legal certainty for the individual, because he must be certain that a law of this kind will not be declared invalid on the grounds of failure to enter into consultations which in general do not have to be published and therefore cannot be verified.

Finally, the Government of the Federal Republic of Germany states that in principle the Member States retain sovereignty in matters of taxation, and that in this connexion it cannot be ignored that tax measures are an indispensable instrument of economic policy, which in principle comes within the area reserved to the Member States under the Treaty.

Consequently, the Government of the Federal Republic of Germany proposes that the answer to Question 4 should be that "breach of the duty to enter into consultations under the fourth paragraph of Part 2 of Annex A to the Second Directive on turnover tax does not give rise to rights for individuals which the national courts must protect".

III — Oral procedure

Denkavit Diensbetoon B.V., represented by Mr Hijweege, the Government of the Federal Republic of Germany, represented by A. Deringer and J. Sedemund, and the Commission of the European Communities, represented by its Agent, B. Baeyens, presented oral argument at the hearing on 20 March 1979.

The Advocate General delivered his opinion at the hearing on 8 May 1979.

Decision

1 By judgments dated 6 September and 11 October 1978, which were lodged at the Court Registry on 11 September 1978 and 13 October 1978, the Hoge Raad of the Netherlands referred several questions for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of certain provisions of the Second Council Directive (No 67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16) in particular Article 4 thereof and Point 2 "Regarding Article 4" of Annex 4 thereto.

2 These questions arise in two cases between a company and the Netherlands Ministry for Finance, which imposed an additional assessment to turnover tax on each of the two companies concerned on the grounds that did not have the capacity of an "undertaking", because although independent from the legal point of view they were both linked to third companies by economic, financial and organizational relationships and therefore constituted with those companies a "single entity for tax purposes" and consequently could not bring value-added tax into their internal transactions with those third companies, and that the companies had wrongfully recovered input tax.

3 In order to resolve this issue, the national court submitted four identical questions in each of the Joined Cases. The first and third of them are very closely connected, and should therefore be dealt with together.

4 In its first question, the national court asks whether "a Member State has adopted a system such as that referred to in Point 2 'Regarding Article 4' of Annex A to the Second Directive, if it has laid down by a Law that turnover tax shall be levied *inter alia* on the supply of goods and services by undertakings and if the concept of an undertaking is not subsequently defined in that Law more closely than as 'any person who independently carries on business', while from the preparatory stages of the Law prior to its coming into force it is clear that the concept of an undertaking can also cover a combination of persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial and organizational relationships", and in the third, if Question 1 is answered in the affirmative, it asks whether "the Netherlands entered into the consultations to which reference is made in Point 2 'Regarding Article 4' of Annex A to the Second Directive". This question is in effect an extension of Question 1, because if Question 3 is answered in the negative this would threaten to deprive an affirmative answer to Question 1 of any effect, since the provision referred to in Question 3 requires a Member State to consult the Commission when it is contemplating the adoption of the system of a single entity for tax purposes.

5 In order to answer these questions, it is first necessary to state that Article 2 of the Second Directive makes "the supply of goods and the provision of services within the territory of the country by a *taxable person* against payment" subject to value-added tax — as from 1 January 1972, the date on which the Member States were to implement the provisions of the said Directive — and that Article 4 defines a "taxable person" as "any person who *independently* and habitually engages in transactions pertaining to the activities of producers, traders or persons providing services, whether or not for gain".

6 The expression "independently" is defined in the fourth paragraph of Point 2 "Regarding Article 4" of Annex A — an integral part of the Second Directive by virtue of Article 20 thereof — as meaning that it "makes it possible for each Member State not to consider as separate taxable persons, but as one single taxable person, persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial or organizational relationships".

7 It is accepted by the national court that the system thus described, known as the "single entity for tax purposes", traditionally formed part of the internal

legal order of the Netherlands before the introduction of the VAT system and that "from the preparatory stages of the Turnover Tax Law 1968 before it came into force it is clear that the legislature wished to give the concept 'undertaking' as described in Article 7 (1) of the Law no other content" (judgment of the Hoge Raad of 6 September 1978 in the van Paassen case).

8 According to Point 2 "Regarding Article 4" of Annex A that system could be expressly allowed, in national legislation introducing the provisions of the Directive relating to VAT into its internal legal order, provided that the Member State entered into the consultations mentioned in Article 16 of the Second Directive.

9 Therefore the question is whether the measures adopted by the Netherlands Government to introduce the provisions of the Directives on VAT into its internal legal order were brought to the attention on the Commission in accordance with the requirements of Article 16.

10 Article 16 does not lay down any particular procedure from the point of view of the form of the reference to the Commission, but it does require that such reference should be made "in good time", that is to say that the Commission should be given a reasonable period of time to examine the documents sent to it, that it should know the purpose for which the Member State has sent them to it and that they should contain complete information enabling the Commission — in accordance with Article 101 of the Treaty — to find that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated.

11 The correspondence sent to the Commission by the Netherlands Government concerning the preparatory stages and publication of the Netherlands Turnover Tax Law 1968 comprises three letters:

(1) a letter of 3 November 1967 transmitting "the Draft Law, the statement of the grounds on which it was based and annexes, in connexion with the provisions of the Council Directives of 11 April 1967",

(2) a letter of 24 April 1968 transmitting amendments to the Draft Law, stating that the communication is "in connexion with the provisions of the Council Directives of 11 April 1967", and

(3) a letter of 16 July 1968 sending the Commission a copy of the "Staatsblad 329" [Official collection of laws, regulations and statutory instruments, No 329], in which the Law of 28 June 1968 was published, and expressly stating that, "this communication is intended to satisfy the provisions of the Council directives which provide for a consultation procedure in a certain number of cases in which the Member State concerned must refer the matter to the Commission in good time"; the letter listed a certain number of particular points in respect of which consultations were requested, but the question raised in this case — exemption from VAT under the system of the single entity for tax purposes — did not appear in that list.

However it must be noted that:

(1) Although the expression "consultations" was used only in the last letter, the sole purpose of all this correspondence was to satisfy the obligation to enter into consultations, since no provision in the Directives required any transmission of national texts to the Commission except in relation to requests for consultations.

(2) The Commission received complete information concerning the Netherlands legislation enacted in the field of VAT since it was sent the Draft Law, the amendments thereto, the definitive text and the statement of the reasons on which it was based, which was very detailed *inter alia* as to the concept of an "undertaking" which covers that of a single entity for tax purposes (Annexes to the Reports of the Second Chamber, 1967/1968-9234, No 3, p. 31, right-hand column, penultimate paragraph).

(3) The matter was referred to the Commission in good time, since the last reference was made in July 1968 whilst the Directive did not have to be implemented until 1 January 1972, and the Commission therefore had more than three years to make any necessary observations to the Netherlands Government.

12 It must therefore be found that, having regard to the terms of Article 16 of and Point 2 "Regarding Article 4" of Annex A to the Second Directive, the Government of the Netherlands fulfilled the obligations imposed by the Directive in order to retain the system of the single entity for tax purposes in force in its legislation.

13 Therefore the answer to Questions 1 and 3 should be that a Member State has adopted a system such as that referred to in the fourth paragraph of Point 2 "Regarding Article 4" of Annex A to the Second Directive if it has laid down in its legislation that turnover tax shall be levied *inter alia* on the supply of goods and services by undertakings, after entering into the consultations to which reference is made in Article 16 of the directive, even though it has not defined the concept of an undertaking otherwise than as "any person who independently carries on business".

14 Questions 1 and 3 of the national court having been answered together in the affirmative, there is no need to answer Questions 2 and 4.

Costs

15 The costs incurred by the Governments of the Netherlands and the Federal Republic of Germany and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Moreover, as these proceedings are in the nature of a step in the actions pending before the Hoge Raad, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad by judgments dated 6 September and 11 October 1978, hereby rules:

A Member State has adopted a system such as that referred to in the fourth paragraph of Point 2 "Regarding Article 4" of Annex A to the Second Directive if it has laid down in its legislation that turnover tax shall be levied *inter alia* on the supply of goods and services by undertakings, after entering into the consultations to which reference is made

in Article 16 of the directive, even though it has not defined the concept of an undertaking otherwise than as "any person who independently carries on business".

Kutscher Mertens de Wilmars Mackenzie Stuart

Pescatore Sørensen O'Keeffe Touffait

Delivered in open court in Luxembourg on 12 June 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 8 MAY 1979 [1]

Mr President,
Members of the Court,

On 11 April 1967 the Council, on the basis of Articles 99 and 100 of the EEC Treaty, adopted the First and Second Directives on the harmonization of leglislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Directives Nos 67/227/EEC and 67/228/EEC, Official Journal, English Special Edition 1967, p. 14 and p. 16). As a result of those Directives for harmonization, cumulative multi-stage taxes were to be abolished and a common system of value-added tax introduced in all Member States as soon as possible and in any event not later than 1 January 1970, which date was subsequently postponed to 1 January 1972 by the Third Directive on value-added tax.

Pursuant to the Second Directive the Kingdom of the Netherlands adopted on 28 June 1968 a law for the replacement of the existing turnover tax by a system of value-added tax, which entered into force on 1 January 1969 (Wet op de Omzetbelasting 1968, Staatsblad 329).

The parties to the main action which is at the root of the joined cases before the Court disagree as to whether the concept of a taxable undertaking used in that law is compatible with the Second Council Directive on the harmonization of turnover tax, which provides in Article 4:

" 'Taxable person' means any person who independently and habitually engages in transactions pertaining to the

1 — Translated from the German.