JUDGMENT OF THE COURT (Fourth Chamber)

12 June 2008 *

In Case C-462/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 22 December 2005,

Commission of the European Communities, represented by R. Lyal and M. Afonso, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, Â. Seiça Neves and R. Laires, acting as Agents,

defendant,

* Language of the case: Portuguese.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 March 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 In its application the Commission of the European Communities requests the Court to declare that, by maintaining in force legislative provisions applying a reduced rate of value added tax (VAT) of 5% to road tolls for crossing the Tagus at Lisbon, the Portuguese Republic has failed to fulfil its obligations under Articles 12 and 28 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value

added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2001/4/EC of 19 January 2001 (OJ 2001 L 22, p. 17, 'the Sixth Directive').

Legal context

The Sixth Directive

2 The 19th recital in the preamble to the Sixth Directive states:

'Whereas it is vital to provide for a transitional period to allow national laws in specified fields to be gradually adapted'.

3 Article 2(1) of the Sixth Directive provides that 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to VAT.

4 Article 4(1) and (5) of the Sixth Directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

…

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

…'

5 As regards rates of VAT, Article 12(3)(a), first to third subparagraphs, of the Sixth Directive provides:

'The standard rate of value added tax shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. From 1 January 2001 to 31 December 2005, this percentage may not be less than 15%.

On a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, the Council shall decide unanimously on the level of the standard rate to be applied after 31 December 2005.

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.'

6 The services of providing access to roads on payment of a toll do not appear either on the list in Annex D to the Sixth Directive or on the list in Annex H to that directive.

7 Article 28(2) of the Sixth Directive reads:

'Notwithstanding Article 12(3), the following provisions shall apply during the transitional period referred to in Article 28l.

…

(d) Member States which at 1 January 1991 applied a reduced rate to restaurant services, children's clothing, children's footwear and housing, may continue to apply such a rate to such supplies.

(e) Member States which at 1 January 1991 applied a reduced rate to supplies of goods and services other than those specified in Annex H may apply the reduced

rate or one of the two reduced rates provided for in Article 12(3) to such supplies, provided that the rate is not lower than 12%.'

National law

8 Article 18(1)(a) of the Portuguese Value Added Tax Code ('the VAT Code') provides that the imports, supplies of goods, and supplies of services mentioned in List I annexed to the VAT Code are subject to a reduced VAT rate of 5%. Point 2.19 on that list covers '[r]oad tolls for crossing the Tagus at Lisbon'.

9 The Portuguese regulations concerning the rate of VAT applicable to that type of toll have evolved as follows:

— on 1 January 1991 a reduced rate of 8% was in force, which was the same as the rate applying to motorway tolls;

— from 24 March 1992 until 31 December 1994, the standard rate of VAT was applied under Law No 2/92 of 9 March 1992;

— since 1 January 1995 a reduced VAT rate of 5% has applied to road tolls for crossing the Tagus at Lisbon, under Law No 39-B/94 of 27 December 1994, whilst the standard rate has applied to other tolls.

Facts in the case and pre-litigation procedure

Background to the present case

10 The application by the Portuguese Republic of a VAT rate of 5% on road tolls for crossing the Tagus at Lisbon was the subject of earlier proceedings for failure to fulfil obligations instituted by the Commission in April 1996 in Case C-276/98 *Commission* v *Portugal* [2001] ECR I-1699.

11 That case concerned not only services linked to crossing the Tagus by toll bridges but also transactions relating to certain goods. The Commission submitted that, by applying a VAT rate of 5% to those services and transactions, the Portuguese Republic had failed to fulfil its obligations under Articles 12 and 28(2) of the Sixth Directive.

12 In Case C-276/98, the Court upheld the Commission's action in so far as it concerned the goods but dismissed it in so far as it concerned the tolls. The grounds of that judgment are as follows:

'22 The Commission accuses the Portuguese Republic of infringing Articles 12(3) and 28(2) of the Sixth Directive by taxing tolls for crossing the toll bridge over the Tagus in Lisbon at a reduced VAT rate of 5% rather than the normal rate in Portugal of 17%.

23 However, the Commission has not brought before the Court sufficient evidence for it to establish the existence of the alleged failure to fulfil obligations. Indeed, it has not been established that the service in question was subject to VAT.

24 In that respect, it should be noted that, under Article 2, point 1, of the Sixth Directive, only supplies of services by a taxable person acting as such are subject to VAT.

25 Under Article 4(5) of the same directive, bodies governed by public law are not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they are acting for consideration. As the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be cumulatively fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see, in particular, Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, paragraph 34; C-276/97 *Commission* v *France* [2000] ECR I-6251, paragraph 39; Case C-358/97 *Commission* v *Ireland* [2000] ECR I-6301, paragraph 37; Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 49; and Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 34 …).

26 Here, the Commission has not challenged the fact that, as the Portuguese Government stated at the hearing, it is a body governed by public law, acting as a public authority, that places the toll bridge over the Tagus in Lisbon at the disposal of its users.

27 It must therefore be held that, since the conditions laid down in the first subparagraph of Article 4(5) of the Sixth Directive have been met in this case, the services supplied by the body governed by public law are not taxable. In this context, the Commission is wrong to claim that that provision offers only an option to derogate from the general principle laid down by Article 2, point 1, of the Sixth Directive. It is clear from the wording of Article 4(5) of the Sixth Directive that Member

States are not entitled to regard bodies governed by public law as taxable persons in respect of an activity performed in the capacity of a public authority not appearing, as in this case, in Annex D to the Sixth Directive and not fulfilling the conditions specified in the second subparagraph of Article 4(5). Therefore, they may not, by virtue of Article 2, point 1, of the Sixth Directive, tax the transactions carried out by those bodies (see, to that effect, Joined Cases 231/87 and 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda* v *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 33).

28 It is true that, if exemption of the activity in question from VAT would lead to significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive, the provision of access to that bridge on payment of a toll would be taxable by virtue of that same provision. In this case, however, the Commission has not argued the existence of such distortions at any time during the pre-litigation procedure.

29 Therefore, contrary to what the Commission claims, the Portuguese Republic has not, by introducing or maintaining in force the reduced rate of VAT on tolls paid for crossing the bridge over the Tagus, infringed Articles 12(3) and 28(2) of the Sixth Directive. In the context of the present action, it is not necessary to reply to the question whether Portugal has infringed other provisions of that directive. During the pre-litigation procedure, the Commission did not make any complaint based on the infringement of provisions other than those of Articles 12(3) and 28(2) of the Sixth Directive, so that such an infringement does not constitute the subject-matter of the dispute.

30 The Commission's action must therefore be dismissed in so far as it concerns tolls for crossing the bridge over the Tagus in Lisbon.'

The pre-litigation stage in the present proceedings

13 After the judgment was delivered in Case C-276/98 the Commission decided to bring further proceedings for failure to fulfil obligations. The letter of formal notice of 19 December 2003 listed two complaints against the Portuguese Republic:

— main submission: the failure complained of resulted from the incompatibility of the VAT Code with Article 4(5) of the Sixth Directive, since the services in question, because they were supplied by a person not liable to VAT, should not have been subject to that tax;

— in the alternative: if the Portuguese authorities considered that the services in question were taxable, the failure would be constituted by the incompatibility of the VAT Code with Articles 12 and 28 of that directive, since standard rate VAT should be applied in this case and not a reduced rate.

14 In the light of the reply from the Portuguese authorities to that letter of formal notice, the Commission sent a reasoned opinion to the Portuguese Republic on 9 July 2004, restating its main and alternative submissions and requesting it to adopt the necessary measures to fulfil its obligations resulting from that opinion within a period of two months of receiving it. As that Member State did not adopt measures to amend its legislation within the allotted time the Commission decided to bring the present action.

15 In support of its action, the Commission relies only on the second of the two complaints stated in paragraph 13 above, namely that it is not the standard rate of VAT that is applied to road tolls for crossing the Tagus at Lisbon but a rate of 5%.

The action

16 By a separate document, the Portuguese Republic raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure of the Court of Justice. The Court, by order of 16 January 2007, decided to reserve its decision on that objection for the final judgment and consider them at the same time.

The objection of inadmissibility

Arguments of the parties

17 The Portuguese Republic raises an objection of inadmissibility on the ground of *res judicata*. It takes the view that in Case C-276/98 the Court had already given a ruling on the same issue as that raised in the present action. As neither the factual circumstances nor the relevant domestic or Community law have changed, the finding made by the Court in paragraph 29 of that judgment concerning the absence of infringement of Articles 12(3) and 28(2) of the Sixth Directive, has the force of *res judicata* and therefore the action should be declared inadmissible.

18 That Member State submits that, although the letter of formal notice and the reasoned opinion relating to the present proceedings concern other failings of the Portuguese legislation in relation to the Sixth Directive, in particular infringement of Article 4(5) of that directive, the subject-matter of this action is ultimately limited to Articles 12 and 28 of that directive, which were relied on in Case C-276/98.

19 The Commission challenges the inadmissibility pleaded by the Portuguese Republic in respect of its action.

20 First, the Commission considers that *res judicata* only covers points of fact and of law actually or necessarily settled in Case C-276/98, and that a finding that the Portuguese legislation is compatible with Articles 12 and 28 of the Sixth Directive cannot be inferred from paragraphs 23 to 28 of the judgment in that case. In that judgment the Court merely found that the Commission had failed to prove that the operator of the services at issue was a private operator.

21 Second, the Commission considers it is clear that there has been a change in the facts which were regarded as having been established in 2001, which prevents the judgment in Case C-276/98 from acquiring the force of *res judicata* in relation to new proceedings between the same parties which have the same subject-matter as the action which culminated in that judgment.

22 In that regard, the Commission refers to the ambiguous and manifestly contradictory nature of the different positions taken successively by the Portuguese authorities regarding the legal status of the body responsible for operating the toll bridges over the Tagus at Lisbon. During the hearing in Case C-276/98 the authorities concerned stated that the operator was a body governed by public law; however, during the pre-litigation stage of the present proceedings they argued that the operator concerned was a commercial company governed by private law, adding that the Court's finding in that judgment was based on a misunderstanding of the written and oral statements made by the representatives of the Portuguese Republic.

Findings of the Court

23 It is clear from settled case-law that the principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-281/89 *Italy* v *Commission* [1991] I-347, paragraph 14; Order in Case C-277/95 P *Lenz* v *Commission* [1996] I-6109, paragraph 50, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] I-8375, paragraph 44).

24 In the present case, although the failure alleged is, as in Case C-276/98, an infringement of Articles 12 and 28 of the Sixth Directive, it should be noted that in that case the Portuguese Republic made no mention, either at the pre-litigation stage or during the written procedure before the Court, of the operator of the services concerned being a concession holder. The only mention of the operator's legal status was at the hearing, when the representative of that Member State simply referred to the operator in question as a body governed by public law, acting as a public authority (see in that connection Case C-276/98, paragraph 26).

25 However, during the pre-litigation procedure in the present case the Portuguese Republic admitted for the first time that the operator of the bridges over the Tagus at Lisbon is Lusoponte — Concessionária para a travessia do Tejo SA ('Lusoponte'), a consortium of companies which, following an international tendering procedure, was granted a concession expiring on 24 March 2030 and covering project design, construction, financing, operation and maintenance of the current Vasco de Gama Bridge, and also the operation and maintenance of an earlier bridge, namely the 25 de Abril Bridge.

26 It is clear from the Court's settled case-law that, even though in proceedings for failure to fulfil obligations under Article 226 EC it is incumbent on the Commission to establish the existence of the failure it has alleged, Member States are nevertheless required, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular, according to Article 211 EC, in ensuring that the

provisions of the EC Treaty and the measures taken by the institutions pursuant thereto are applied. When it is a question of checking whether the national provisions intended to ensure effective implementation of a directive are correctly applied in practice, the Commission is largely reliant on the information provided by the Member State concerned, and so that State cannot plead that there is a lack of specific information as to national law and practice put forward by the Commission and, therefore, the action is inadmissible (see Case C-408/97 *Commission* v *Netherlands*, paragraphs 15 to 17, and case-law cited therein, and Case C-248/05 *Commission* v *Ireland* [2007] ECR I-9261, paragraphs 67 and 68, and case-law cited therein).

27 Clearly, the new information provided by the Portuguese Republic concerning the legal status of the operator of the services at issue constitutes a fundamental change in the factual premise in the light of which, in Case C-276/98, the Court found that Article 4(5) of the Sixth Directive applied and that therefore the complaint of failure to comply with Articles 12 and 28 of that directive as regards road tolls for crossing the Tagus at Lisbon should be rejected. In those circumstances, the Portuguese Republic cannot validly plead *res judicata*, since the subject-matter of the present case and that of Case C-276/98 are different, precisely on account of the information which that Member State supplied to the Commission in the context of the present case.

28 Therefore, the objection of inadmissibility raised by the Portuguese Republic against the Commission's action must be rejected as unfounded.

Substance

29 It should be noted first of all that any failure to fulfil obligations as a result of a misapplication of the rates chargeable under Articles 12 and 28 of the Sixth Directive presupposes either the inapplicability of Article 4(5), first subparagraph, of the Sixth Directive in the present case or, where appropriate, the applicability of that provision in conjunction with Article 4(5), second subparagraph.

30 If Article 4(5), first subparagraph, of the Sixth Directive is applicable, the supply of goods or services effected for consideration within a country can not be taxed if they are effected by a body not liable to VAT. It is only where the non-taxability provided for in that first subparagraph leads to significant distortions of competition that the second subparagraph of Article 4(5) requires the services in question to be subject to VAT.

Applicability of Article 4(5), first and second subparagraphs, of the Sixth Directive

— Arguments of the parties concerning Article 4(5), first subparagraph

31 The Commission submits that Article 4(5), first subparagraph, of the Sixth Directive is not applicable in the present case. The Portuguese authorities confirmed, in the replies they sent to the Commission at the pre-litigation stage, that Lusoponte, which is responsible for operating the bridges over the Tagus at Lisbon and collecting tolls for crossing those bridges, from 1 January 1996 in the case of the 25 de Abril Bridge and from 29 March 1998 in the case of the Vasco de Gama Bridge, is an operator governed by private law holding the concession to run a public work. Consequently, the first of the two cumulative conditions required under the case-law of the Court for the applicability of that provision, namely that the operator must be a body governed by public law, is not met.

32 The Portuguese Republic accepts that the operator of the toll bridges in question is a consortium comprising Portuguese companies, a United Kingdom company and a French company. However, it claims that the consortium is a body governed by public law, given the object and purpose of the operation entrusted to it, the fact that it has public authority powers and the fact that it is subject to administrative law.

33 The Portuguese Republic considers that the Court's case- law concerning Article 4(5), first subparagraph, of the Sixth Directive does not make clear whether the arrangement for treating bodies covered by that provision as not being liable to VAT applies only to 'public bodies', namely those bodies which are an integral part of the public service or whether, on the other hand, 'bodies governed by public law' also fall within its scope. The Member State concerned concludes that both the wording of that provision and the principle of the neutrality of VAT require that 'bodies governed by public law', such as Lusoponte, should be included in the arrangement for non-taxable persons.

— Findings of the Court

34 It should be noted first of all that the Court has already ruled that the provision of access to roads on payment of a toll constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive (*Commission* v *France*, paragraph 36; Case C-358/97 *Commission* v *Ireland*, paragraph 34; *Commission* v *United Kingdom*, paragraph 46; Case C-408/97 *Commission* v *Netherlands*, paragraph 30; *Commission* v *Greece*, paragraph 31; and Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 11).

35 Also, as the Court has held on numerous occasions, it is clear from Article 4(5), first subparagraph, of the Sixth Directive, when examined in the light of the aims of that directive, that two conditions must be fulfilled in order for there to be no liability for VAT: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (Case 235/85 *Commission* v *Netherlands* [1987] 1471, paragraph 21; *Comune di Carpaneto Piacentino and Others*, paragraph 12; Case C-202/90 *Ayuntamiento de Sevilla* [1991] ECR I-4247, paragraph 18. See also *Commission* v *France*, paragraph 39; Case C-358/97 *Commission* v *Ireland*, paragraph 37; *Commission* v *United Kingdom*, paragraph 49; Case C-408/97 *Commission* v *Netherlands*, paragraph 34; *Commission* v *Greece*, paragraph 34; Case C-83/99 *Commission* v *Spain*, paragraph 11, and Case C-408/06 *Götz* [2007] ECR I-11295, paragraph 41).

36 In the present case, the Portuguese Republic sets out a detailed set of arguments to show that Lusoponte is a body governed by public law, although those arguments do not contain an analysis of the corporate or institutional structure of that body. It submits that the object or purpose of the latter's activity allows it to be described as a body governed by public law. Whether that body is directly or indirectly dependent in relation to the public service, or even forms part of the public service, is said to be irrelevant in that regard.

37 The Portuguese Republic's argument cannot be accepted.

38 As regards the first of the conditions contained in Article 4(5), first subparagraph, of the Sixth Directive, namely that the operator must be a body governed by public law, the Court has held that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority (Case 235/85 *Commission* v *Netherlands*, paragraph 21, and *Ayuntamiento de Sevilla*, paragraph 19).

39 If an activity involving acts falling within the prerogatives of the public authority is entrusted to an independent third party or is carried out by bodies which are not part of the public service, in the form of an independent economic activity, the exclusion from VAT provided for by Article 4(5), first subparagraph, of the Sixth Directive is not applicable (see, to that effect, Case 235/85 *Commission* v *Netherlands*, paragraph 22, and *Ayuntamiento de Sevilla*, paragraph 20).

40 In the present case, it is common ground that Lusoponte is a third party which does not form part of the public service and is not dependent in relation to it. More specifically, as was stated in paragraph 25 above, it is a consortium of companies set up in the form of a limited liability company owned by Portuguese companies, by a French company and by a United Kingdom company and, following a tendering procedure, that consortium was granted a concession by the Portuguese authorities.

41 In those circumstances, it is clear that Lusoponte cannot be regarded as a 'body governed by public law' for the purposes of Article 4(5), first subparagraph, of the Sixth Directive. That provision is not therefore applicable in the present case.

42 As Article 4(5), first subparagraph, of the Sixth Directive is not applicable in the present case, the second subparagraph of Article 4(5) does not apply, since that provision applies only to bodies covered by the first subparagraph.

Failure to comply with Article 12(3)(a), and Article 28(2)(e), of the Sixth Directive

— Arguments of the parties

43 The Commission submits that the Portuguese legislation infringes Article 12(3)(a) of the Sixth Directive in that the reduced rate of VAT is not applicable since the services at issue are not among those listed in Annex H to that directive.

44 Article 28(2)(e) of the Sixth Directive does not permit application of the reduced rate provided for in the VAT Code either. Even if a reduced rate had been applied on 1 January 1991, since the services at issue were taxed at the standard rate, from 24 March 1992 to 31 December 1994 in the present case, a reduced rate cannot be reintroduced. That view is based on the objective of further approximation of VAT rates, as stated in the second recital in the preamble to Council Directive

92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388 (OJ 1992 L 316, p. 1), and the derogating and transitional nature of that provision, which requires it to be interpreted strictly.

45 At any event, even if the Court was not able to support such a strict interpretation, the Commission submits it should find that the Portuguese legislation, in providing for a rate that was lower than 12% for road tolls for crossing the Tagus at Lisbon, infringes Article 28(2)(e) of the Sixth Directive.

46 The Portuguese Republic contends that the rate applied in the present case is based on Article 28(2)(e) of the directive, since, contrary to what is provided in Article 28(2) (d), the only condition expressly laid down in the first of those two provisions is that a reduced rate must have applied to the services in question since 1 January 1991.

47 The Portuguese Republic concludes that the Court's judgment should go no further than finding that the 5% rate is inapplicable, and setting a rate which should be applied instead of the rate provided for in the VAT Code. In any event, according to that Member State, if the Court were to find there had been an infringement of Articles 12 and 28 of the Sixth Directive, there would be grounds for applying an intermediate rate of 12% instead of the standard 21%.

— Findings of the Court

48 There are two legal obstacles in the present case to applying the transitional arrangement provided for in Article 28(2)(e) of the Sixth Directive.

49 First, it is clear from the wording of that provision that the reduced rate that may be applied cannot be lower than 12%. In the present case, although it is common ground that on 1 January 1991 the Portuguese Republic was applying a reduced rate to road tolls for crossing the Tagus at Lisbon, that rate, from that date until the present, has always been lower than 12%.

50 Second, as the Commission has pointed out, as the standard VAT rate applied to the services at issue between 24 March 1992 and 31 December 1994, the Portuguese Republic was not entitled to reintroduce a reduced rate.

51 It must be borne in mind that the Community system of VAT is the result of a gradual harmonisation of national legislation pursuant to Articles 93 EC and 94 EC. The Court has consistently held that this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial (Case C-165/88 *ORO Amsterdam Beheer and Concerto* [1989] ECR I-4081, paragraph 21, and Case C-240/05 *Eurodental* [2006] ECR I-11479, paragraph 50).

52 Thus, the harmonisation envisaged has not yet been achieved in so far as Article 28 of the Sixth Directive authorised the Member States to retain or adopt certain provisions which would, without that authorisation, be incompatible with the directive (see, to that effect, Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 38 and *Eurodental*, paragraph 51).

53 However, as the heading of Title XVI of the Sixth Directive and the 19th recital in the preamble to that directive indicate, the objective of Article 28 is to allow, during a transitional period, national laws in specified fields to be gradually adapted.

54 As it is a case of derogating and transitional arrangements, Article 28 of the Sixth Directive must be strictly interpreted (see, to that effect, Case C-169/00 *Commission* v *Finland* [2002] ECR I-2433, paragraph 34, and *Eurodental*, paragraph 54) and in accordance with its objective.

55 In the present case, since it is common ground that the standard rate of VAT was applied to the services at issue from 24 March 1992 to 31 December 1994, the Portuguese Republic cannot be authorised to reintroduce a reduced rate in respect of those services (see, to that effect, Case C-35/90 *Commission* v *Spain* [1991] ECR I-5073, paragraph 7; Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 15; Case C-414/97 *Commission* v *Spain* [1999] I-5585, paragraph 29, and *Eurodental*, paragraph 55).

56 As the Portuguese Republic has complied, as regards the services at issue, with the harmonised provisions of the Sixth Directive, it cannot exempt itself from its obligations by relying on Article 28(2)(e) of that directive, since the objective of that provision is precisely the opposite, namely the gradual harmonisation of national provisions to align them with those of the Sixth Directive.

57 The difference, alleged by the Portuguese Republic, between the wording of Article 28(2)(e) and that of Article 28(2)(d) of the Sixth Directive does not justify a different conclusion from that reached the two preceding paragraphs, since the objective of gradual harmonisation is common to those transitional provisions.

58 As the conditions for the application of Article 28(2)(e) of the Sixth Directive are not met in the present case, the standard rate of VAT should have been applied to road tolls for crossing the Tagus at Lisbon.

59 In the light of all the above considerations, it must be concluded that, by maintaining in force a reduced rate of 5% for value added tax applicable to road tolls for crossing the Tagus at Lisbon, the Portuguese Republic has failed to fulfil its obligations under Articles 12 and 28 of the Sixth Directive.

Costs

60 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for the Portuguese Republic to be ordered to pay the costs and the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.

On those grounds, the Court (Eighth Chamber) hereby:

1. **Declares that, by maintaining in force a reduced rate of value added tax of 5% applicable to road tolls for crossing the Tagus at Lisbon, the Portuguese Republic has failed to fulfil its obligations under Articles 12 and 28 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2001/4/EC of 19 January 2001;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]