OPINION OF ADVOCATE GENERAL COSMAS

delivered on 11 May 2000 *

I — Introduction

1. The Tribunal de Première Instance (Court of First Instance), Liège (Belgium) has referred to the Court for a preliminary ruling two questions concerning the exemption from value added tax (hereinafter 'VAT') enjoyed by international passenger airline companies and the non-exemption of passenger transport by coach. More particularly, these questions concern the extent to which the taxation of the coach undertakings violates the principles of equal treatment and non-discrimination and the extent to which the exemption of the airlines constitutes State aid prohibited by Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

II — The legal framework

A — *Community legislation*

2. In order to 'render tax non-discriminatory from the point of view of competition', the Sixth Directive 77/388/EEC [1] (hereinafter the 'Sixth Directive') is intended to make liable to VAT any taxable transaction not exempt under some other provision which derogates from that directive. [2] Under Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration by a taxable person acting as such is subject to VAT. The exemptions from VAT for which the Sixth Directive provides (Article 13 et seq.) are derogations from this general principle. [3] In fact, the principles of general application and neutrality of the tax underlying the Sixth Directive are an essential key in interpreting derogating provisions. [4]

3. In Title XVI of the Sixth Directive, Article 28 establishes certain transitional provisions authorising the continuation by Member States of exemptions maintained with a view to their eventual abolition. Thus, Article 28(3)(b) states that, during the transitional period referred to in para-

* Original language: Greek.

1 — Council Directive 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).

2 — See Case 73/85 *Kerrutt* [1986] ECR 2219, paragraphs 14 and 17.

3 — As exceptions to the general rule, these derogations must be interpreted strictly: see, in particular, Case 348/87 *Stichting Uitvoering Financiele* [1989] ECR 1737, paragraph 13, and Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, paragraph 19.

4 — See point 5 of the Opinion of Advocate General Tesauro in Case C-35/90 *Commission* v *Spain* [1991] ECR I-5073.

graph 4, Member States [5] may 'continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned'. In other words, this provision permits a pre-existing system to be maintained if the Member States concerned so wish. [6]

4. According to Article 28(4) of the Sixth Directive: 'The transitional period shall last initially for five years as from 1 January 1978. At the latest six months before the end of this period, and subsequently as necessary, the Council shall review the situation with regard to the derogations set out in paragraph 3 on the basis of a report from the Commission and shall unanimously determine on a proposal from the Commission, whether any or all of these derogations shall be abolished.'

5. Moreover, Annex F to the Sixth Directive, which, as its title indicates, consists of a list of the transactions referred to in Article 28(3)(b), mentions 'passenger transport' at point 17 and continues: 'The transport of goods such as luggage or motor vehicles accompanying passengers and the supply of services related to the transport of passengers shall only be exempted in so far as the transport of the passengers themselves is exempt'. [7]

B — *National legislation*

6. Within Belgium's internal legal system, the provisions of the Sixth Directive are implemented by the Code de la TVA (VAT Code).

7. Article 1(1) of Royal Decree No 20 of 20 July 1970 fixing the rates of value added tax and classifying goods and services according to those rates provides for VAT to be charged at the rate of 6% on the goods and services specified in Table A of the annex to the decree.

5 — Article 28 of the Sixth Directive has been repeatedly interpreted by the Court, which has clearly established that the expiration of the period laid down in its paragraph 4 did not lead *ipso facto* to the extinction of the right to maintain existing exemptions; see, for example, *Commission* v *Spain*, cited in footnote 4, paragraph 9; Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 3; and Case C-331/94 *Commission* v *Greece* [1996] ECR I-2675, paragraph 14.

6 — See Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 57.

7 — On 5 November 1992, the Commission submitted to the Council a proposal for a directive amending the VAT arrangements applicable to passenger transport (COM(92) 416 final, OJ 1992 C 307, p. 11) which, having come to nothing, was finally withdrawn in view of the fact that, since the Council had taken no decision, the proposal was no longer topical, as noted by the Commission itself (OJ 1997 C 2, p. 2).

8. Section XXV, entitled 'Transport', of Table A mentions:

'Transport of passengers and non-registered luggage and animals accompanying passengers.'

9. Article 41(1)(1) of the VAT Code exempts from VAT maritime passenger transport; international air passenger transport; transport of luggage and motor vehicles accompanied by passengers in the case of the transport referred to in this same indent (1).

III — The facts

10. Idéal Tourisme SA (hereinafter 'Idéal Tourisme'), the applicant in the main proceedings, which is established in Liège, is a company operating international passenger transport by coach.

11. In a letter addressed to the Belgian tax authority dated 11 July 1997, referring to its (monthly) VAT return for its transactions in June 1997, Idéal Tourisme stated that it considered the Belgian segments of its international coach passenger transport operations to be zero-rated for VAT.

12. In this letter, Idéal Tourisme argued that the Belgian legislation, under which the Belgian segments of coach passenger transport operations are subject to VAT at the rate of 6%,[8] whereas air passenger transport is exempt from VAT, was giving rise to discrimination, with respect to VAT, between tourist coach operators and airline companies, in breach of the general principle of equal treatment. Moreover, Idéal Tourisme considered that the VAT system which gave advantages to the air passenger transport sector constituted State aid incompatible with the common market within the meaning of Article 92 et seq. of the EC Treaty.

13. On 10 October 1997, the VAT Office in Liège sent Idéal Tourisme a statement of VAT adjustment, charging it BEF 554 845 in VAT and a fine of BEF 55 000.

14. By letter of 27 October 1997, Idéal Tourisme authorised the VAT office to debit

8 — The segments of the journey completed in other countries of the European Union are subject to VAT at the rate specific to the country concerned.

those sums from its VAT current account, while simultaneously disputing the adjustment and giving the office notice to repay the sums debited.

15. The tax authority having failed to comply, on 16 January 1998 Idéal Tourisme brought an action against its refusal to reimburse.

16. On 26 January 1998, the VAT office informed Idéal Tourisme that the sums at issue had been repaid.

17. On 18 February 1998, a summons to pay the said sums was issued against Idéal Tourisme.

18. On 22 April 1998, Idéal Tourisme made an application to have the summons set aside, on the same grounds as in the action for repayment brought in January 1998.

19. Idéal Tourisme supported its application with two arguments drawn from Community law, submitting that the Belgian legislation breached both the principle of equal treatment and the provisions of the EC Treaty concerning State aid.

IV — The questions referred to the Court

20. In order to resolve the dispute before it, the national court has referred the following two questions to the Court for a preliminary ruling:

'1. Does Council Directive 77/388/EEC, and in particular Articles 12(3) and 28(3)(b) thereof, permit Member States to introduce, to the detriment of coach passenger transport undertakings, discrimination which is contrary to the principles of equal treatment and non-discrimination contained in Community law?

2. Can a VAT regime which favours a given sector of economic activity, such as the one in issue in the present case, constitute State aid within the meaning

of Article 92 of the Treaty of Rome, even where it does not exclusively protect the interests of national industry?'

V — Replies to the questions referred to the Court

A — *Admissibility of the questions*

21. The Belgian Government expresses doubt as to whether there is a genuine dispute, arguing that the questions which Idéal Tourisme had suggested that the national court should raise, while not purely hypothetical, nevertheless had the sole purpose of achieving a result which it had not yet been possible to achieve by legislation. [9]

22. According to Idéal Tourisme there is nothing artificial about the main proceedings. Indeed, it is plain that the parties disagree on a number of important points and that Idéal Tourisme did not come to an agreement with the Belgian State to refer a question to the Court for a preliminary ruling.

23. Finally, in the view of the Tribunal de Première Instance de Liège, Idéal Tourisme's position is sustainable and there can be no suspicion that it has manufactured the dispute merely in order to bring before the Court of Justice various questions, whose expediency and formulation remain a matter for the national court.

24. It is clear from the order for reference that the action brought by Idéal Tourisme seeks reimbursement of the VAT it paid and hence the benefit for itself of an exemption from VAT.

25. With regard to the first question referred for a ruling, I believe that it is possible to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, points of Community law which require interpretation. [10] The reply to the questions of interpretation raised

9 — The Belgian Government also raises the question of whether, within the context of an order for reference which depends heavily on the factual and legal circumstances giving rise to the main proceedings, the court can rule on an interpretation of certain provisions of Community law which would have the effect of limiting the competence of the Community legislature in this field or even precluding it from doing so.

10 — See, in particular, Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207, paragraph 9, and Case C-250/91 *Hewlett Packard France* v *Directeur Générale des Douanes* [1993] ECR I-1819, paragraph 9.

corresponds to an objective requirement inherent in the resolution of the dispute brought before the national court. [11]

26. Nevertheless, having regard to the subject-matter of the dispute submitted to the national court, I believe that there is no need to reply to the second question. Thus, Idéal Tourisme's action is aimed at obtaining the reimbursement of the VAT paid and not at having the Belgian tax authorities ordered to stop granting aid to the airlines in the form of exemptions from VAT or having the airline companies thus advantaged repay to the tax authorities the aid at issue granted in breach of Article 93(3) of the EC Treaty (now Article 88(3) EC), in which case the raising of this question would be justified and the Court's reply relevant to the resolution of the dispute in the main proceedings. [12] I reach this conclusion without having to decide whether the exemption of the airlines from VAT should be characterised as State aid, as that question, for the above reason, need not be examined.

27. Thus, for the Court, replying to the second question raised by the national court would signify a clear departure from precedent, in that it would thereby be declaring admissible, and replying to, questions referred for a ruling, even though, as already explained, those questions are not relevant to the outcome of a pending case and have been formulated *in connection with* such a (pending) case and raise a problem which, to a greater or lesser extent, has been discussed in theory or practice, without its solution being of any assistance in deciding that case.

11 — In fact, on several occasions (see, in particular, Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraphs 18 to 21) the Court has pointed out that Article 177 of the EC Treaty (now Article 234 EC) assigns the Court the duty not of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. So, having regard to the circumstances of fact and law involved and the analysis of the problems facing the national court in the main proceedings, the Court examines whether there is a genuine need to interpret provisions of Community law and whether the interpretation requested will be useful in resolving the dispute in the main proceedings or whether the questions have been raised within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of the dispute (see *Foglia* v *Novello*, cited above, paragraph 18, Case C-231/89 *Gmurzynska-Bscher* v *Oberfinanzdirektion Köln* [1990] ECR I-4003, paragraph 23, and Case C-437/97 *Evangelischer Krankenhausverein Wien and Others* v *Abgabenberufungskommission Wien and Others* [2000] ECR I-1157, paragraph 52). Only exceptionally has the Court had recourse to the right to refuse to reply, when it was quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law bore no relation to the subject-matter of the main action (see, in particular,Case 126/80 *Salonia* v *Poidomani and Baglieri* [1981] ECR 1563, paragraph 6, and Case C-368/89 *Crispoltoni* v *Fattoria Autonoma Tabacchi di Città di Castello* [1991] ECR I-3695, paragraph 11).

12 — It may be recalled that in *Evangelischer Krankenhausverein Wien*, cited above in footnote 11, paragraph 53, the Court considered that it was unnecessary to reply to the question whether exemption from the payment of beverage duty on the sale of wine direct from the vineyard constitutes State aid incompatible with Community law. In this judgment, the Court held that the question submitted was wholly irrelevant to the resolution of the disputes in the main proceedings, which concerned the obligation on various companies to pay beverage duty in respect of supplies of beverages and ice cream effected for consideration, and not the question whether exemption of wine sold directly at the place of production from payment of such a duty constituted State aid incompatible with the Treaty.

B — *The first question*

28. By its first question, the national court inquires whether the Sixth Directive, and in particular Article 28(3)(b) thereof, permits Member States to introduce inequality of treatment to the detriment of coach passenger transport undertakings and whether such discrimination is contrary to the principles of equal treatment and non-discrimination, which form an integral part of Community law.

29. It follows from the main proceedings that the reply to this question would be useful in resolving the dispute in the main action only in so far as the question of whether the exemption can be extended to coach passenger transport undertakings has been decided. In my view, the answer to this question follows from the interpretation of Article 28(3)(b) of the Sixth Directive, without it being necessary to examine the question put by the national court.

30. The wording of Article 28(3)(b) of the Sixth Directive is clear. It authorises Member States to continue to apply under the same conditions the exemptions from VAT for which their legislation provided before the entry into force of the Sixth Directive, but not to introduce a new exemption system. [13] However, this only applies to the extent that the two conditions on which the compatibility of national legislation with the Sixth Directive depends, namely, anteriority and maintenance of the legislation at issue in the same form as it was in at the time of entry into force of the Sixth Directive, or free from changes incompatible with the exception introduced by Article 28(3), are cumulatively satisfied. Thus, exemptions applicable on the date of entry into force of the Sixth Directive may not be extended, nor may new exemptions be introduced after the entry into force of that directive, [14] no more than it is possible to reintroduce exemptions that existed before the provision of certain services was made subject to VAT under the Sixth Directive. [15]

31. Furthermore, in my view, the combined provisions of Article 28(3)(b) and Annex F,

13 — See *Kerrutt*, cited above in footnote 2, paragraph 17, and the Opinion of Advocate General Tesauro in *Commission* v *Spain*, cited above in footnote 4, point 4.
Moreover, the Court has acknowledged that the authorisation granted to Member States to retain their existing legislation in regard to exclusion from the right of deduction of VAT, provided for in Article 17(6) of the Sixth Directive, will remain in force until such time as the Council has adopted the provisions envisaged by that article; see, in particular, Case C-305/97 *Royscot Leasing and Others* v *Customs and Excise* [1999] ECR I-6671, paragraphs 29 and 30, and Case C-43/96 *Commission* v *France* [1998] ECR I-3903, paragraphs 16 to 19, together with paragraphs 20 and 21 of the Opinion of Advocate General Jacobs in the latter case, and also point 24 et seq. of my opinion in Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi Synthelabo* pending before the Court.

14 — See, in particular, *Kerrutt*, cited above in footnote 2, paragraph 17, and Case C-136/97 *Norbury Developments* v *Commissioners of Customs and Excise* [1999] ECR I-2491, paragraphs 19 and 20, in both of which, however, the Court stressed that this provision did not prevent the abolition of exemptions existing on the date of entry into force of the Sixth Directive, with a view to the uniform application of the latter (paragraph 20), and also *Commission* v *Germany*, cited above in footnote 5, paragraph 15.

15 — See *Commission* v *Spain*, cited above in footnote 4, paragraphs 6 to 9, and *Commission* v *Germany*, cited above in footnote 5, paragraph 15.

point 17, of the Sixth Directive are not contrary to the principles of equal treatment and non-discrimination. If it became apparent that the application or maintenance of certain existing provisions by Member States involved discrimination, that could not be laid at the door of the Sixth Directive, and there could be no question of extending the existing exemptions.

32. In the light of the above, my position is as follows: if, after the entry into force of the Sixth Directive, the VAT exemption system applicable to air passenger transport had been extended to coach transport undertakings, that extension would have been contrary to Article 28(3)(b), thus giving rise to distortions to the detriment of Member States [16] which, in accordance with this transitional provision, had left their legislation as it stood on the entry into force of the Sixth Directive and had not extended the VAT exemptions that existed at that time. Ultimately, this outcome would be contrary to the requirement of uniform application of the provisions of the Sixth Directive, [17] to the detriment of the objective of achieving a market characterised by healthy competition.

33. In the present case, therefore, Article 28(3)(b) of the Sixth Directive does not allow a Member State, such as the Kingdom of Belgium, to extend the exemption provided for airline companies to coach transport undertakings once the Sixth Directive has entered into force.

34. Accordingly, the Court is not required to examine the question whether the airline companies are receiving favourable treatment to the detriment of the coach transport undertakings, since, in any event, as I have already explained, the reply given would not be of use in resolving the present dispute.

16 — See *Commission* v *Germany*, cited above in footnote 5, paragraphs 25 and 26.

17 — See *Norbury Developments*, cited above in footnote 14, paragraph 20.

VI — Conclusion

35. In the light of the above, I propose that the Court reply to the questions referred for a preliminary ruling by the Tribunal de Première Instance de Liège as follows:

The combined provisions of Article 28(3)(b) and Annex F, point 17, 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 should be interpreted as meaning that they do not authorise Member States to extend, after the entry into force of that directive, the system of exemptions from value added tax for certain passenger transport activities.