OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 28 March 1996 *

I — Facts

1. By an application lodged on 13 December 1994, the Commission is seeking a declaration that, by adopting and maintaining in force legislative provisions contrary to Articles 2, 9(2)(b) and 26 of the Sixth Council Directive (77/388/EEC) on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [1] (hereinafter 'the Sixth Directive'), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty.

The Commission complains that the defendant has exempted from VAT the following services:

(a) the transport of persons by rail and sea, where the destination or place of departure of the voyage is outside Greek territory;

(b) trips by sea in vessels flying the Greek flag which do not put in at the ports of other countries ('round trips');

and has imposed VAT on:

(c) organized trips to destinations in countries other than Member States of the Community, without exempting that part of the provision of services by tour operators concerning activity carried on outside the Community.

2. During the written procedure, the Hellenic Republic raised the objection that it had, in the meantime, adjusted its legislation to comply with the obligations laid down by the abovementioned articles of the Sixth Directive as regards the complaints mentioned in point 1(a) and (c) above. It consequently submitted that the Commission's

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

application was now devoid of purpose in so far as the two abovementioned infringements were concerned.

At the hearing, the Commission discontinued its action with regard to the two abovementioned complaints. [2] This was accepted by the defendant. Consequently, the Court of Justice is not required to examine those aspects of the case.

II — Arguments of the parties

3. As regards the complaint that it has failed to impose VAT on round trips, the Greek Government does not dispute that its legislation is incompatible with the provisions of the Sixth Directive.

The Greek Government points out, however, that the application of VAT to round trips and the calculation of the amount of tax payable gives rise to considerable practical difficulties because the amount of VAT chargeable on such journeys is in any event negligible. According to the defendant, round trips of that type are conducted for the most part within international waters and only to a very limited extent within Greek territorial waters. It would therefore be disproportionate to tax the part of the voyage that takes place within national waters, since the administrative costs would far exceed the amount of any VAT collected. Furthermore, according to the defendant, it would, in practice, be impossible *a priori* to calculate the amount of VAT payable in view of the route taken by vessels providing that type of service. The route taken on the trip is subject to changes that cannot be anticipated and depend on external factors — such as weather conditions — which may compel vessels to change route while under way.

4. Nor should it be forgotten, according to the Greek Government, that, in the absence of harmonization at Community level, the application of the VAT rules to maritime transport raises problems that cannot easily be resolved. For that very reason, the proposal for amending the Sixth Directive, drawn up by the Commission and dated 30 September 1992, makes international maritime transport generally (and, therefore, both the intra-Community and the national element of such transport) zero-rated for VAT purposes.

2 — See my Opinion of 9 November 1995 in Case C-17/95 *Commission* v *France* [1995] ECR I-4896, in particular footnote 4, on the issue of the permissibility of partial discontinuance. The special feature of this case, however, is that it was partially discontinued at the hearing. The proceedings have been partially discontinued in so far as two of the three issues on which the application is based have been resolved. Article 77 of the Rules of the Procedure will therefore apply, whereas Article 78 was relied upon in the earlier case. Moreover, Article 78 of the Rules of Procedure requires the applicant to inform the Court in writing that he wishes to discontinue the proceedings but contains no reference to the agreement of the defendant, whereas that agreement is in fact required under Article 77. The latter article lays down no formal requirement concerning the agreement of the parties on the settlement of their dispute or the communication of that agreement to the Court of Justice.

5. The Greek Government also points out that all the Member States exempt international maritime transport. The Commission, moreover, appears to accept, according to the defendant, that even the national element of the journey may be exempted from VAT in the case of international maritime transport. That exemption should, therefore, apply to round trips also.

Greece of its obligation to tax the part of the journey at issue here. The same applies, according to the Commission, to the alleged difficulty in establishing in advance the amount of the VAT on the ground that the route of the cruise may have to be changed.

6. Finally, the defendant refers to its particular geographical position which makes it especially vulnerable to distortion of the market in the round trip sector, laying it open to competition from non-member countries which do not apply VAT to that form of transport. The proposal for amending the Sixth Directive exempts altogether transport to a destination situated outside the Community, precisely because of the risk of distortions of competition.

The defendant's contention that the taxation required under the directive results in a competitive situation disadvantageous to it is, according to the Commission, equally unfounded. The Sixth Directive permits exemptions and the alleged distortion of competition would, in any event, have no practical significance, given that the defendant can in any case exempt the journey within international waters from VAT. Furthermore, the fact that the proposal for amending the Sixth Directive envisages exempting from VAT the national element of the international transport of persons also in order to rule out possible distortions of competition in this particular sector confirms, in the Commission's view, that until such time as it is abolished, the obligation to levy the tax is a definite requirement under the legislation in force.

7. The Commission puts forward a number of arguments in response to the defendant's submissions. First of all, the fact that the national element of an international journey is negligible does not exempt Greece from taxing that part of the journey. Furthermore, as regards the method of calculating the VAT payable on such national journeys, the fact that it is negligible and that the administrative cost of levying the tax therefore far exceeds the sum collected in no way relieves

The point made by the defendant that it is the practice of the Member States to exempt the national element of the journey in the context of international maritime passenger transport is also irrelevant, according to the Commission: that particular situation cannot

in any way be transposed to the case of round trips.

III — Analysis of the dispute

8. The arguments of the defendant are basically the same as were advanced by the Federal Republic of Germany in an action for failure to fulfil an obligation which concerned, *inter alia*, an infringement of Article 26(3) of the Sixth Directive. [3]

The judgment given in that case suggests that the pleas put forward by Greece in this case, both those based on the difficulties involved in calculating the amount of VAT payable on the national journey as a result of the frequent and unforeseeable changes in route, [4] and those based on the risk of distortion of competition, [5] are unfounded.

I shall deal with the latter point first. The defendant claims that the part of the vessel's journey within territorial waters is negligible as compared with the journey as a whole. If that is so, then the fact that it is possible to exempt that part of the journey taking place within international waters, as provided for under the Sixth Directive, means that, in this case, the alleged distortion of competition resulting from the application of the Community tax legislation at issue is without foundation.

9. The defendant further asserts that the administrative costs exceed the tax revenue it could obtain. An argument of that nature does not, however, constitute a valid reason for not properly implementing the provisions of the Sixth Directive. Application of the provisions at issue cannot be left to the discretion of the Member States. They are provisions which have to be transposed pursuant to Article 189 of the Treaty. In accordance with the consistent case-law of the Court of Justice, the Member States have to comply with them in full and within the required time-limit by transposing them, as necessary, into the national legal order.

As regards the defendant's argument concerning the proposed amendment to the Sixth Directive, it can have no relevance in the present circumstances, as these are considerations applying, if at all, to law to be created. Nor can it be argued that any disadvantages that might arise for a Member State or private individual from the provisions of

3 — Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437.
4 — Case C-74/91, paragraph 12.
5 — Case C-74/91, paragraph 25.

Community law authorize the Commission and the Member States to *disapply* those provisions without recourse to the procedures laid down for having the rules in force removed through legislative process or censured by the courts.

10. Nor can it be considered, as the defendant argues, that the treatment accorded, *praeter legem*, to international maritime passenger transport, for that part of the journey within territorial waters, may be extended to cover round trips.

Even supposing, despite my above comments, that the exemption which the defendant is seeking to have applied extensively were permitted by Community law, the actual circumstances of the round trips in any case differ significantly from those of international maritime passenger transport. Vessels engaged in the latter transport pass through territorial waters only to the extent necessary to enable them subsequently to cross international waters or the territorial waters of other States to reach ports in other countries. The final destination of a round trip is, however, its port of departure, possibly after calls at other ports of the same Member State. In the first example, territorial waters are crossed only in order to reach the open seas, and it is, therefore, perfectly understandable that the tax burden on transport through national waters should be minimized. In the second example, the crossing of national waters is not absolutely necessary in order to reach the high seas and sail to foreign ports but is a an essential feature of the trip and clearly serves touristic purposes. The tax regime that applies to the one set of circumstances is not justified in the other.

11. Since the arguments put forward by Greece have been rejected, the action for failure to fulfil an obligation brought by the Commission should be declared well founded in so far as concerns the round trips.

12. Under the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. I therefore propose that the defendant be ordered to pay the costs relating to the complaint concerning the round trips. Furthermore, under Article 69(5) of the Rules of Procedure, the defendant must also be ordered to pay the costs relating to the two complaints of failure to fulfil obligations discontinued by the applicant.

IV — Conclusion

I therefore propose that the Court of Justice should uphold the action in so far as it concerns the infringement of the Sixth VAT Directive, in so far as round trips are not subject to VAT as regards the journey in national waters, and order the defendant State to pay the costs, in accordance with Article 69(2) and (5) of the Rules of Procedure.