OPINION OF ADVOCATE GENERAL ALBER

delivered on 27 January 2000 *

I — Introduction

1. In these proceedings for failure to fulfil Treaty obligations the Commission claims that the Netherlands has failed to fulfil its obligations under the EC Treaty in so far as value added tax was not levied on fees charged for use of transport infrastructure (tolls). [1]

2. In 1989 a toll was still being levied in the Netherlands for the use of two bridges and a tunnel. Under the Netherlands legislation in force at that time those fees were not subjected to VAT. At the time the action was brought only the use of a tunnel was still subject to a toll. That was the tunnel under the Dordtse Kil. In that case too the fees collected were not liable to VAT. However, since the Commission had alleged that there had been an infringement of existing Community law as a result of the failure to levy VAT, the Netherlands authorities calculated the VAT revenue in this respect and transferred to the Commission contributions to the Communities' own resources on the basis thereof. However, those transfers were made pending clarification of the points at issue and amounted to NLG 70 000 in respect of the toll collected for the years 1981 to 1998.

II — Pre-litigation procedure

3. By letter of 3 December 1985 the Commission asked the Netherlands Government for information on the levying of VAT on the toll for the use of transport infrastructure (roads, bridges, tunnels, locks, *inter alia*). A reply was made by letter of 8 July 1986.

* Original language: German.

1 — The Commission has also brought actions against France, Ireland, the United Kingdom and Greece on the same grounds: see Cases C-276/97, C-358/97, C-359/97, and C-260/98. Unlike the other defendant Member States, the Netherlands has made the corresponding amount of own resources available to the Commission pending clarification of the points at issue. In the Member States against which no action has been brought either no tolls are charged or VAT is levied on tolls. As a lower rate of tax is levied in Spain, the Commission has also brought an action against Spain (Case C-83/99).

4. On 20 April 1988 the Commission sent a letter of formal notice concluding that the failure to levy VAT on the toll, which constituted the consideration for use of the infrastructure, infringed Article 2 and Article 4(1), (2) and (5) of the Sixth VAT Directive.

5. Assuming that no reply thereto had been made by the Netherlands Government, the Commission sent an initial reasoned opinion by letter of 19 October 1989. In that opinion it alleged that in failing to levy VAT on the toll the Netherlands had failed to fulfil its obligations under the EC Treaty.

6. By letter of 8 December 1989 the Netherlands Government informed the Commission that it had responded to the letter of formal notice by reply of 5 July 1988.

7. Since the Commission considered that the alledged infringement had not been remedied, it sent an additional reasoned opinion, which reiterated the previous allegations, by letter of 23 December 1996.

8. A reply was made by letter of 27 February 1997.

9. The Commission brought an action under Article 169 of the EC Treaty (now Article 226 EC) — received by the Registry of the Court on 4 December 1997 — claiming that the Court should:

(1) declare that in not subjecting tolls for the use of transport infrastructure to value added tax, contrary to Articles 2 and 4 of Sixth Directive 77/388/EEC of 17 May 1977 on VAT, the Kingdom of the Netherlands had failed to fulfil its obligations under the EC Treaty,

(2) order the Kingdom of the Netherlands to bear the costs of the proceedings.

10. The Netherlands Government contends that the Court should:

(1) dismiss the application,

(2) order the Commission to bear the costs of the proceedings.

III — Legal background

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 [2] (hereinafter 'the Directive')

11. Article 2 of the Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;...'

12. Under Article 4(1), (2) and (5) of the Directive:

'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.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services, including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic 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,

2 — OJ 1977 L 145, p. 1.

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, [3] provided they are not carried out on such a small scale as to be negligible.

Member States may consider activities of these bodies which are exempt under Article 13 [4]... as activities which they engage in as public authorities.'

3 — Annex D lists a total of 13 types of activity, including telecommunications, the supply of water, gas, electricity, port and airport services, and the running of trade fairs and exhibitions.

4 — Article 13(A) lists 17 exemptions for certain activities in the public interest. Thus *inter alia* the following are exempt from tax: the supply of services by the public postal services, hospital and medical care, the supply of services and of goods closely linked to welfare and social security work and to the protection of children and young persons, supply of services for their members by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civil nature, and activities of public radio and television bodies other than those of a commercial nature. Article 13(B) provides for further exemptions for insurance and reinsurance transactions, certain credit activities and — with four exceptions — the leasing or letting of immovable property.

IV — Arguments of the parties

13. The Commission argues that in its reply (8 December 1989) to the letter of formal notice the Netherlands Government stated that at that time two bridges and a tunnel were subject to a toll on which no VAT was levied. In its reply (27 February 1997) to the additional reasoned opinion it was stated that now a toll was being levied only in respect of a tunnel, but VAT was likewise not being levied.

14. In the view of the Commission the present case concerns an economic activity involving the provision of infrastructure on payment of a toll. Since what counts is not the legal form of this activity but the nature thereof, consideration of the actual economic situation is the decisive criterion for the applicability of the common VAT system. Moreover, definition of the term 'taxable transaction' cannot be left to the legal systems of the Member States without jeopardising the uniform and neutral application of VAT.

15. The relevant activity must be appraised objectively and regardless of its purpose or result. Moreover, in the present case there is evidence of a direct link between the service and the consideration. First, only certain stretches of road are subject to a toll and,

second, this amount constitutes a consideration given in return for use.

16. The mere fact that the infrastructure is created in the first place by public bodies does not mean that the provision thereof on payment of a toll is effected in the exercise of public authority.

17. Under the Sixth VAT Directive, public bodies are, as a rule, taxable. The provision in Article 4(5) must be interpreted strictly. Articles 13 and 28 of the Sixth VAT Directive lay down specific exceptions from tax liability in respect of public bodies and therefore any further exemptions must be interpreted strictly. The general nature of the common VAT system also calls for such interpretation.

18. In order to enjoy a tax exemption under Article 4(5) a specific activity must be carried out by a public body and in the exercise of public authority, which is not so in the present case.

19. The planning and construction of roads infrastructure (such as bridges and tunnels) are included among such State responsibilities, but the operation of such infrastructure is fundamentally different. Since not all roads, bridges or tunnels are subject to a toll, it is clear that the collection of a toll does not involve the exercise of public authority. Moreover, the economic aspect is highlighted by the fact that in the present case there are alternatives to the toll tunnel in the road network.

20. The provision for consideration of roads infrastructure is comparable to the supply of gas, water or electricity. However, no tax exemptions are possible in that respect in particular.

21. In answering the question when is a public body acting in the exercise of public authority the decisive factor must be whether or not the activity concerned constitutes the essential core of State activity. That is not so in this case.

22. Cross-border competition and the free movement of goods are affected by the lack of uniform application of VAT to tolls in the Community. The VAT system requires the possible deduction of input tax as an essential element but that requirement in particular is not met in the present case. It is therefore necessary to subject the collection of the toll to VAT also in the case of the Netherlands.

23. The Netherlands Government argues in the first place that the present action is of minor economic significance. In the case of the Netherlands a toll is being collected only for the use of the tunnel under the Dordtse Kil at the time of these proceedings. Furthermore, this is merely a temporary exception since there are no Netherlands laws, regulations or administrative provisions which lay down a general obligation to impose a toll. [5]

24. In principle every service supplied by a taxable person in return for a consideration is subjected to VAT in the Netherlands except where there are grounds for an exemption. The tolls, however, are not subjected to VAT.

25. In its application, the Netherlands Government argues, the Commission fails to furnish any evidence that the Netherlands has failed to fulfil its obligations under the Sixth VAT Directive. The Commission's argument is far too general and abstract and does not define the alleged infringements with sufficient precision. In particular it is also unclear what, in the Commission's view, the Netherlands should have done to have acted in conformity with the Directive. Furthermore, the factual information was not sufficient to conclude that there had been an infringement. The Commission merely puts forward general allegations without adducing the relevant evidence. The action is, therefore, unfounded and possibly inadmissible (in part).

26. The Netherlands Government also argues that Article 4(5) is applicable in the present case and therefore the toll does not have to be subjected to VAT. Here a public body is engaging in activities under the special regime applicable to it and is thus doing so in the exercise of public authority. Article 4(5) has independent significance in respect of the definition of 'taxable person'. Consequently, it need not be interpreted as strictly as the Commission claims and it is therefore unreasonable to limit tax exemptions to activities which form the core of public authority. The exceptions laid down in sub-paragraphs (2) and (3), on the other hand, must be interpreted strictly.

27. Consequently, it is clear that a public body which acts pursuant to public law and discharges its responsibility in the exercise of public authority cannot be treated in the same way as entities governed by private law. Moreover, since the applicable provisions of Netherlands public law relate to the supply of services, the Sixth VAT Directive does not apply.

5 — A toll will be collected in respect of the Westerschelde Tunnel, which is still under construction, following its completion — expected in 2003 — but that toll will also be subjected to VAT.

28. Furthermore, there is no economic activity since the infrastructure is financed only partially by the toll collected. It is not possible to regard the construction of roads infrastructure as an activity falling within the remit of public law but the financing or maintenance thereof as a private economic operation. This view is supported by the fact that the primary objective of collecting the toll is not to make a profit. The sole aim of collecting this fee is to facilitate the discharge of a public responsibility, that is to say to provide infrastructure.

29. Nor would the action required by the Commission help stabilise the common VAT system. Instead, the public authorities would then have to be regarded as final consumers which would give them advantages over road users which the VAT system specifically seeks to avoid.

30. Furthermore, the Commission has failed to demonstrate that there is a consideration in the form of a toll for the provision of road infrastructure. The amount of the toll does not necessarily correspond to the value of the service which the user receives. The close link which might exist between the toll and the service does not mean that this toll must be subjected to VAT. In particular there is no economic competition with other market operators.

31. Finally, the Commission has also failed to show that the Netherlands' conduct leads to significant distortions of competition within the meaning of Article 4(5)(2). Since there is no participation in competition and no cross-border effects have been demonstrated, the Commission's argument in that respect must also be rejected as unfounded.

V — Appraisal

Admissibility

32. The Netherlands Government raises a plea alleging (partial) inadmissibility. It claims that neither in the pre-ligation procedure nor in the application has the Commission adduced any concrete evidence that the Netherlands has failed to fulfil its obligations under the EC Treaty. Moreover, the application is too imprecise and therefore the action may be (partially) inadmissible.

33. On that point it must be said that as regards the merits it is necessary to consider whether the allegations made by the Com-

mission are true and demonstrate that there has been an infringement of Community law which can be attributed to the defendant Member State. It is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption. However, this question need not be examined here (in respect of the merits see point 38 et seq. below).

34. However, the question whether the Commission's application is sufficiently precise is one of admissibility. The request for legal protection must, as a matter of principle, be considered in the light of the application and the grounds stated. The conduct by which the Commission claims the Member State concerned has failed to fulfil its Treaty obligations must be clear from these factors. In that respect the subject-matter of the dispute is as defined by the pre-litigation procedure.

35. In the present case the Commission had, in the pre-litigation procedure, to rely on the Member States cooperating with it in good faith since it does not have the power, of its own motion, to examine the national VAT system and investigate the relevant circumstances. In respect of the resultant own resources contributions the Commission also relies on the Member States making available to it the necessary information. Since in the pre-litigation procedure and in its action the Commission can take as a basis only the information which it receives from the Member States, a Member State cannot claim that the Commission's observations are insufficiently specific and that an action is inadmissible where the Commission refers in the pre-litigation procedure and in the application to observations made by the Member State.

36. The aim of the Commission is to remedy a situation which is contrary to the Treaty. In its view such a situation arises from the failure to subject the fees for road infrastructure to VAT. Since it seeks to cover all the relevant facts and not just an individual case, it is empowered, first, to include 'continuous infringements' in its action pursuant to Article 169 of the EC Treaty and, second, to complain about Member States' general conduct in the context of this application for a declaration.

37. On those grounds the Commission's action is admissible.

Merits

1. Levying of VAT on tolls

38. In accordance with the structure of the Directive, it must first be ascertained whether there is a taxable transaction within the meaning of Article 2 of the Sixth VAT Directive. That requires a supply of services in return for consideration. Next, it must be ascertained whether that transaction was carried out by a taxable person and, if so, whether it was an economic activity.

(a) Supply of services for consideration

39. The supply of services consists here in the provision of infrastructure.

40. Those services are supplied in return for consideration — the toll levied. On the question whether services are being provided for consideration the Court has ruled that, for the provision of services to be taxable, there must be a direct link between the service provided and the consideration received. [6]

41. There is such a direct link in that a toll is paid for the provision of infrastructure, the amount of which, in turn, depends on the type of vehicle concerned and the length of the road.

42. The toll itself is not a tax, as a tax is payment of money, which is not made in return for a particular service, and which is imposed by a body governed by public law, in order to generate revenue, on all those who meet the statutory conditions for liability. Since, however, in the present case there is a specific service provided in return, in the shape of the supply of certain parts of the roads infrastructure, the money paid is a fee which must be seen as a consideration for a service provided.

43. There is thus a supply subject to value added tax within the meaning of Article 2 of the Sixth VAT Directive.

6 — Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs and Excise* [1988] ECR 1443, paragraph 11.

(b) Taxable persons

44. Under Article 4(1) and (2) of the Directive, a taxable person is any person who independently carries out any economic activity — and that includes all activities of producers, traders or persons supplying services.

45. Under Article 4(5)(1) of the Directive, States, regional and local government authorities and other 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. This is so even where they collect dues, fees, contributions or other payments in connection with these activities or transactions.

(aa) State activity

46. According to the case-law of the Court, two conditions must be fulfilled in order for public bodies to be treated as non-taxable persons: 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. [7]

47. This means, first, that not all activities of bodies governed by public law are automatically exempt from tax, but only those which also serve to discharge a specific responsibility in the exercise of public authority. Second, an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority. [8]

48. The subject-matter or purpose of the activity of the public body does not determine whether activities are carried out as public authorities. According to the case-law of the Court, it is the way in which the activities are carried out that determines to what extent public bodies are to be treated as non-taxable persons. [9]

49. The Court has thus ruled that the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities as public authorities when they do so under

7 — Case 107/84 *Commission* v *Germany* [1985] ECR 2655, Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471 and Joined Cases 231/87 and 129/88 *Carpaneto and Others* [1989] ECR 3233, paragraph 12.

8 — *Commission* v *Netherlands*, cited above at footnote 7, paragraph 21.

9 — *Carpaneto*, cited above at footnote 7, paragraph 15.

the special legal regime applicable to them. [10] On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting as public authorities.

50. Since, under Article 6(1) of the Sixth VAT Directive, even activities carried out in pursuance of the law are taxable, it is clear that the mere fact that an activity falls within the remit of public law is not sufficient to fulfil the requirements for VAT exemption in Article 4(5)(1). As that provision constitutes an exception to the definition of taxable person, it must be interpreted strictly. Thus, only those activities of public authorities which constitute the essential core of State activity can be considered exempt from VAT. This is also confirmed by Article 4(5)(3), which refers to the activities listed in Annex D (see above at point 12), in respect of which even bodies governed by public law are liable to VAT.

51. The planning and construction of roads, bridges and tunnels are State responsibilities which can only be discharged by bodies governed by public law. Such activities concern an essential part and thus the core of public responsibilities. They can even be regarded as the provision of essential facilities. If the State carries out such activities, it must be considered to do so in the exercise of public authority.

52. It is true that the provision of roads, bridges and tunnels is not expressly classified as an activity subject to VAT, as the supply of water, gas and electricity is in Annex D. In reality, the provision of roads infrastructure without charge must be seen as an activity of the State. The question remains whether, conversely, the whole network of roads built with taxpayers' money in discharge of a State responsibility can be operated by private economic operators on payment of a toll which is collected from everyone. In any event, making available a stretch of road in a manner which is selective, inasmuch as payment is required, cannot be seen as an activity performed in the exercise of public authority. The levying of the toll is, indeed, also possible in connection with a State activity and, in itself, does not give rise to tax liability, as Article 4(5)(1) expressly confirms. It should, however, be borne in mind that, in the present case, the road user has a choice between using the toll-free road infrastructure and using toll roads. In providing the toll-free road network, the State responsibility has, in any event, been discharged and the provision of additional stretches of road on payment of a toll must be viewed as a purely private economic activity. Anyone who needs planning permission which is subject to a fee has no option but to pay the fee. Anyone who is following a course of study for which everyone must pay fees has no other means of achieving the same goal, i.e. the relevant qualification. However, in the present case, the user has a genuine choice between two

10 — *Carpaneto*, cited above at footnote 7, paragraph 16.

possibilities — although one may be less convenient and slower — in order to achieve *the same* goal. The toll road network is made available to everyone who is prepared to pay, but only to them. This must be viewed as selection, which is alien to State activity. Tolls are levied principally for economic and financial reasons. Thus, the provision of a limited stretch of road on payment of a toll cannot be regarded as a State activity.

53. Article 4(5)(1) is, therefore, not applicable to the present case, since the provision of infrastructure on payment of a toll cannot be regarded as an activity carried out in the exercise of public authority. The bodies empowered to collect the tolls must, therefore, be considered to be taxable persons.

(bb) Economic activity

54. As I have already pointed out, under Article 4(1) of the Directive any person who independently carries out any economic activity is deemed to be a taxable person.

55. Article 4(2) of the Sixth VAT Directive defines economic activity as 'all activities of producers, traders and persons supplying services'.

56. The Court has consistently held that the scope of the term 'economic activities' is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. [11]

57. Under this wide definition of economic activity it is not necessary for services to be primarily or exclusively orientated towards the market or economic life. It is sufficient that they are actually connected with economic life in some way or other. [12]

58. Even if in the present case the provision of road infrastructure on payment of a toll is subject to public law and the stretch of toll road forms part of the public roads network, this is of no relevance in determining whether there is an economic activity. Under Article 6(1) of the Sixth

11 — Case 235/85, cited above at footnote 7, Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatsecretaris van Financiën* [1989] ECR 1737, paragraph 10, and Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 17.

12 — Opinion of Advocate General Lenz of 12 February 1987 in Case 235/85, point 22, and judgment in that case, cited above at footnote 7.

VAT Directive taxable transactions may include the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law. The objective nature of the definition of economic activity also calls for the classification of the activity in this case as an economic one as the activity itself must be considered, regardless of its purpose or result.

59. Consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system. [13] In the present case this means that given parts of the roads infrastructure are made available to road users on payment of a toll. As this activity is thus also carried out by the relevant bodies to generate revenue, in order to cover expenditure on materials and at the same time earn an income, it is clear that there is an economic activity in the case under consideration.

(c) (In the alternative) Distortion of competition

60. Under Article 4(5)(2) States, regional and local government authorities and other bodies governed by public law are considered taxable persons even in respect of the activities or transactions in which they engage as public authorities, where treatment as non-taxable persons would lead to significant distortion of competition. In the light of the observations made above, this sub-class should not require analysis as such activity must be considered not to form part of State activities. The following analysis is thus given only in the alternative.

61. Distortion of competition in the above sense would arise where a non-taxable State body was competing for the supply of the same services with a taxable private person and was therefore able to offer its services at a lower price because of the tax exemption. In the provision of road infrastructure such as we are concerned with here there is, however, no competitor covered by private law, so that there can be no competition either.

62. The examples of distortion of competition given by the Commission do not stand up to scrutiny here. First, the scope of the Directive — as is clear from a number of provisions — is limited to transactions at national level. There is no breach of the

13 — Case C-260/95 *Commissioners of Customs and Excise* v *DFDS* [1997] ECR I-1005, paragraph 23.

duty to treat other nationals equally in the present case. Second, the cases of distortion mentioned — no right to deduct input tax on the one hand and reduced costs on the other — are not the result of waiving tax or charging tax as the case may be, but of the misapplication of the law. Following clarification by the Court, the Member States will certainly levy VAT in a uniform manner. (The same will then be true of payments to own resources.) If the Commission's argument is taken to its logical conclusion, distortion of competition would most of all prejudice those countries where no road tolls are levied at all.

63. There is thus no distortion of competition within the meaning of Article 4(5)(2) which would justify treatment as a taxable person. However, as I explained in points 38 to 58, that is not the key issue. In the present case there is a supply subject to VAT because the levying of the toll is not a State activity.

64. Thus, it must be concluded that the Netherlands has failed to fulfil its Treaty obligations by not subjecting the collection of a toll to VAT.

65. In conclusion, brief consideration should given to the question — even though it is not raised by any of the parties here — of the extent to which the lapse established in Cases C-276/97, C-358/97, C-359/97 and C-260/98 [14] of the claims for the payment of contributions to own resources [15] affects the present case.

66. In the abovementioned cases the Commission allowed considerable time to elapse between the conclusion of the pre-litigation procedure and the bringing of the action without taking adequate steps to resolve the questions at issue.

67. Since it is clear from the first part of Article 9(2) of Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax, [16] that the VAT own resources base relating to Member States' annual statements may be corrected only until 31 July of the fourth year following the financial year concerned, it must be

14 — In these cases (see also footnote 1 above) the Commission also alleged that the defendant Member States had failed to pay corresponding amounts to own resources as a result of the failure to levy VAT on tolls.

15 — See the relevant Opinion of 27 January 2000, section V — Appraisal, 3.

16 — OJ 1989 L 155, p. 9.

assumed that in principle any collection of contributions to own resources is likewise impossible after expiry of this time-limit. Under the second part of Article 9(2) that applies unless those statements concern points previously notified either by the Commission or by the Member State concerned. The aim of this rule is to enable points which are disputed but have been raised to be resolved even at a later date. However, it must be assumed that those concerned will also make an effort in the intervening period to resolve the problems and that such a resolution is in fact possible.

68. However, in the proceedings against France, Ireland, the United Kingdom and Greece there was not sufficient further dialogue in the years between the conclusion of the pre-litigation procedure and the bringing of the action and therefore any claim for payment of contributions has lapsed in accordance with the 43-month time-limit. Only the financial years prior to the bringing of the action which fell within that time-limit are not yet closed and the relevant annual statements can still be corrected.

69. However, unlike in those cases, the Netherlands had paid the Commission the corresponding contributions to own resources subject to a reservation and the Commission had sent an additional reasoned opinion (23 December 1996) approximately seven years after an initial reasoned opinion (19 October 1989). However, in the light of the above observations it must also be assumed here that the claim for payment of resources has lapsed in so far as it relates to the financial years prior to 1993. So, even though the Netherlands has transferred the calculated contributions to own resources subject to a reservation, it should be possible to request reimbursement of the resources paid before 1993 or to have them credited to subsequent financial years.

70. However, since this problem does not form the subject-matter of these proceedings, no final decision need be taken on it here.

VI — Costs

71. 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. The Commission has asked for the Netherlands to be ordered to pay the costs.

VII — Conclusion

72. For the foregoing reasons I therefore propose that the Court should rule as follows:

(1) By not subjecting tolls for the use of transport infrastructure to value added tax, contrary to Articles 2 and 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977, the Netherlands has failed to fulfil its obligations under the EC Treaty.

(2) The Kingdom of the Netherlands shall bear the costs of the proceedings.