JUDGMENT OF THE COURT (Sixth Chamber)

13 July 2000 *

In Case C-36/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal de Première Instance de Liège, Belgium, for a preliminary ruling in the proceedings pending before that court between

Idéal Tourisme SA

and

Belgian State

on the interpretation of Articles 12(3) and 28(3)(b) of 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), in the version of Council Directive 96/95/EC of 20 December 1996 amending, with regard to the level of the standard rate of value added tax, Directive 77/338 (OJ 1996 L 338, p. 89), and of Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Schintgen, C. Gulmann, G. Hirsch (Rapporteur) and V. Skouris, Judges,

Advocate General: G. Cosmas,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Idéal Tourisme SA, by F. Herbert and S. Houx, of the Brussels Bar,

— the Belgian State, by A. Snoecx, Adviser in the Directorate-General for Legal Affairs of the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent, assisted by B. van de Walle de Ghelcke, of the Brussels Bar,

— the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and D. Colas, Secretary for Foreign Affairs in that directorate, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes, Director of the Legal Service in the Directorate-General for European Community Affairs of the Ministry of Foreign Affairs, Â. Cortesão de Seiça Neves, lawyer in that directorate, and R. Álvaro de Figueiredo Ribeiro, lawyer in the Directorate-General of Land Transport, acting as Agents,

— the Commission of the European Communities, by H. Michard and D. Triantafyllou, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Idéal Tourisme SA, represented by F. Herbert, S. Houx and M. Pittie, of the Brussels Bar; the Belgian State, represented by B. van de Walle de Ghelcke; the French Government, represented by D. Colas and F. Million, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by H. Michard and D. Triantafyllou, at the hearing on 29 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2000,

gives the following

Judgment

1 By decision of 8 February 1999, received at the Court on 10 February 1999, the Tribunal de Première Instance (Court of First Instance), Liège, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 12(3) and 28(3)(b) of 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), in the version of Council Directive 96/95/EC of 20 December 1996 amending, with regard to the level of the standard rate of value added tax, Directive 77/338 (OJ 1996 L 338, p. 89), and of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

2 Those questions were raised in proceedings between Idéal Tourisme SA and the Belgian State concerning the charging of value added tax (VAT) on international passenger transport operations by coach carried out by Idéal Tourisme.

Community legislation

3 Article 28(3)(b) of the Sixth Directive provides:

'During the transitional period referred to in paragraph 4, Member States may:

...

(b) continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned.'

4 Annex F to the Sixth Directive, entitled 'Transactions referred to in Article 28(3)(b)', mentions at point 17:

'Passenger transport

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.'

5 Article 15 of the Sixth Directive, which governs *inter alia* the exemption of international transport, prescribes at point 6:

'Without prejudice to other Community provisions Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

...

6. the supply, modification, repair, maintenance, chartering and hiring of aircraft used by airlines operating for reward chiefly on international routes,

and the supply, hiring, repair and maintenance of equipment incorporated or used therein.'

6 Under Article 17(3)(b) of the Sixth Directive, Member States are to grant to every taxable person the right to a deduction or refund of VAT in so far as the goods and services are used for the purposes of transactions which are exempt under Article 15 of the directive.

7 Article 12(3) of the Sixth Directive regulates the fixing by Member States of the standard and reduced rates of VAT on taxable transactions.

8 Article 92(1) of the Treaty states:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

National legislation

9 In Belgium, the Code de la Taxe sur la Valeur Ajoutée (Code of Value Added Tax, 'the VAT Code') provides in Article 21(3):

'By derogation from paragraph 2, the place of provision of services shall be deemed to be:

...

3. the place where the transport is carried out, according to the distances travelled, if the subject-matter of the service is transport.'

10 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 (*Moniteur Belge*, 31 July 1970) provides:

'Value added tax shall be charged:

1. at the rate of 6% on the goods and services specified in Table A of the annex to this decree.'

11 Point XXV, entitled 'Transport', of Table A mentions:

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

12 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 indent.'

13 Article 45(1) of the VAT Code reads as follows:

'A taxable person may deduct from the tax which he is liable to pay the tax which has been charged on goods and services supplied to him, on goods he has imported and on his intra-Community acquisitions of goods, in so far as he uses them to carry out:

1. taxable transactions;

2. transactions exempt under Articles 39 to 42.'

14 The Belgian provisions on the exemption of international air passenger transport predate the entry into force of the Sixth Directive.

The main proceedings and the questions referred for a preliminary ruling

15 Idéal Tourisme, established in Liège, Belgium, is a company which operates international passenger transport by coach.

16 In its monthly VAT return relating to its transactions during June 1997, Idéal Tourisme declared the sections of its international coach passenger transport operations carried out in Belgium at the rate of 0% instead of the rate of 6% prescribed in the Belgian legislation. In so doing, it stated that it considered itself discriminated against with respect to VAT, compared to international passenger transport by air. It stated that the latter means of transport was exempt from VAT, which did not prevent air transport undertakings from deducting input VAT, whereas the Belgian section of passenger transport operations by coach was, under the Belgian provisions, subject to VAT at 6%. It regarded this as discrimination contrary to the general principle of equal treatment, which was one of the general principles of Community law.

17 After the Belgian tax authorities demanded BEF 554 845 from Idéal Tourisme as VAT and BEF 55 000 in fines, it paid those amounts, and then brought proceedings in the Tribunal de Première Instance de Liège for reimbursement of those sums. Before that court, Idéal Tourisme submitted that the Belgian legislation exempting international air passenger transport not only breached the

general principle of equality but also constituted State aid within the meaning of Article 92 of the Treaty in favour of air transport undertakings.

18 Since it considered that an interpretation of Community law was needed for it to give judgment, the Tribunal de Première Instance de Liège stayed proceedings and referred the following 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?'

Admissibility of the questions

19 The Belgian State expresses doubt as to whether there is a genuine dispute in the main proceedings. It considers that the questions which Idéal Tourisme suggested that the national court should refer to the Court, while not purely hypothetical, nevertheless have the sole purpose of achieving a result which it has not yet been possible to achieve by legislation. It leaves to the Court the question of the admissibility of the reference.

20 It must be recalled that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, *inter alia*, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59). Nevertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Bosman*, paragraph 61, and Case C-437/97 *Evangelischer Krankenhausverein Wien and Others* v *Abgabenberufungskommission Wien and Others* [2000] ECR I-1157, paragraph 52).

21 It is clear from the order for reference that the action brought by Idéal Tourisme seeks reimbursement of the VAT it paid to the Belgian State, and hence the benefit for itself of an exemption from VAT without thereby losing the right to deduct the input VAT.

22 The documents in the case contain nothing to show that the parties to the main proceedings manifestly colluded to obtain a ruling from the Court by means of an artificial dispute, as was the case in Case 244/80 *Foglia* v *Novello* [1981] ECR 3045. On the contrary, it is plain that the parties disagree on a number of important points, and it is clear from the documents that Idéal Tourisme did not come to an agreement with the Belgian State to refer hypothetical questions to the Court for a preliminary ruling.

23 As to the relevance of the first question, it must be stated that the question is not manifestly irrelevant, since it appears from the case-file that the national court considers that coach passenger transport operators are discriminated against

compared to air transport operators, that discrimination appearing to it to be contrary *a priori* to the Community principle of equality and non-discrimination.

24 It is not for the Court, when considering the admissibility of the first question, to criticise that assessment.

25 The national court's first question must therefore be answered.

26 On the other hand, its second question is manifestly irrelevant to the result of the case in the main proceedings.

27 By that second question the national court essentially asks whether the air transport operators' exemption from VAT constitutes State aid which is incompatible with Community law.

28 However, the main proceedings are not concerned with that point, but with whether certain transactions carried out by Idéal Tourisme are subject to VAT or not.

29 The second question should therefore not be answered (see, to that effect, in a similar case, *Evangelischer Krankenhausverein Wien*, paragraph 53).

The first question

30 By its first question, the national court essentially asks whether the principle of equal treatment precludes legislation of a Member State which, first, in accordance with Article 28(3)(b) of the Sixth Directive, continues to exempt international passenger transport by air and, second, taxes international passenger transport by coach.

31 Idéal Tourisme claims that as a coach transport undertaking it competes directly with air transport operators over intermediate distances, that is, distances from 300/400 to 2 500/3 000 km. It submits that the difference in taxation is therefore unjustified and breaches the principle of equal treatment. The Belgian State and the French and Portuguese Governments contend, on the other hand, that those two means of transport are not sufficiently interchangeable to be regarded as belonging to the same market. The Commission states that the difference in taxation according to the means of transport used by the taxable person, whether or not objectively justified, must be regarded as consistent with the Sixth Directive as long as the Community legislature has not put an end to the transitional provisions on exemption.

32 It must be noted at the outset that Article 28(3)(b) of the Sixth Directive, read in conjunction with Annex F thereto, clearly and unambiguously authorises Member States to continue to apply, under the same conditions, certain exemptions which were provided for in their legislation before the entry into force of the Sixth Directive. While that article consequently does not permit Member States to introduce new exemptions or extend the scope of existing exemptions following the entry into force of that directive, it does not prevent a reduction of existing exemptions, especially as their abolition constitutes the

objective pursued by Article 28(4) of the directive (see Case C-136/97 *Norbury Developments* v *Customs and Excise* [1999] ECR I-2941, paragraph 19).

33 It follows that a Member State which, like the Kingdom of Belgium, imposes VAT on the international transport operations of coach passenger transport operators and continues to exempt international air passenger transport would not be authorised to extend to the former the exemption allowed to the latter, even if the difference in treatment infringed the Community principle of equal treatment. On the other hand, it could tax air transport as well, in order to remove such a difference in treatment.

34 However, a Member State may continue on the one hand to exempt, under the conditions set out in Article 28(3)(b) of the Sixth Directive, international passenger transport by air, and on the other hand to tax international passenger transport by coach.

35 The principle of equal treatment is indeed one of the fundamental principles of Community law. That principle requires that similar situations are not to be treated differently unless differentiation is objectively justified (Joined Cases 201/85 and 202/85 *Klensch and Others* v *Secrétaire d'État à l'Agriculture et à la Viticulture* [1986] ECR 3477, paragraph 9).

36 As Idéal Tourisme rightly submits, it also follows from *Klensch*, paragraph 10, that when Member States transpose directives into their national law they must comply with the principle of equal treatment.

37 However, the Community system of VAT is the result of a gradual harmonisation of national laws in the context of Articles 99 and 100 of the EC Treaty (now Articles 93 EC and 94 EC). As the Court has repeatedly stated, this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial (see Case C-165/88 *ORO Amsterdam Beheer and Concerto* v *Inspecteur der Omzetbelasting* [1989] ECR 4081, paragraph 21).

38 As the Belgian State stated at the hearing, the harmonisation envisaged has not yet been achieved, in so far as the Sixth Directive, by virtue of Article 28(3)(b), unreservedly authorises the Member States to retain certain provisions of their national legislation predating the Sixth Directive which would, without that authorisation, be incompatible with that directive. Consequently, in so far as a Member State retains such provisions, it does not transpose the Sixth Directive and thus does not infringe either that directive or the general Community principles which Member States must, according to *Klensch*, comply with when implementing Community legislation.

39 With respect to such a situation, it is for the Community legislature to establish the definitive Community system of exemptions from VAT and thereby to bring about the progressive harmonisation of national VAT laws (see, to that effect, Case C-305/97 *Royscot and Others* v *Customs and Excise* [1999] ECR I-6671, paragraph 31).

40 The answer to the first question must therefore be that, in the present state of harmonisation of the laws of the Member States relating to the common system of VAT, the Community principle of equal treatment does not preclude legislation

of a Member State which on the one hand, in accordance with Article 28(3)(b) of the Sixth Directive, continues to exempt international passenger transport by air, and on the other hand taxes international passenger transport by coach.

Costs

41 The costs incurred by the French and Portuguese Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunal de Première Instance de Liège by order of 8 February 1999, hereby rules:

In the present state of harmonisation of the laws of the Member States relating to the common system of value added tax, the Community principle of equal

treatment does not preclude legislation of a Member State which on the one hand, in accordance with Article 28(3)(b) of 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, in the version of Council Directive 96/95/EC of 20 December 1996 amending, with regard to the level of the standard rate of value added tax, Directive 77/388, continues to exempt international passenger transport by air, and on the other hand taxes international passenger transport by coach.

Moitinho de Almeida Schintgen Gulmann

Hirsch Skouris

Delivered in open court in Luxembourg on 13 July 2000.

R. Grass — Registrar

J.C. Moitinho de Almeida — President of the Sixth Chamber