JUDGMENT OF THE COURT (Sixth Chamber)

3 May 2001 *

In Case C-481/98,

Commission of the European Communities, represented by E. Traversa, acting as Agent, assisted by N. Coutrelis, avocat, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and S. Seam, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

Republic of Finland, represented by H. Rotkirch and T. Pynnä, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that, by introducing and maintaining in force legislation relating to value added tax which provides for a rate of 2.1% to be charged on medicinal products reimbursable under the social security system, whereas other medicinal products are taxed at the reduced rate of 5.5%, the French Republic has failed to fulfil its obligations under Article 12 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),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet, R. Schintgen and N. Colneric (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 December 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by introducing and maintaining in force legislation relating to value added tax ('VAT') which provides for a rate of 2.1% to be charged on medicinal products reimbursable under the social security system, whereas other medicinal products are taxed at the reduced rate of 5.5%, the French Republic has failed to fulfil its obligations under Article 12 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).

The Community legislation

2 In its original version, Article 12(3) of Sixth Directive 77/388 provided:

'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.'

3 That provision was the subject of a significant amendment in 1992. Article 12(3)(a) of Sixth Directive 77/388, as amended by Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388 (approximation of VAT rates) (OJ 1992 L 316, p. 1), (hereinafter 'the Sixth Directive)', provides as follows:

'From 1 January 1993 Member States shall apply a standard rate which, until 31 December 1996, may not be less than 15%.

...

Member States may also apply either one or two reduced rates. The reduced rates may not be less than 5% and shall only apply to supplies of the categories of goods and services specified in Annex H.'

4 Two minor amendments were subsequently made to that provision by, in the first place, Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388 and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47) and, second, by 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). Article 12(3)(a) of the Sixth Directive, as amended by Directive 96/95, is worded as follows:

'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 1997 to 31 December 1998, this percentage may not be less than 15%.

...

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.'

5 Article 28(2)(a), first subparagraph, of the Sixth Directive provides:

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

(a) Exemptions with refund of the tax paid at the preceding stage and reduced rates lower than the minimum rate laid down in Article 12(3) in respect of the reduced rates, which were in force on 1 January 1991 and which are in accordance with Community law, and satisfy the conditions stated in the last indent of Article 17 of the second Council Directive of 11 April 1967, may be maintained.'

6 Article 17, final indent, of Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16) ('the Second Directive') provides:

'With a view to the transition from the present system of turnover taxes to the common system of value added tax, Member States may:

...

— provide for reduced rates or even exemptions with refund, if appropriate, of the tax paid at the preceding stage, where the total incidence of such measures does not exceed that of the reliefs applied under the present system. Such measures may only be taken for clearly defined social reasons and for the benefit of the final consumer, and may not remain in force after the abolition of the imposition of tax on importation and the remission of tax on exportation in trade between Member States.'

7 The eighth recital in the preamble to First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14) ('the First Directive') provides as follows:

'... the replacement of the cumulative multi-stage tax systems in force in the majority of Member States by the common system of value added tax is bound, even if the rates and exemptions are not harmonised at the same time, to result in neutrality in competition, in that within each country similar goods bear the same tax burden ...'.

8 Under Article 6 of Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems (OJ 1989 L 40, p. 8), Member States are authorised to decide that a medicinal product will be reimbursable under the national social security system only after it has been included on a positive list of medicinal products covered by the national health insurance system. Any decision not to include a medicinal product on that list must be based on objective and verifiable criteria.

National legislation

9 Article 281g of the Code général des impôts (French General Tax Code), introduced into that Code by Article 9 of Law No 89-935 of 29 December 1989 on the Finance Law for 1990 (JORF of 30 December 1989, p. 16337), provides that the rate of VAT applicable to medicinal products reimbursable under the social security system is to be 2.1%, whereas, under Article 278c of that Code, other medicinal products are taxed at the rate of 5.5%.

10 Under Article R 163-3 of the Code de la sécurité sociale (French Social Security Code), in the version applicable to this dispute, products may be included on the list of reimbursable medicinal products only if it is shown that they result in:

'— either an improvement as regards therapeutic effectiveness or, where relevant, secondary effects of the medical service provided;

— or a saving in the cost of medicinal treatment.'

11 Article R 163-3 of the Code de la sécurité sociale also provides that: 'where medicinal products are equivalent in terms of effectiveness or savings, preference shall be given to those medicinal products which are the result of research by the manufacturer.'

12 Under Article L.601 of the Code de la santé publique (French Public Health Code), in the version applicable to this dispute, inclusion on the list of

reimbursable medicinal products may be requested only for proprietary medicinal products which have received prior marketing authorisation, and it is the receipt of that authorisation that allows the product to be effectively recognised as being a proprietary medicinal product capable of being marketed.

13 It is common ground that this last-mentioned national legislation is in accordance with Community law, in particular with Directive 89/105.

Pre-litigation procedure

14 The Commission took the view that application of two different reduced rates of VAT for medicinal products, depending on whether or not they were reimbursable under the social security system, was contrary to the provisions of the First and Sixth Directives, in particular Article 12(3) of the Sixth Directive. By letter of 28 September 1995, it notified the French Government, in accordance with Article 169 of the Treaty, of its complaints in respect of what it presumed to be an infringement of Community law and requested the French Government to submit its observations on the matter.

15 In its reply of 18 January 1996, the French Government put forward a range of arguments which, in its opinion, were capable of demonstrating that the existence of those two reduced rates of VAT did not constitute an infringement of Community law.

16 Remaining unconvinced by the French Government's arguments, the Commission addressed to the French Republic on 22 December 1997 a reasoned opinion calling on it to adopt the measures necessary for compliance within two months of its notification.

17 The French Government maintained its position in its letter of 8 April 1998 in reply to the reasoned opinion, whereupon the Commission decided to bring the present action.

18 By order of the President of the Court of 14 July 1999, the Republic of Finland was granted leave to intervene in the dispute in support of the forms of order sought by the French Republic.

The action

19 In support of its action, the Commission points out that a rate of VAT lower than 5%, such as the rate of 2.1% applicable in France with regard to medicinal products reimbursable under the social security system, can be justified under Articles 12(3)(a) and 28(2)(a) of the Sixth Directive solely if that rate not only existed before 1 January 1991, which is the position in this case, but also if it is, as such, in accordance with Community law. This second condition, the Commission submits, is not satisfied in this case. By taxing non-reimbursable medicinal products at the rate of 5.5% and reimbursable medicinal products at the rate of 2.1%, the French legislation subjects two similar products to two different rates of VAT, contrary to the principles of VAT uniformity, of fiscal neutrality inherent in the common system of VAT, and of the elimination of distortion in competition.

20 The French Government contends that the action must be dismissed inasmuch as the three conditions laid down in Article 28(2)(a) of the Sixth Directive are satisfied. First, it submits that it is common ground that the reduced rate of VAT applicable to reimbursable medicinal products pre-dates 1 January 1991. Second, that rate, it argues, complies with Community legislation, in particular the principle of fiscal neutrality. Finally, the French Government contends that the reduced rate meets the criteria set out in the final indent of Article 17 of the Second Directive inasmuch as it was introduced for social reasons and for the benefit of the final consumer.

The principle of fiscal neutrality

21 According to Article 28(2)(a) of the Sixth Directive, the maintenance of reduced rates of VAT lower than the minimum rate laid down in Article 12(3)(a) of that directive must be consistent with Community legislation. It follows that the introduction and maintenance of a rate of 2.1% for reimbursable medicinal products, whereas the supply of non-reimbursable medicinal products is subject to a rate of 5.5%, are permissible only in so far as they are consistent with the principle of fiscal neutrality inherent in the common system of VAT and in compliance with which the Member States are required to transpose the Sixth Directive (see, to that effect, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 19).

22 That principle in particular precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes (see, to this effect, the eighth recital in the preamble to the First Directive and paragraphs 21 and 27 of the judgment in Case C-283/95 *Fischer* [1998] ECR I-3369). It follows that those products must be subject to a uniform rate. The principle of fiscal neutrality for that reason also includes the other two principles invoked by the Commission, namely the principles of VAT uniformity and of elimination of distortion in competition.

23 The Commission submits that all medicinal products are defined by curative or preventive properties and are, for that reason, similar products. The classification of medicinal products into two categories according to whether or not they are reimbursable does not refer to intrinsically different products, which would be the only argument capable of justifying different rates of VAT. This classification in itself distorts competition in favour of reimbursable medicinal products, and that distortion is further aggravated by the lower tax rate applied to the latter.

24 The French Government contends that reimbursable and non-reimbursable medicinal products are different products which may for that reason be subject to

different rates of VAT. It stresses in this regard the parties' agreement that this classification of medicinal products is based on objective criteria.

25 It is clear that, in introducing and maintaining in force a VAT rate of 2.1% solely for reimbursable medicinal products, the French legislation did not, and does not, infringe the principle of fiscal neutrality. Reimbursable and non-reimbursable medicinal products are not similar products in competition with each other.

26 In the first place, a medicinal product is included on the list of reimbursable medicinal products pursuant to objective criteria and in accordance with Directive 89/105. Under that directive, even though two medicinal products have the same curative or preventive effect, one may be reimbursable and the other not, *inter alia* because the latter product is considered to be too expensive. This distinct classification is none the less in accordance with Community law.

27 Next, it must be noted that the effect of this classification is that the two categories of medicinal products are not similar products in competition with each other. Once included on the list of reimbursable products, a medicinal product will, *vis-à-vis* a non-reimbursable medicinal product, have a decisive advantage for the final consumer. This is why the consumer, as the Advocate General notes in point 66 of his Opinion, seeks in preference medicinal products coming within the category of those that are reimbursable, and consequently it is not the lower rate of VAT which provides the reason for his decision to purchase. The reduced rate of VAT on reimbursable medicinal products does not have the effect of favouring the sale of such products over the sale of medicinal products that are not reimbursable. The two categories of medicinal products are thus not in a situation of competition in which the difference in the rates of VAT could be relevant.

28 This conclusion is not affected by the fact that, in order to be eligible for reimbursement, reimbursable medicinal products must be purchased on a doctor's prescription. There could be distortion of competition only if a not insignificant quantity of reimbursable medicinal products was purchased without any medical prescription whatever, something which does not appear from the file documents and, moreover, is not alleged by the Commission in this case.

29 It should be added that this conclusion also accords with Community law on competition. In this connection, the French Government rightly refers to Commission Decision 95/C 65/04 of 28 February 1995 declaring a concentration to be compatible with the common market (Case No IV/M.555 — Glaxo/Wellcome) (OJ 1995 C 65, p. 3), in which the Commission accepted that the market in reimbursable medicinal products can be distinguished from that of non-reimbursable medicinal products.

30 It must consequently be held that the Commission has failed to establish that, by introducing and maintaining in force different rates of VAT for reimbursable medicinal products and for non-reimbursable medicinal products, the French Republic infringed the principle of fiscal neutrality inherent in the common system of VAT.

The purpose served by the reduced rate of VAT

31 With regard to the third condition to which Article 28(2)(a) of the Sixth Directive makes the introduction of a reduced rate of VAT subject, the Commission argues that, in this case, such a rate was not introduced for clearly defined social reasons and for the benefit of the final consumer. It submits that, on the contrary, the

French Republic used VAT for an economic and social purpose, namely to relieve the burden on the social security system and to reduce household expenditure.

32 Suffice it in this regard to point out that application of a reduced rate of VAT to reimbursable medicinal products clearly constitutes a social reason, inasmuch as it necessarily reduces the charges borne by the social security system, and also benefits the final consumer, whose health expenses are thereby reduced.

33 It follows from all of the foregoing that, by introducing and maintaining in force VAT legislation pursuant to which medicinal products reimbursable under the social security system are taxed at the rate of 2.1% whereas other medicinal products are taxed at the reduced rate of 5.5%, the French Republic has not failed to fulfil its obligations under Article 12 of the Sixth Directive. The action for failure to fulfil obligations must for that reason be dismissed as unfounded.

Costs

34 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 French Republic has applied for costs to be awarded against the Commission and the Commission has been unsuccessful, the latter must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene in the proceedings must bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs;

3. Orders the Republic of Finland to bear its own costs.

Gulmann Skouris Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 3 May 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber