Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 25 October 2012 [1]

Case C-360/11

European Commission
v

Kingdom of Spain

(Failure of a Member State to fulfil obligations — Directive 2006/112/EC — Points 3 and 4 of Annex III — Reduced rate of VAT — Supply of goods to which reduced rates can be applied — Pharmaceutical products normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes — Medical equipment, aids and other appliances normally intended to alleviate or treat disability, for the exclusive personal use of the disabled)

I – Introduction

1. Under European Union ('EU') law on value added tax (VAT), Member States may apply a reduced rate of VAT to pharmaceutical products and certain medical devices. The Commission has brought the present infringement action against the Kingdom of Spain as it considers that the Member State has applied a reduced VAT rate on broader categories of goods than what is provided for in points 3 and 4 of Annex III to Council Directive 2006/112/EC on the common system of value added tax ('the VAT Directive'). [2]

2. The Kingdom of Spain contends that the action should be dismissed. It considers that the categories of goods and services in Annex III to the VAT Directive are not defined clearly enough to merit an infringement action.

II – Legal framework

EU law

3. Article 96 of the VAT Directive provides that:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

1 — Original language: English.
2 — OJ 2006 L 347, p. 1.

4. Article 98 of the VAT Directive under section 2 titled 'reduced rates' provides that:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

…'

5. Point 3 of Annex III to the VAT Directive ('category 3') covers the supply of the following goods:

'pharmaceutical products of a kind normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes, including products used for contraception and sanitary protection'.

6. Point 4 of Annex III to the VAT Directive ('category 4') covers the supply of the following goods and services:

'medical equipment, aids and other appliances normally intended to alleviate or treat disability, for the exclusive personal use of the disabled, including the repair of such goods, and supply of children's car seats'.

National law

7. Paragraphs 1(5) and 1(6) of the first section of Article 91 of the Ley española del IVA (Spanish Law on VAT)[3] provides for the application of a reduced rate of VAT on supply of the following goods:

'5. Medicaments for veterinary use and medicinal substances which can be used habitually and suitably in the production of medicinal products.

6. Appliances and accessories, including glasses with corrective lenses and contact lenses, which viewed objectively, can be used essentially or primarily to alleviate physical disability in humans and animals, including limitations in their mobility and communicational abilities.

Medical devices, material, equipment and appliances which, viewed objectively, can be used only to prevent, diagnose, treat, alleviate or cure human or animal illnesses or ailments.

Not included in this category are cosmetic products and personal hygiene products excluding sanitary towels, tampons and panty liners.'

8. Paragraph 1(3) of the second section of Article 91 of the Ley española del IVA provides for the application of a reduced rate of VAT on the supply of the following goods:

'Medicaments for human use, as well as medicinal substances, pharmaceutical forms and intermediary products which can be used habitually and suitably in the production of medicinal products.'

3 — Law 37/1992.

III – Pre-litigation procedure

9. By letter of 22 March 2010, the Commission informed the Kingdom of Spain that it considered the regime of reduced rates of VAT provided in paragraphs 1(5) and 1(6) of the first section of Article 91 and paragraph 1(3) of the second section of Article 91 of the Spanish Law on VAT to be in breach of the obligations of the Kingdom of Spain under the VAT Directive.

10. The Kingdom of Spain responded on 28 May 2010 that it considered the Spanish provisions on reduced rates of VAT to be in conformity with the VAT Directive.

11. The Commission did not consider the arguments provided by the Kingdom of Spain sufficient and on 25 November 2010 issued a reasoned opinion, requesting the Kingdom of Spain to take appropriate action within a deadline.

12. Since the Kingdom of Spain maintained its position in its reply to the reasoned opinion that the Spanish provisions concerning goods to which reduced rates of VAT are applied are in conformity with EU law, the Commission decided to bring the present action.

IV – Procedure before the Court

13. By its application of 8 July 2011, the European Commission asks the Court to declare that the Kingdom of Spain has failed to fulfil its obligations under Article 98 of the VAT Directive in conjunction with Annex III thereto by applying a reduced rate of VAT to the following categories of goods:

(1) Medicinal substances which can be used habitually and suitably in the manufacturing of medicinal products (paragraph 1(5) of the first section of Article 91 and paragraph 1(3) of the second section of Article 91 of the Spanish Law on VAT).

(2) Medical devices, material, equipment and appliances which, viewed objectively, can be used only to prevent, diagnose, treat, alleviate or cure human or animal illnesses or ailments, but which are not 'normally intended to alleviate or treat disability, for the exclusive personal use of the disabled' (paragraph 1(6) of the first section of Article 91 of the Spanish law on VAT).

(3) Aids and equipment which may be used essentially or primarily to treat physical disabilities in animals (paragraph 1(6) of the first section of Article 91 of the Spanish law on VAT).

(4) Aids and equipment essentially or primarily used to treat human disabilities, but which are not intended for the exclusive personal use of 'the disabled'; the common understanding of this term is to be assumed, that is as being different from and more restrictive than the term 'the sick' (first part of paragraph 1(6) of the first section of Article 91 of the Spanish Law on VAT).

14. The Commission also asks that the Kingdom of Spain is ordered to pay the costs.

V – Admissibility

15. Without raising a formal complaint of inadmissibility, the Kingdom of Spain pointed out in its reply to the Commission's application that the Commission had in its application effectively included an additional complaint concerning the application of a reduced VAT rate to 'intermediary products' without having introduced this grievance in the pre-litigation procedure.

16. Since no formal complaint of inadmissibility has been raised, I intend to analyse the Commission's complaints as they have been presented in the application to the Court. Moreover, I find that the inclusion or exclusion of the term intermediary product within the scope of this infringement action makes no difference to the outcome of the action.

VI – Assessment

A – *Preliminary observations*

17. At the outset it is necessary to recall that the common VAT system of the European Union 'should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain'.[4] It is settled case-law of the Court that the introduction and maintenance of reduced rates of VAT are permissible only if they do not infringe the principle of fiscal neutrality.[5]

18. It should also be noted at the outset that the reduced VAT rate regime is an exception to the general rule that the standard rate of VAT applies. According to settled case-law of the Court, provisions which are in the nature of exceptions to a principle must be interpreted strictly and that applies also in the case of reduced rates of VAT.[6]

19. Taking into account these considerations, it should be recalled that the more supplies of goods and services are subject to a lower VAT rate or exempted from VAT altogether, the more important it becomes to define clearly the groups of goods and services to which a reduced rate of VAT or an exemption is applied. A reduced rate of VAT may be applied only to the supply of goods and services covered by the categories listed in Annex III to the VAT Directive. Since these are of the nature of exceptions, their scope is to be interpreted strictly.

20. The Kingdom of Spain does not contest the Commission's proposition that categories 3 and 4 should be interpreted strictly, but rather argues that because the expressions used in these provisions have not been defined in EU legislation, it is not clear which products are covered by them. This, according to the Kingdom of Spain, has necessitated their interpretation based on national health legislation.

21. It should also be borne in mind that it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question.[7]

4 — See recital 7 of the VAT Directive.

5 — See Case C-442/05 *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-1817, paragraph 42 and case-law cited.

6 — See Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 19 and case-law cited, and more recently Case C-3/09 *Erotic Center* [2010] ECR I-2361, paragraph 15.

7 — See, for example, Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 24 and case-law cited.

22. The expressions used in categories 3 and 4 form a part of EU law provisions which do not refer to the law of the Member States for the determining of their meaning and scope.[8] However, taking into account that the socio-political goals of the reduced VAT rate system cannot be attained without taking into consideration the particular circumstances in individual Member States, the tying of definitions used in national systems of reduced VAT rate to provisions of other national legislation may as such be justified and even reasonable, provided that these definitions do not extend the scope of provisions of the VAT Directive forming an exception to the general system.

23. In this context it should be recalled that it was not the intention of the regime of reduced VAT rates to completely curb the discretion of Member States in determining the goods and services to which a reduced rate of VAT would be applied. This is at least partially due to the impracticality and inefficiency of attempting to provide detailed lists of goods and services on EU level.

24. This intention is indeed evident in a report reviewing the scope of Annex H to the Sixth VAT Directive,[9] in which the Commission outlined the historical context of the categories listed in the annex as follows:

'Instead of endless discussions about what should or should not be included in a category, it only became necessary for the Council to agree on the broad outline of a general definition for each category at Community level (i.e. essentially to decide what fell outside the scope of a category). Subject to respecting this general definition (by not enlarging the scope of a category) each Member State was subsequently free to use, in its implementing legislation, its own definition for categories depending on what particular group of products or services it wished to tax at the reduced rate.'[10]

25. Therefore it should be concluded that the fact that the scope and meaning of categories 3 and 4 on the EU level should be interpreted strictly, taking into consideration the wording, context and the purpose of the provisions,[11] does not preclude Member States from determining the individual products for which a reduced rate of VAT is applied, as long as these are within the scope of categories 3 and 4.

26. I will discuss the scope of categories 3 and 4 in the order of the grounds for the present infringement action presented by the Commission.

B – *First complaint: medicinal substances which can be used habitually and suitably in the manufacturing of medicinal products*

27. Under the first ground for the infringement action, the Commission considers that the application of a reduced rate of VAT to medicinal substances which can be used habitually and suitably in the production of medicine as provided by paragraph 1(5) of the first section of Article 91 and paragraph 1(3) of the second section of Article 91 of the Spanish Law on VAT is precluded by the VAT Directive.

8 — According to Article 100 of the VAT Directive, it is for the Council, based on a report from the Commission, to review the scope of the reduced rates every two years and alter the list of goods and services set out in Annex III if necessary.

9 — 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 ('the Sixth VAT Directive'), OJ 1977 L 145, p. 1. Annex H to the Sixth VAT Directive was transferred to Annex III to the recast VAT Directive with no changes to the wording of points 3 and 4.

10 — See Report from the Commission to the Council in accordance with Articles 12(4) and 28(2)(g) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, COM(94) 584 final, p. 14.

11 — See *NCC Construction Danmark*, paragraph 23 and case-law cited.

28. According to the Commission, category 3 allows Member States to apply a reduced rate of VAT to goods which fulfil two conditions. First, they have to be 'pharmaceutical products', and second, these products have to be 'normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes'.

29. The Commission claims that medicinal substances are not covered by category 3 because they are not final products and cannot therefore be considered to be 'normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes'. The Commission argues that where the EU legislature has intended categories in Annex III to the VAT Directive to cover also substances used in the production of goods, this has been expressly stated. For example, category 1 of Annex III includes, in addition to 'foodstuffs', also 'live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs'.

30. The Kingdom of Spain claims that medicinal substances are pharmaceutical products in the sense of category 3. The Kingdom of Spain argues that in the absence of a definition on the level of EU law, it is justified to have had resorted to a definition in national law. The concept of medicinal substance used in the Spanish Law on VAT originates from a Spanish law (Law 25/1990) that has since been repealed. According to the Spanish authorities, this concept differs from the concept of raw materials [materias primas] used in the current law (Law 29/2006), and to the supply of which a reduced rate of VAT does not apply.

31. I agree with the Commission's interpretation of the criteria for goods to which a reduced rate of VAT can be applied under category 3. The first question is therefore whether medicinal substances habitually and suitably used in the manufacturing of medicinal products are pharmaceutical products.

32. The Commission suggests that the concept of pharmaceutical product should be likened to medicinal product defined in Article 1 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [12] as follows:

'Any substance or combination of substances presented for treating or preventing disease in human beings.

Any substance or combination of substances which may be administered to human beings with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings is likewise considered a medicinal product.'

33. Most language versions use different expressions in category 3 and in Article 1 of Directive 2001/83. [13] The Commission points out that in the German versions, however, the term 'Arzneimittel' is used in both provisions. This is indeed a narrower term than 'pharmaceutical product', but it seems to be an exception to the more general trend of using differing expressions.

34. In my view it is clear that medicinal products are pharmaceutical products, but I am doubtful whether it is appropriate to assume that the opposite is also true as the Commission posits. The two directives pursue rather different objectives, and without an express reference to a definition in another directive, I would refrain from establishing a connection between them.

12 — OJ 2001 L 311, p. 67.

13 — For example, in English 'pharmaceutical product' and 'medicinal product', in French 'les produits pharmaceutiques' and 'médicament', Italian 'prodotti farmaceutici' and 'medicinale'.

35. Moreover, the definition of medicinal product in Article 1 of Directive 2001/83 ties the concept to the medical care of human beings. For its part, the concept pharmaceutical product in category 3 covers also veterinary use. It seems to me that the expression pharmaceutical product used in category 3 is intended to be broader than the term medicinal product as it is defined in Directive 2001/83.

36. The second criterion of the products being 'normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes' is in my opinion the decisive one in determining whether category 3 precludes the application of a reduced rate of VAT to medicinal substances which can be used habitually and suitably in the production of medicinal products.

37. The wording of category 3 ties the definition of the concept of a pharmaceutical product to its usage. It indicates that pharmaceutical products have reached a certain stage in their manufacturing process at which point they can be used 'for health care, prevention of illnesses and as treatment for medical and veterinary purposes'. This mature stage also reflects the objectives of the reduced VAT rate regime.

38. The objective of value added tax is to tax goods destined for personal consumption, and as such it comes to burden the final consumer.[14] The purpose of the reduced VAT rate regime is to ease the impact of VAT on final consumers in relation to goods deemed as necessities, such as pharmaceutical products and medical equipment for the disabled.[15]

39. It seems to me clear that medicinal substances used in the manufacturing of pharmaceutical products cannot be sold to final customers as such, but only as components of the final product. However, to the extent that such medicinal substances also are 'normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes' and placed on the market for consumers to buy, there is no reason why a reduced rate of VAT could not be applied to them.

40. It is also clear that if a reduced rate of VAT is applied to pharmaceutical products it is applied to them regardless of their pharmaceutical, or dosage form. Fiscal neutrality requires that similar goods in competition with each other are subject to a uniform rate in order to eliminate distortion in competition. Mere difference in the physical form in which the goods are sold, for example pills or liquid form, cannot as such justify different VAT treatment.

41. It seems to me therefore clear that the application of a reduced rate of VAT to medicinal substances habitually and suitably used in the manufacturing of medicinal products cannot be considered to comply with the VAT Directive, unless they are 'normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes' and placed on the market for consumers to buy.

42. I therefore conclude that the Commission's first complaint must be upheld.

14 — See, for example, Case C-520/10 *Lebara* [2012] ECR, paragraph 24 and case-law cited.

15 — See, for example, Case C-481/98 *Commission* v *France* [2001] ECR I-3369, paragraph 32.

C – Second complaint: medical devices, material, equipment and appliances used only to prevent, diagnose, treat, alleviate or cure human or animal illnesses or ailments

43. With the second ground of the infringement action, the Commission considers that the application of a reduced rate of VAT on medical devices, material, equipment and appliances which, viewed objectively, can be used only to prevent, diagnose, treat, alleviate or cure human or animal illnesses or ailments, but which are not 'normally intended to alleviate or treat disability, for the exclusive personal use of the disabled' provided for in paragraph 1(6) of the first section of Article 91 of the Spanish law on VAT is not in line with the VAT Directive because such goods are not covered by categories 3 and 4.

44. As concerns category 4, the Commission's argument is two-fold. First, medical equipment used for veterinary purposes is not covered by category 4 which refers to medical equipment, aids and appliances for the exclusive use by humans. Second, category 4 refers to exclusive personal use, thus excluding general use.

45. The Kingdom of Spain claims that the expression pharmaceutical product used in category 3 covers also medical devices because Article 168 TFEU has grouped the terms medicinal product and devices for medical use under the same objective in the protection of public health, indicating that the protection given to one should also cover the other.[16] According to the Kingdom of Spain this interpretation does not render category 4 meaningless because it refers to a very specific usage of medical devices not covered by the term pharmaceutical product used in category 3. The inclusion under category 3 of medical devices not intended for this specific usage, but which are 'normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes' is therefore in their opinion not a contradictory conclusion.

46. The broad interpretation of pharmaceutical products adopted by the Kingdom of Spain has lead the Spanish tax authority (Dirección General de Tributos, 'the DGT') to apply a VAT rate of 8 per cent to, for example, appliances for measuring blood pressure, thermometers, acupuncture needles and materials, and gloves, masks, gowns and caps for medical use.

47. To start with, I must agree with the Commission in that Article 168 TFEU is not relevant in this context as the provision refers only to the quality and security of medicinal products and medical devices.

48. As to the Kingdom of Spain's argument of pharmaceutical products covering medical devices beyond those referred to in category 4, it seems to me that the wording and structure of categories 3 and 4 is self-evident. If indeed pharmaceutical products were intended to cover medical devices beyond what is referred to in category 4, it would have been simpler just to have one category covering all 'pharmaceutical products', including also the specific use indicated in category 4, and not two separate more defined categories.

49. Most language versions of the VAT Directive use a word deriving from the Latin *pharmaceuticus*, denoting 'of drugs' in category 3. Hence, the relevant factor determining the goods falling under this category is the chemical or biochemical[17] constitution of the goods, not solely the purpose of their usage to prevent, diagnose, treat or alleviate illnesses.

16 — Article 168(4)(c) TFEU lists 'measures setting high standards of quality and safety for medicinal products and devices for medical use' as subject for the achievement of the objectives set in Article 168.

17 — I recall that in substitution treatment of diseases such as hypothyroidism and insulin dependent diabetes, hormones of animal origin were used before the developments in biotechnology allowed the synthetic production of human hormones.

50. The wording of category 4 attributes the following criteria to medical equipment to which a reduced rate of VAT can be applied: such goods have to be 'for the exclusive personal use of the disabled'. Two observations can be made of this wording: first, category 4 refers to medical devices used exclusively by humans, with no mention of veterinary use. Second, the application of a reduced rate of VAT to medical devices is reserved for 'exclusive *personal* use', excluding general use.

51. It can be assumed that had the legislator intended to include also medical equipment for veterinary use, as is the case with pharmaceutical products in category 3, this would have been expressly included in category 4. It is therefore obvious that the application of a reduced rate of VAT to medical devices, material, equipment and appliances used to diagnose and treat illnesses in animals is not in line with the VAT Directive.

52. It appears equally obvious from the wording of category 4 that it excludes general use of medical equipment, aids or appliances used in health care to prevent or diagnose illnesses by, for example, doctors and nurses, in hospitals or clinics. Any general use of pharmaceutical products, even if the term were interpreted broadly as the Kingdom of Spain suggests, would be excluded from the application of a reduced rate of VAT. There does not seem to be variation in the requirement for personal use of the equipment in the different language versions. [18]

53. As I have noted above, the objective of the exception of reduced rates of VAT is a socio-political one, intended to ease the VAT burden on individuals in regard to goods considered as necessities. It is not consistent with this objective to apply a reduced rate of VAT on goods which are used by professionals in the provision of medical care, the supply of which, for its part, can be exempted from VAT according to Article 132 of the VAT Directive.

54. Therefore, I am of the opinion that the application of a reduced rate of VAT to the supply of medical devices, material, equipment and appliances which, viewed objectively, can be used only to prevent, diagnose, treat, alleviate or cure human or animal illnesses or ailments, but which are not 'normally intended to alleviate or treat disability, for the exclusive personal use of the disabled' is not covered by the scope of categories 3 and 4.

55. I therefore conclude that the Commission's second complaint must be upheld.

D – *Third complaint: aids and equipment which may be used essentially or primarily to treat physical disabilities in animals*

56. The Commission's third ground for the infringement action concerns the application of a reduced rate of VAT on aids and equipment which may be used essentially or primarily to treat physical disabilities in animals. This, according to the Commission, is not in line with category 4 because the provision makes no reference to animals. Neither, argues the Commission, is the Spanish provision covered by category 3 because such goods are not pharmaceutical products.

57. The Kingdom of Spain argues that medical and veterinary devices are pharmaceutical products in the sense intended in category 3.

58. The wording of category 4 covering medical equipment, aids and other appliances does not make any reference to veterinary use of such devices. As category 3 expressly mentions veterinary use, it can be concluded that had the EU legislator intended to include equipment for alleviating and treating animal disabilities, it would have worded category 4 in accordance with this intention.

18 — For example, the Spanish version of point 4 of Annex III uses the term 'uso personal y exclusivo'.

59. Taking into account furthermore that veterinary medicine has been distinguished from human medicine also in other areas of the VAT regime,[19] I must conclude that the application of a reduced rate of VAT to aids and equipment which may be used essentially or primarily to treat physical disabilities in animals does not comply with the VAT Directive.

60. I therefore conclude that the Commission's third complaint must be upheld.

E – *Fourth complaint: aids and equipment essentially or primarily used to treat human disabilities, but which are not intended for the exclusive personal use of 'the disabled'*

61. As the fourth ground, the Commission considers that the application of a reduced rate of VAT on medical aids and equipment used *essentially or primarily* to alleviate physical disability in humans, but which are not intended for the exclusive personal use of 'the disabled' is not in line with the VAT Directive because category 4 does not cover medical equipment intended for general use. The Commission also claims that the Spanish interpretation of the term 'disabled' is too broad, being in practice synonymous with 'ill'.

62. The Kingdom of Spain argues that in the absence of an EU law definition of the term 'disabled', it has defined 'disabled' in accordance with terminology used by the World Health Organisation (WHO). This, according to the Kingdom of Spain, leads to an interpretation, also in the field of taxation, that the term 'disabled' indicates all persons incapacitated by an illness.

63. It is clear from the wording of category 4 that the reduced VAT rates regime is intended for medical equipment which is for the exclusive use of disabled people, and that this use has to be personal, i.e. not general as discussed above. Two questions arise from this: first, how is the term 'disabled' to be understood in the VAT regime of the European Union, and second, does 'exclusive use' cover also the use referred to in the first part of paragraph 1(6) of the first section of Article 91 of the Spanish Law on VAT.

64. Concerning the interpretation of the term disabled used in category 4, I find that in the absence of an express definition of the term in the context of VAT, one can refer to the definition given in the UN Convention on the Rights of Persons with Disabilities, to which the European Union is party:[20] '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.[21]

65. As this suggests, an essential part of the definition of disabled is an impairment which hinders an individual's normal functioning in society in the long-term. In my opinion the cause of the impairment is not relevant, the term 'disabled' used in category 4 being broad enough to include also disabilities stemming from serious or chronic illness, without it being synonymous with 'ill' or 'sick'.[22]

19 — In Case 122/87 *Commission* v *Italy* [1988] ECR 2685 the Court stated that services provided by veterinary surgeons could not be exempted from VAT although the provision of medical care in the exercise of the medical and paramedical professions were exempted.

20 — Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC) (OJ 2010 L 23, p. 35).

21 — The Convention on the Rights of Persons with Disabilities, *United Nations Treaty Series*, vol. 2515, p. 3.

22 — See also, by analogy, Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 44, in which the Court concludes that the concepts 'disability' and 'sickness' cannot be treated as being the same in the context of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

66. The scope of category 4 is further limited by the requirement that a reduced rate of VAT can be applied only to medical equipment, aids and appliances that are for the *exclusive personal* use of the disabled. This excludes general use of goods which, although used to alleviate or treat physical disability are used in hospitals, health centres, clinics or other institutions taking care of the disabled. This also excludes goods that are needed by the disabled, but have also other uses.

67. Certain goods may be intended both for the use of the disabled and for other purposes. The Court has considered that the purpose of a supply of a good may indeed indicate whether a reduced rate of VAT can be applied or not.[23] In the context of the present proceedings however, it would be impossible in practice to ensure that only the disabled, clearly intended to be the beneficiaries of a reduced VAT rate scheme, would benefit from the reduced VAT rate.

68. The VAT Committee has stated in its guidelines that 'Member States may apply a reduced VAT rate to products specifically designed for disabled people (medical equipment, aids and other similar appliances) which are normally purchased or used only by (permanently or temporarily) disabled people to alleviate or treat their complaints. Products normally used for other purposes (e.g. cordless telephones) are excluded by the provision, as are also medical equipment and aids designed for general use and not specifically for disabled people (e.g. x-ray equipment)'.[24]

69. The Commission recently proposed to include in category 4 equipment or apparatus specially designed or adapted for the disabled (e.g., Braille keyboards, specially adapted cars, etc.) that are not eligible for the reduced rate even though they reply to the same needs,[25] but these changes were not included in Directive 2009/47/EC amending the VAT Directive.[26]

70. In this context it should be recalled that there are methods other than reduced VAT rates available to Member States wishing to ease the financial burden of the disabled in need of equipment that can be used also for other purposes.

71. Consequently, I am of the opinion that the scope of category 4 excludes the application of a reduced rate of VAT to goods used essentially or primarily by the disabled.

72. I therefore conclude that the Commission's fourth complaint must be upheld.

VII – Conclusion

73. In light of these considerations, I propose that the Court should:

(1) Declare that, by applying a reduced rate of VAT to the following categories of goods, the Kingdom of Spain has failed to fulfil its obligations under Article 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in conjunction with Annex III thereto:

— medicinal substances which can be used habitually and suitably in the manufacturing of medicinal products;

23 — See Case C-41/09 *Commission* v *Netherlands* [2011] ECR I-831, paragraph 57, in which the Court found that supplies of horses for slaughter in order to be used in the preparation of foodstuffs may be subject to a reduced rate of VAT although supplies of horses in general could not.

24 — See VAT Committee guidelines, guidelines resulting from the 54th meeting of 16-18 February 1998, available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/vat_committee/2012_guidelines-vat-committee-meetings_en.pdf.

25 — COM(2008) 428 final.

26 — OJ 2009 L 116, p. 18.

— medical devices, material, equipment and appliances which, viewed objectively, can be used only to prevent, diagnose, treat, alleviate or cure human or animal illnesses or ailments, but which are not 'normally intended to alleviate or treat disability, for the exclusive personal use of the disabled';

— aids and equipment which may be used essentially or primarily to treat physical disabilities in animals;

— aids and equipment essentially or primarily used to treat human disabilities, but which are not intended for the exclusive personal use of the disabled.

(2) Order the Kingdom of Spain to pay the costs.