# JUDGMENT OF THE COURT (Fifth Chamber)

8 May 2003 *

In Case C-384/01,

**Commission of the European Communities,** represented by E. Traversa and C. Giolito, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**French Republic,** represented by G. de Bergues and P. Boussaroque, acting as Agents,

defendant,

APPLICATION for a declaration that, by applying a reduced rate of value added tax to the fixed part of the prices for gas and electricity supplied by the public networks, the French Republic has failed to fulfil its obligations under Article 12(3)(a) and (b) of Sixth Council Directive 77/388/EC 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

* Language of the case: French.

(OJ 1977 L 145, p. 1), as amended 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 77/388/EEC (OJ 1996 L 338, p. 89),

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward (Rapporteur), A. La Pergola, P. Jann and A. Rosas, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 October 2002,

gives the following

## Judgment

1 By application lodged at the Court Registry on 5 October 2001, the Commission of the European Communities brought an action under Article 226 EC for a

declaration that, by applying a reduced rate of value added tax ('VAT') to the fixed part of the prices for gas and electricity supplied by the public networks, the French Republic has failed to fulfil its obligations under Article 12(3)(a) and (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), as amended 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 77/388/EEC (OJ 1996 L 338, p. 89, 'the Sixth Directive').

## Law

2 Article 12(3)(a) of the Sixth Directive provides:

'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.'

3 Article 12(3)(b) of the Sixth Directive provides:

'Member States may apply a reduced rate to supplies of natural gas and electricity provided that no risk of distortion of competition exists. A Member State intending to apply such a rate must, before doing so, inform the Commission. The Commission shall give a decision on the existence of a risk of distortion of competition. If the Commission has not taken that decision within three months of the receipt of the information a risk of distortion of competition is deemed not to exist.'

4 Article 29 of Law No 98-1266 of 30 December 1998 adopting the budget for 1999 (*Journal officiel de la République Française* of 31 December 1998, p. 20050) amended Article 279 of the General Tax Code and inserted the following provision:

'Value added tax shall be charged at the reduced rate of 5.5% in respect of:

...

(b)(ix) standing charges for the supply of electricity and natural gas delivered by public networks'.

5 The French Government thus charges a reduced rate of 5.5% on standing charges for the public networks for the supply of gas and electricity and a standard rate of 19.6% on the consumption of those two products.

## Pre-litigation procedure

6 By letter of 8 July 1998 the French Government notified the Commission of its intention, pursuant to Article 12(3)(b) of the Sixth Directive, to charge a reduced rate on standing charges for supply networks for gas and electricity.

7 By letter of 31 July 1998 the Commission asked the French authorities to provide it with details of the proposed implementation of that plan. In its letter, it stated that 'the reduced rate will apply in so far as the standing charge is the consideration for the supply of energy. If, on the other hand, that same consideration is, in whole or in part, for some other service such as, for example, the hire of the meter, the maintenance of the network, etc., the reduced rate will only be charged on that part directly attributable to the supply of energy'.

8 On 7 September 1998 the French authorities sent a letter to the Commission in the following terms:

'Dear Commissioner,

In your letter of 31 July 1998, you stated that, pursuant to Article 12(3)(b) of the Sixth Directive, the reduced rate of VAT could be applied to standing charges for the supply network for gas and electricity provided that this is the consideration for the supply of energy.

That is the case in France. The purpose of invoicing consumption of gas and electricity on the basis of a tariff which includes a fixed part (the standing charge) and a variable part is to adjust the price of the energy consumed according to the amount consumed and the methods of consumption.

The cost of the energy supplied to users varies according to the level of consumption: the greater the amount of energy consumed, the larger must be the production and distribution facilities called upon to meet that demand.

Accordingly, the breakdown of the price into a fixed and variable part enables three rates to be established according to whether the user is a domestic user, a commercial/light-industrial user or an industrial user.

It follows that the standing charge is not the remuneration for a specific service but the consideration for the supply of gas and electricity. The fact that the fixed costs incurred for the actual production represent more than half of all costs incurred by the producer whereas the standing charge represents only about 27% of the sums invoiced to users highlights the fact that cover for fixed costs is reflected both in the standing charge and in the variable part of the price paid by the consumer.'

9 On 7 December 1998, the Commission sent a letter to the French authorities in the following terms:

'Dear Minister, dear Secretary of State,

Thank you for your letter of 7 September last in reply to mine of 31 July, in which you explained the procedures for implementing the reduced rate of VAT on standing charges for gas and electricity.

Under Article 12(3)(b) of the Sixth VAT Directive, the reduced rate of VAT can be applied to supplies of gas and electricity in certain circumstances.

You state that the standing charge is not the remuneration for a specific service but the consideration for the supply of gas and electricity. However, the Commission wonders whether that is really the case inasmuch as the fixed part of the price of the energy which the standing charge constitutes does not include any actual consumption of energy. I would therefore be grateful if you would provide the Commission with clarification on this point so that it can take a decision on the proposed measure.

Moreover, it seems to me that thought should also be given to Article 12(3)(a).

I would remind you that the period of three months within which the Commission must examine the application under Article 12(3)(b), which has already been suspended by the Commission's previous request for information dated 31 July last, is again suspended by the present request. Time will begin to run again upon receipt of your reply.

Yours sincerely,'.

10 The French authorities did not reply to that letter of 7 December 1998. However, on 30 December 1998 the French Parliament adopted Law No 98-1266, Article 29 of which amended Article 279 of the General Tax Code by making provision for charging VAT at the rate of 5.5% on standing charges for the supply of electricity and gas.

11 On 22 October 1999, considering that the French Republic had adopted Article 29 in breach of Article 12(3)(a) and (b) of the Sixth Directive, the Commission sent that Member State a letter of formal notice, requesting it to submit its observations within two months.

12 Since the French authorities did not reply, the Commission issued, on 13 June 2000, a reasoned opinion restating the terms of the letter of formal notice and requesting the French Republic to take the measures necessary to comply with that opinion within two months of its notification.

13 On 7 August 2000 the French authorities replied to that reasoned opinion by challenging the Commission's position, whereupon the Commission decided to bring the present action.

## The application

14 By its application the Commission complains that the French Republic has brought into force a reduced rate of VAT for standing charges for energy networks and a standard rate for the consumption of energy, in breach of Article 12(3)(a) and (b) of the Sixth Directive.

15 The application essentially raises three issues.

16 First, the Commission harbours doubts as to the classification of 'standing charges for the supply of electricity and natural gas delivered by public networks' as 'supplies of natural gas and electricity' within the meaning of Article 12(3)(b) of the Sixth Directive. It wonders whether standing charges ought not to be classified instead as consideration for a 'specific service representative of fixed costs which is distinct from the supply of energy'.

17 Second, according to the Commission, even if a supply is involved, the same rate must apply to the standing charge and to any other consumption of electricity, in accordance with the principle of neutrality.

18 Third, in adopting the contested provision, the French Republic is said to have infringed the procedure laid down by Article 12(3)(b) of the Sixth Directive. Those complaints will be examined in turn.

*Classification of the standing charge as a 'supply'*

19 It should be noted that, as stated in paragraphs 7 to 9 of the present judgment, the Commission had initially accepted that 'the reduced rate will apply in so far as the standing charge is the consideration for the supply of energy'. The French authorities explained that the standing charge was in effect the 'consideration for the supply of gas and electricity'. In its letter of 7 December 1998 the Commission merely wondered about that classification 'inasmuch as the fixed part of the price of the energy which the standing charge constitutes does not include any actual consumption of energy'.

20 The Commission has advanced no argument before the Court to the effect that the standing charge cannot in any circumstances be considered as a supply and must therefore be regarded as a provision of services. It has merely expressed doubts, made assumptions or raised queries in that regard.

*The principle of neutrality*

21 The Commission contends that if the standing charge is considered to be a supply, the charging of a reduced rate of VAT on standing charges for energy networks and a standard rate on any other supply of energy would infringe the principle of neutrality inherent in the Sixth Directive.

22 In that regard, it should be noted that Article 12(3)(a) of the Sixth Directive presupposes that the same rate of VAT, the standard rate, is charged on the supply of goods and the supply of services.

23 That same provision goes on to provide that either one or two reduced rates may be charged but only in respect of supplies of the goods and services specified in Annex H.

24 Article 12(3)(b) of the Sixth Directive permits the charging of a reduced rate on supplies of natural gas and electricity.

25 The Court has already held that the introduction and maintenance of reduced rates of VAT below the standard rate laid down in Article 12(3)(a) of the Sixth Directive are permissible only in so far as they are consistent with the principle of

fiscal neutrality inherent in the common system of VAT which precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes (Case C-481/98 *Commission* v *France* [2001] ECR I-3369, paragraphs 21 and 22).

26 The Commission has adduced no evidence to show that, in the present case, that principle would be infringed by the selective application of the reduced rate of VAT to one part only of the supply of gas and electricity.

27 In any event, there is nothing in the text of Article 12(3)(b) of the Sixth Directive which requires that provision to be interpreted as requiring that the reduced rate can be charged only if it is applied to all supplies of natural gas and electricity. It is true that the French text of that provision uses the definite article 'aux' before the term 'fournitures', but a comparison of the different language versions, some of which do not use the definite article, argues in favour of an interpretation that a selective application of the reduced rate cannot be excluded, provided that no risk of distortion of competition exists.

28 Moreover, since the reduced rate is the exception, the restriction of its application to concrete and specific aspects, such as the standing charge conferring entitlement to a minimum quantity of electricity on the account holders, is consistent with the principle that exemptions or derogations must be interpreted restrictively.

29 It must therefore be concluded that the Commission has failed to demonstrate that the charging of a reduced rate solely on the standing charge conferring entitlement to a minimum supply of energy necessarily requires that the same reduced rate be charged on all other supplies of energy.

30 The requirement that the charging of a reduced rate must not give rise to any risk of distortion of competition will be considered in the context of the question concerning the procedure laid down by Article 12(3)(b) of the Sixth Directive.

*The procedure laid down by Article 12(3)(b) of the Sixth Directive*

31 The Commission contends that, in order to bring into force the reduced rate of VAT chargeable on standing charges, the French authorities ought to have waited until the end of the procedure laid down by Article 12(3)(b) of the Sixth Directive.

32 According to that provision, a Member State intending to apply a reduced rate must, before doing so, inform the Commission of that intention. If the Commission has not taken a decision on the existence of a risk of distortion of competition within three months of the receipt of that information, such a risk is deemed not to exist.

33 No provision is made in Article 12(3)(b) for extension or suspension of the period of three months.

34 Even supposing that the Commission could suspend the period of three months by requesting further information, in the present case the Commission waited until the last moment, two days before the expiry of the time-limit set by it, before replying to the letter of 7 September 1998 from the French authorities.

35 In the present case, in its letter of 7 December 1998 the Commission did not ask the French authorities any specific question or seek any specific information with regard to a potential risk of distortion of competition. Nor does it make any finding as to the categorisation of the facts in that regard.

36 In those circumstances, since the Commission did not find, within the period of three months granted to it under Article 12(3)(b) of the Sixth Directive, that there was any risk of distortion of competition, the charging of the reduced rate is deemed not to produce any such risk.

37 Accordingly, the French authorities cannot be criticised for having implemented the proposed measures.

38 Since the Commission has failed in its three complaints, the application must be dismissed.

## Costs

39 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 and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

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

Wathelet Edward La Pergola

Jann Rosas

Delivered in open court in Luxembourg on 8 May 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber