OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 12 February 1987 *

Mr President,
Members of the Court,

A — Facts of the case

1. The present proceedings for a declaration that a Member State has failed to fulfil its Treaty obligations are concerned with the question whether the Kingdom of the Netherlands, the defendant, is obliged under Community law to subject the official services of notaries and bailiffs to value-added tax [hereinafter referred to as 'VAT'].

2. The Commission of the European Communities, the applicant, regards the defendant's failure to levy VAT on the services of those professions as an infringement of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes. [1] The Commission takes the view that the provision of services by notaries and bailiffs is an 'economic activity' within the meaning of the Sixth Directive, which gives an autonomous definition of that term.

3. The *applicant* therefore *claims* that the Court should:

(1) Declare that by not subjecting to the system of value-added tax the official services performed by notaries and bailiffs for remuneration, the defendant has failed to fulfil its obligations under Community legislation, in particular under Article 2 and Article 4 (1), (2) and (4) of the Sixth Council Directive of 17 May 1977;

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

4. The *defendant claims* that the Court should dismiss the application and order the applicant to bear the costs.

5. The defendant argues that, in view of the statutory organization of the two professions and their statutory functions, it is clear that their activities consist in official acts, performed by a public institution in the public interest. Activities of that kind are not covered by the concept of 'economic activity', because the normal laws of economics do not apply to them.

6. In the alternative, the defendant contends that the exemption laid down in Article 4 (5) of the Sixth Directive, which provides that States, regional and local government authorities and other bodies governed by public law are not to be considered taxable persons, is applicable to the official acts of notaries and bailiffs in any event.

7. At the hearing the parties stated that the activities of lawyers in the Netherlands are subject to VAT.

8. The activities of notaries and bailiffs are subject to VAT in all the Member States in which those activities are carried out by self-employed persons, with the exception of Belgium. [2]

* Translated from the German.

1 — Official Journal 1977, L 145, p. 1.

2 — No comment was made concerning the situation in Greece. There, the directives on turnover tax did not need to be applied until 1 January 1986 (see Fifteenth Council Directive No 83/648 of 19 December 1983, Official Journal 1983, L 360, p. 49).

9. The disputed turnover of Netherlands notaries and bailiffs is not taken into account when the amount of VAT to be remitted to the Community as own resources is calculated. As regards Belgium, it makes a compensatory payment to the Community in respect of the turnover of notaries and bailiffs in Belgium which is not subject to VAT.

10. Where necessary I will examine further points of the parties' arguments in the rest of my Opinion. For the rest, I refer to the Report for the Hearing.

B — Opinion

11. I shall deal first with the question whether the services in question supplied by notaries and bailiffs fall within the scope of the common system of VAT and then the question whether those professional bodies might be regarded as 'bodies governed by public law' and therefore treated as non-taxable persons. I shall go on to consider the question whether the defendant was entitled, at least during a transitional period, to exempt the contested services from VAT pursuant to Article 28 (3) (b).

The scope of VAT

12. Article 2 (1) of the Sixth Directive provides that 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to VAT.

13. According to Article 4 (1), a 'taxable person' means any person who independently carries out any economic activity, whatever the purpose or results of that activity.

14. Article 4 (2) of the Sixth Directive defines economic activities as comprising 'all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions'.

15. Article 4 (4) provides that a person who 'independently' carries out an economic activity is understood as excluding employed or other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

(a) 16. In the applicant's view, it is unquestionable that the services of notaries and bailiffs are 'economic activities' within the meaning of Article 4 (2) of the Sixth Directive. That provision does not require the exercise of a profit-making activity or one subject to market forces, but only a permanent activity, pursued for consideration. Like the analogous activities of lawyers or doctors, the services provided by notaries and bailiffs cannot be exempted from VAT on the grounds that they are exercising public powers. Notaries and bailiffs cannot be equated with court clerks or tax bailiffs since the latter are officials or servants of the State or of other public bodies and provide services as subordinates of and for the account of their employers. Notaries and bailiffs, on the other hand, pursue their activities for their own account,

independently, and on their own responsibility in law. Even though the professions concerned are subject to the supervision of State authorities — and this they have in common with other categories of taxable persons — they are not subordinate to an employer, as would be the case if they performed their functions as officials of a public body.

17. The *defendant* first points out that notaries and bailiffs, whose offices go back to a time when the role of a legal person governed by public law was hardly developed, have a special, independent position. An analysis of the functions of notaries and bailiffs and of the statutory organization of those professions shows, according to the defendant, that their activities consist of official acts carried out by a public body in the public interest.

18. In assessing whether the provision of a service may be regarded as an economic activity, the nature of the service must be examined and the manner in which the activities are organized. In any event, no economic activity exists if the activity in question is not governed by the normal laws of economics, the remuneration for the activity is laid down by statute and it does not entail the provision of a true service for individuals but the services must, as a matter of public policy, be solicited by them.

(b) 19. The first point to be borne in mind with regard to the scope of VAT is that under Article 2 (1) of the Sixth Directive all supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such are in principle subject to VAT. That broad formulation suggests that VAT has a wide comprehensive application. Indications to that effect are to be found in the preamble to the First Council Directive of 11 April 1967[3] on the harmonization of legislation of Member States concerning turnover taxes, in which it is stated that:

'a system of value-added tax achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution and the provision of services; . . .'.

20. In that connection it should be noted that, in implementation of Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources,[4] the budget of the Communities is financed completely out of the Communities' own resources irrespective of other sources of revenue. Those resources include VAT, which is yielded by the application of a common rate to a basis of assessment which is uniformly defined in accordance with Community provisions.

21. Since VAT is therefore to be charged as generally as possible, the term 'economic activities' in Article 4 cannot be construed as restrictively as the defendant construes it. Even though Article 4 does not define 'economic activities' comprehensively, the definition given none the less suggests that it is intended to be an extensive one; that is demonstrated by the examples given in

3 — Official Journal, English Special Edition 1967, p. 14.

4 — Official Journal, English Special Edition 1970 (I), p. 224.

Article 4 (2), all of which are treated as economic activities.

22. It is not therefore necessary for services to be primarily or exclusively orientated towards the market or economic life in order to come within the scope of VAT; it is sufficient that they are actually connected with economic life in some way or other.

23. For that reason, it cannot be relevant that the areas of activity of notaries and bailiffs are regulated or prescribed by statute. The same may be said of, for instance, lawyers and auditors, whose activities are indisputably subject to VAT.

24. The decisive point, however, is that the Sixth Directive deals expressly with this question in Article 6 (1), in which it provides that a 'supply of services' may include *inter alia*

'the performances of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law'.

25. When considered in the light of those criteria, the whole range of activities pursued by notaries and bailiffs in the Netherlands must be regarded as the activities of taxable persons.

26. Whilst it is true that notaries and bailiffs are appointed by the State and that their activities are regulated and supervised by the State, it must nevertheless be borne in mind that they carry on their activities independently, without being integrated into the organization of the State. They pursue their activities for their own account and in particular they themselves collect the fees and charges due to them. They pursue their activities as members of a legal partnership or firm and do not therefore differ substantially from lawyers, accountants or tax advisers. The purpose of their activities is to generate revenue for their own account, so as to cover their overheads and provide themselves with income. To that end they supply services to third parties, on their own responsibility, thus acting 'independently' within the meaning of Article 4 of the Sixth Directive.

27. Notaries and bailiffs, who pursue their activities as independent persons, therefore fall within the scope of VAT to which they are subject under Articles 2 (1) and 4 (1) and (2) of the Sixth Directive.

The exemption of public bodies from payment of VAT

28. It now remains to examine whether Netherlands notaries and bailiffs are still not to be regarded as taxable persons because the derogation laid down in Article 4 (5) of the Sixth Directive could be applied to them.

29. The relevant part of Article 4 (5) of the Sixth Directive reads as follows:

'States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of

these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.'

(a) 30. In the applicant's view, it is not the purpose of Article 4 (5) to exempt from VAT all acts connected with the exercise of public authority, but only those acts relating to the fundamental powers and functions of States and other bodies governed by public law in the field of public administration, the administration of justice, security and national defence.

31. The applicant maintains that activities which by their nature are carried out by independent undertakings with a view to making a profit, or by members of the liberal professions in consideration for a fee from those instructing them, cannot be regarded as being carried on in the exercise of public authority; private individuals carrying out such activities do not meet the definition of a 'body governed by public law'.

32. According to the applicant, the very principle that VAT must be a general and comprehensive tax on consumption dictates a narrow interpretation of a transaction engaged in by a public authority acting as such.

33. The defendant contends that, amongst the activities reserved to public authorities or bodies governed by public law, a distinction must be drawn between economic activities which meet the real needs of consumers and the public services which consumers are obliged by law to use for reasons of public policy and for which a fixed fee is laid down by statute. Article 4 (5) of the Sixth Directive must be interpreted according to the nature of the activities carried out and not according to their appearance (or the manner in which they are organized).

34. According to the defendant, the concept of a body governed by public law covers all forms of public body existing in the various Member States. The independence of such a body and the absence of a hierarchical relationship do not preclude the application of Article 4 (5). Annex D to the Sixth Directive, to which the third subparagraph of Article 4 (5) refers, expressly subjects to VAT certain activities often carried out by bodies which are legally independent of the public authorities. On the other hand, the last subparagraph of Article 4 (5) authorizes the Member States to regard certain activities set out in Article 13 as activities of public authorities even if they are carried out by legally independent bodies. The argument that notaries and bailiffs perform their functions as private individuals overlooks the fact that they occupy official positions and exercise fundamental powers and functions in the legal system.

(b) 35. In construing Article 4 (5) of the Sixth Directive reference should be made to the preamble to the First Council Directive on turnover taxes, according to which a system of VAT achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution and the provision of services. Reference should also be made to the eleventh recital of the Sixth Directive, according to which a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States.

36. The exemptions contained in particular in Articles 13 and 28 of the Sixth Council Directive cover *inter alia* a whole series of activities which are carried on by bodies governed by public law. Accordingly, the State and other bodies governed by public law are not, as a matter of principle, excluded from VAT but exempt only in respect of those activities in which they engage as public authorities. [5]

37. Thus, public bodies should be regarded as non-taxable persons only when they act as public authorities in the strict sense of the term. However, even public bodies are to be subject to tax when the activities in which they engage as public authorities would lead to significant distortions of competition if they were not taxed.

38. The Sixth Directive therefore tends to enlarge the category of taxable persons and thus the scope of VAT itself, by allowing even public bodies to be treated as taxable persons if the competitive situation so requires. On the other hand, it provides no possibility for exempting from VAT taxable transactions conducted by private individuals performing functions similar in nature to the activities of public bodies. That leaning towards a tax system which is as general as possible suggests that the tax must also be charged in marginal or dubious cases.

39. At this stage it may therefore be stated that the very wording of the relevant provisions of the Sixth Directive shows that the exclusion of public authorities from the application of VAT is a limited one. Not every activity carried on by a public authority is exempted from VAT but only a certain core of activities. In addition, the activities of public bodies may be subject to VAT if this is necessitated by the threat of significant distortions of competition.

40. In view of that conclusion and since it is accepted that the derogating provisions laid down in Article 2 of the Sixth Directive must in principle be construed restrictively, it is not possible to give a broad interpretation to the derogation contained in Article 4 (5) by extending its scope to persons engaged in activities in the private sector, even if they act partly in performance of public functions or in the public interest.

41. Thus, as long as the offices of notary and bailiff in the Netherlands are performed by persons engaged in private enterprise and those offices are thus not performed by bodies governed by public law, there are no grounds for regarding those professions as non-taxable persons within the meaning of Article 4 of the Sixth Directive.

42. Moreover, there is no need to extend the derogation in Article 4 (5) of the directive. As is shown by the Belgian practice mentioned at the hearing, it was quite possible under the Sixth Directive, at least at the time of its adoption, for the activities of notaries and bailiffs to continue to be exempted from turnover tax under Article 28 (3) (b) read in conjunction with Annex F, Item 2.

5 — See the judgment of the Court of 11 July 1985 in Case 107/84 *Commission of the European Communities* v *Federal Republic of Germany* [1985] ECR 2663, at paragraph 15.

43. The defendant, however, did not rely on or use that provision because it had taken the view that notaries and bailiffs are not to be regarded as taxable persons on account of their official activities. Above all, however, the defendant failed, as it conceded at the hearing, to draw the correct inferences from the application of the transitional provision contained in Article 28 of the Sixth Directive: under Article 2 (2) of Council Regulation No 2892/77 of 19 December 1977 implementing in respect of own resources accruing from value-added tax the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources,[6] the 'VAT own-resources basis' is to be determined by reference *inter alia* to transactions which Member States continue to exempt pursuant to Article 28 (3) (b) of the Sixth Directive. In other words, the defendant ought to have taken into account, as Belgium did, the 'official' transactions of notaries and bailiffs when calculating and remitting the Communities' own resources. This, however, the defendant indisputably failed to do.

44. Since, therefore, the defendant did not invoke Article 28 of the Sixth Directive or draw the correct inferences from it, Article 28 must be disregarded in these proceedings.

C — Conclusion

45. In conclusion, I propose that the Court should grant the application and order the defendant to pay the costs of the proceedings.

6 — Council Regulation No 2892/77 of 19 December 1977 on the implementation of the Decision of 21 April 1970, Official Journal 1977, L 336, p. 8.