JUDGMENT OF THE COURT (Third Chamber)

29 October 2009 *

In Case C-246/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 3 June 2008,

Commission of the European Communities, represented by P. Aalto and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent,

defendant,

* Language of the case: Finnish.

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by failing to levy value added tax ('VAT') on legal advice services provided by public legal aid offices (that is, by public legal advisers employed by those offices) in return for part payment, as provided for in Finnish legislation on legal aid, while like services are subject to VAT when they are provided by private advisers, the Republic of Finland has failed to fulfil its obligations under Article 2(1) and Article 4(1), (2) and (5) of the 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 Sixth Directive').

Legal context

Community legislation

2 Article 2 of the Sixth Directive is worded as follows:

'The following shall be subject to [VAT]:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

3 According to Article 4 of the Sixth Directive:

‘1. “Taxable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

…

5. 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.

…’

4 Article 6(1) of the Sixth Directive provides:

‘1. “Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include inter alia:

— assignments of intangible property whether or not it is the subject of a document establishing title,

— obligations to refrain from an act or to tolerate an act or situation,

— 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.’

National legislation

The legislation concerning legal aid

5 The legal aid scheme in Finland is based on four pieces of legislation adopted in 2002, namely, the Law on legal aid (oikeusapulaki (257/2002)) of 5 April 2002, the Law on State legal aid offices (laki valtion oikeusaputoimistoista (258/2002)) of 5 April 2002, the Government Decree on legal aid (valtioneuvoston asetus oikeusavusta (388/2002)) of 23 May 2002 and the Government Decree concerning the criteria governing remuneration for legal aid services (valtioneuvoston asetus oikeusavun palkkioperusteista (389/2002)) of 23 May 2002.

6 Article 1 of the Law on legal aid provides that legal aid, financed out of public funds, will be granted to any person who is in need of assistance with a legal matter but is unable, because of his financial situation, to meet the costs of dealing with his case. Legal aid may be granted both in legal proceedings and for non-contentious matters.

7 Under Article 8 of that law, legal aid is as a general rule provided by legal advisers employed by public legal aid offices ('public offices'). Those offices, of which there were 60 in 2008, employ around 220 advisers who are officials paid by the State. The operating costs of the public offices are met from public funds. Fees settled by recipients of legal aid are shown, however, as receipts in the accounts of each office and no public financing is made available in respect of operating costs covered in that way.

8 Article 8 of the Law on legal aid provides, however, that in the case of legal proceedings, a private adviser, namely an advocate or another private lawyer who has consented to act, may also be appointed. When the recipient of legal aid has himself proposed that he should be represented by a person who can show that he has the requisite professional qualifications, that person must be appointed, unless there are particular reasons why he should not be.

9 Article 17 of the Law on legal aid lays down rules concerning the fees of private advisers. It provides that a private adviser will be entitled to reasonable fees and to reimbursement of expenses, which are borne by the State and paid following deduction of any contribution owed by the recipient. Apart from that contribution, the private adviser may not receive any other payment or reimbursement from the recipient of legal aid.

10 The Government Decree on legal aid lays down in more detail the conditions under which the aid is granted.

11 Article 1 of the decree provides that legal aid is granted on the basis of the applicant's disposable income and assets and that it may, on that basis, be provided to him either free of charge or — which is one of the amendments made in 2002 to the legislation previously in force — in return for a part contribution borne by him. The decree distinguishes in that regard between a basic contribution ('perusomavastuu') and an additional contribution ('lisäomavastuu').

12 Under Article 5 of the Government Decree on legal aid, the basic contribution corresponds to a percentage of the fees and expenses of the adviser consulted, including

VAT if it is included in the calculation of costs. The percentage is fixed by reference to the following thresholds of disposable monthly income:

‘In relation to a single person:

Not more than EUR 650: 0%

Not more than EUR 850: 20%

Not more than EUR 1 000: 30%

Not more than EUR 1 200: 40%

Not more than EUR 1 300: 55%

Not more than EUR 1 400: 75%

In relation to a person forming part of a couple:

Not more than EUR 550: 0%

Not more than EUR 650: 20%

Not more than EUR 800: 30%

Not more than EUR 1 000: 40%

Not more than EUR 1 100: 55%

Not more than EUR 1 200: 75%.'

13 Article 6 of the Government Decree on legal aid specifies that, in any event, aid will not be granted where disposable income exceeds EUR 1 400 for a single person and EUR 1 200 per person for a couple.

14 Under Article 7 of that Government decree, an additional contribution is required where the recipient has deposits or other similar assets which may easily be liquidated and whose value exceeds EUR 5 000. That contribution amounts to one half of the value of those deposits and assets in excess of EUR 5 000.

15 The Government Decree concerning the criteria governing remuneration for legal aid services sets out the rules applicable with regard to the payment of fees. Articles 2 to 7 of that decree contain detailed provisions on that matter relating to the calculation of ordinary fees, whilst Articles 8 and 9 govern situations in which fees are set at a higher or, on the contrary, a lower amount than ordinary fees. Pursuant to Article 11 of that decree, the same criteria apply when a public office provides legal aid services in legal proceedings.

VAT legislation

16 Under Article 1 of the Law on Value Added Tax (arvonlisäverolaki (1501/1993)) of 30 December 1993, legal aid provided by a private adviser in legal proceedings is subject to VAT as a supply of legal services. By contrast, legal aid provided by the public offices free of charge or in return for a part contribution is not an activity which is subject to VAT.

The pre-litigation procedure

17 On 13 October 2004, the Commission sent the Finnish authorities a letter concerning the fact that legal aid services of the same kind are treated differently, from the point of view of the VAT rules, depending on whether the services are provided by private

advisers or by public offices. According to the information gathered by the Commission, the rules entailed a significant distortion of competition to the detriment of private advisers.

18 By letter of 17 December 2004, the Finnish authorities described the VAT rules applicable to legal aid services and explained that any distortion of competition as a result of those rules is minimal, since factors other than VAT, such as professional experience or the workload of the public offices, play a decisive role when the recipient of legal aid chooses between public offices and private advisers.

19 On 19 December 2005, taking the view that that explanation was inadequate, the Commission, in accordance with Article 226 EC, sent a letter of formal notice to the Republic of Finland, in which it asserted that, when the recipient of legal aid services himself pays a part contribution and those services can also be provided by a private adviser — that is, in the context of legal proceedings — the services offered by the public offices must be subject to VAT. In the Commission's view, in such a case, the public offices are not acting as public authorities within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive and the fact that VAT is not levied on the services in question leads to a significant distortion of competition within the meaning of the second subparagraph of that provision.

20 In its reply of 16 February 2006, the Republic of Finland repeated its arguments, drawing attention to the artificial nature of the Commission's premiss that the public offices act as public authorities when they deal with non-contentious matters but not when they act in legal proceedings and similarly that they act as public authorities when legal aid services are provided free of charge but not when they are provided in return for a part contribution paid by the recipient.

21 Since it was not satisfied with that reply, the Commission, on 15 December 2006, sent a reasoned opinion to the Republic of Finland, in which, first, it claimed that the latter had infringed Article 2(1) and Article 4(1), (2) and (5) of the Sixth Directive with regard to certain services provided by the public offices in return for a part contribution and, second, called on it to comply with that opinion within two months of receipt thereof.

22 By letter of 15 February 2007, the Republic of Finland responded to the reasoned opinion maintaining the position adopted in its reply to the letter of formal notice.

23 In those circumstances, the Commission decided to bring the present action.

The action

Arguments of the parties

24 The Commission makes clear that, in the present action, its sole complaint against the Republic of Finland is the fact that the latter does not levy VAT on legal aid services when they are provided by public offices in legal proceedings in return for a part contribution from the recipient of the service. Thus this action does not seek to challenge the fact that VAT is not levied on those services when they are provided by public offices free of charge, although the services provided by a private adviser are, for their part, in any event subject to VAT, with the State paying the fees and the VAT billed by the adviser. Indeed, the fact that public offices are not treated as taxable persons in those circumstances follows, in the latter case, from the fact that the services are provided to the recipient of legal aid free of charge, the only payment received by the lawyers employed by those offices being their normal salary. Accordingly, such services cannot be regarded as supplied for consideration, within the meaning of Article 2(1) of the Sixth Directive.

25 The Commission submits that when, conversely, public offices provide legal aid services in legal proceedings in return for a part contribution from the recipient, they are carrying out an economic activity within the meaning of the Sixth Directive. That economic activity gives rise to a supply of services effected for consideration within the meaning of Article 2(1) of that directive, since there is a direct link between the service supplied by the office and the consideration paid by the recipient.

26 In those circumstances, the Commission submits that it is necessary to consider whether the exceptions provided for in Article 4(5) of the Sixth Directive apply.

27 The Commission maintains in that regard that, so far as the services in question are concerned, public offices are not acting as public authorities within the meaning of the first subparagraph of that provision, since those services are not performed under a special legal regime applicable to them (see, in particular, Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 17 and the case-law cited). In fact, the public offices do not provide such services under special provisions which do not apply to private advisers, but act within the same legal framework as the latter. The situation is in that respect different where the public offices provide legal aid services other than in legal proceedings. Indeed, as that activity is not open to private advisers, it is not pursued by the public offices on the same legal conditions as those applicable to such advisers.

28 In any event, the Commission maintains that the fact that public offices are not treated as taxable persons in respect of legal aid services provided in return for a part contribution leads to significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive. In view of the low level of the income and asset ceilings to which entitlement to the aid is subject, a difference of 22%

in the payment to be made (corresponding to the applicable rate of VAT in Finland) appreciably distorts competition, all the more so since final consumers are not entitled to deduct the tax. That distortion of competition must be regarded as 'more than negligible' within the meaning of the case-law (see Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 79), since more than 4 000 people a year use legal aid services and pay a part contribution in return.

29 The Finnish Government contends that the legal aid services provided by the public offices form an indivisible whole which cannot be regarded as an economic activity within the meaning of Article 2(1) of the Sixth Directive. Those services are not supplied in such a way as to cover the costs to which they give rise but are mostly financed from public funds. The pursuit of those activities is therefore not accompanied by the economic risk characteristic of normal commercial activity. Furthermore, the contributions do not cover, even in part, the costs associated with such services. It is impossible to isolate — as a specific economic activity — an individual area of those offices' activities. Such a distinction cannot be justified either by the minimal contribution which must be paid by certain recipients of legal aid services depending on their financial situation or by the services themselves.

30 As regards the application of the first subparagraph of Article 4(5) of the Sixth Directive, the Finnish Government points out that legal aid may be provided only on the basis of the special legal rules which apply to it. Public offices perform the specific task assigned to them by law and they are, under the law, obliged to provide that aid. It is true that the possibility of a private adviser providing such legal aid is also based on the same law. However, in such a case that aid is provided following a decision by a public office and the private adviser has to consent to act. The public authority thus authorises an independent third party to carry out an activity which falls within its own powers.

31 In any event, the Finnish Government contends that the fact that VAT is not levied on the services concerned does not give rise to significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive. As well as it being far from certain that any question of distortion of competition arises since entitlement to legal aid requires an appropriate decision to be taken and payments are governed by legislation, statistical data show that clients who pay a part contribution for legal aid services are a clear minority among the legal aid clients of private advisers. Furthermore, with regard to cases which have given rise to part contributions, the ratio between cases which have been dealt with by a private adviser and those which have been dealt with by a public lawyer in the context of legal proceedings remained stable during the period 2004 to 2006. Finally, factors other than VAT influence the choice of adviser, in particular previous client relationships and the adviser's area of expertise.

Findings of the Court

32 As a preliminary point, it should be stated that the Commission does not, by this action, challenge the failure to levy VAT on legal aid services provided by public offices when the supply of those services is effected (i) free of charge in legal proceedings and (ii) other than in such proceedings, whether free of charge or not.

33 The Commission's action concerns solely the failure to levy VAT on legal aid services provided by public offices in legal proceedings in return for a part contribution borne by the recipient where his disposable income exceeds the limit set for entitlement to free legal aid but does not exceed the ceiling barring all entitlement to legal aid. It is thus apparent that the Commission's action derives from the extension of the legal aid scheme in force in Finland, in return for a part payment by recipients, to persons with incomes which, whilst modest, are none the less higher than those of persons entitled to

free legal aid. The reasoning which follows therefore relates solely to that part of the legal activities of the public offices.

34 It must be recalled that, although Article 4 of the Sixth Directive gives a very wide scope to VAT, only activities of an economic nature are covered by that tax (see, inter alia, Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 15; Case C-305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, paragraph 39; and Case C-369/04 *Hutchison 3G and Others* [2007] ECR I-5247, paragraph 28).

35 According to Article 2 of the Sixth Directive concerning taxable transactions, together with the importation of goods, the supply of goods or services effected for consideration within the country is subject to VAT. Furthermore, under Article 4(1) of the Sixth Directive, 'taxable person' means any person who independently carries out an economic activity, whatever the purpose or results of that activity (see, inter alia, Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 6; Case C-260/98 *Commission* v *Greece* [2000] ECR I-6537, paragraph 24; and *Isle of Wight Council and Others*, paragraphs 26 and 27).

36 'Economic activities' are defined in Article 4(2) of the Sixth Directive as including all activities of producers, traders and persons supplying services, inter alia the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis (see, in particular, Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 18; and *Hutchison 3G and Others*, paragraph 27).

37 An analysis of those definitions shows that the scope of the term economic activities is very wide and that the term is objective in character, in the sense that the activity is

considered per se and without regard to its purpose or results (see, inter alia, *Commission* v *Greece*, paragraph 26; and Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47 and the case-law cited). An activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity (*Commission* v *Netherlands*, paragraphs 9 and 15; and Case C-408/06 *Götz* [2007] ECR I-11295, paragraph 18).

38 However, it follows from the case-law that the receipt of a payment does not, per se, mean that a given activity is economic in nature (see *Hutchison 3G and Others*, paragraph 39 and the case-law cited; and *Götz*, paragraph 21).

39 In order to determine whether the Commission's action is well founded, it is therefore appropriate to consider, in the first place, whether the legal aid services provided by the public offices in legal proceedings in return for a part payment constitute economic activities within the meaning of Article 2(1) and Article 4(1) and (2) of the Sixth Directive.

40 It must first of all be stated that, in view of the objective character of the term 'economic activities', the fact that the activity of the public offices consists in the performance of duties which are conferred and regulated by law, in the public interest and without any business or commercial objective, is in that regard irrelevant. Indeed, Article 6 of the Sixth Directive expressly provides that certain activities carried on in pursuance of the law are to be subject to the system of VAT (*Commission* v *Netherlands*, paragraph 10, *Commission* v *Greece*, paragraph 28).

41 Moreover, it is established that the public offices provide the legal aid services in question on a permanent basis.

42 In those circumstances, it is appropriate to ascertain whether those services can be regarded as provided by the public offices in return for remuneration.

43 In that connection, it is clear from the case-law of the Court that, within the framework of the VAT system, taxable transactions presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. Thus, where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT (see Case 89/81 *Hong Kong Trade Development Council* [1982] ECR 1277, paragraphs 9 and 10; and Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 12).

44 It follows from that, according to the Court's case-law, that a supply of services is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see, inter alia, *Tolsma*, paragraph 14; Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 45; and *MKG-Kraftfahrzeuge-Factoring*, paragraph 47).

45 Consequently, according to the case-law of the Court, a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes a direct link between the service provided and the consideration received (see, inter alia, Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11 and 12; Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 12; and *Commission* v *Greece*, paragraph 29).

46 In this instance, the legal aid services with which the present action is concerned are not provided by the public offices free of charge and thus without any consideration, since the recipients of those services are required to make a payment to the public offices.

47 However, it is established that the payment concerned is only a part payment since it does not cover the whole amount of the fees set by the national legislation, by reference to the nature of the dispute, in respect of remuneration for legal aid services provided by public offices and private advisers. Indeed, as is clear from paragraphs 12 to 14 of this judgment, the payment consisting in the basic contribution is a percentage, ranging from 20% to 75%, of that amount. Admittedly, that payment may, depending on the recipient's assets, be supplemented by an additional contribution. Nevertheless, the Commission does not maintain — and, as the Advocate General has noted in point 48 of his Opinion, it is unlikely, in view of the income ceilings fixed by the national legislation for the grant of legal aid — that the additional contribution could result in the recipient making a payment corresponding to the full amount of the fees set by the legislation concerned for the supply of legal aid services.

48 Although this part payment represents a portion of the fees, its amount is not calculated solely on the basis of those fees, but also depends upon the recipient's income and assets. Thus, it is the level of the latter — and not, for example, the number of hours worked by the public offices or the complexity of the case concerned — which determines the portion of the fees for which the recipient remains responsible.

49 It follows that the part payment made to the public offices by recipients of legal aid services depends only in part on the actual value of the services provided — the more modest the recipient's income and assets, the less strong the link with that value will be.

50 As the Advocate General has observed in points 50 and 51 of his Opinion, that finding is borne out by the fact that, according to the data provided by the Finnish Government in the present proceedings, the part payments made in 2007 by recipients of legal aid services provided by the public offices (which relate to only one third of all the services provided by public offices) amounted to EUR 1.9 million, whilst the gross operating costs of those offices were EUR 24.5 million. Even if those data also include legal aid services provided other than in court proceedings, such a difference suggests that the part payment borne by recipients must be regarded more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration in the strict sense.

51 Therefore, in light of the foregoing, it does not appear that the link between the legal aid services provided by public offices and the payment to be made by the recipients is sufficiently direct for that payment to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities for the purposes of Article 2(1) and Article 4(1) and (2) of the Sixth Directive.

52 The Commission has put forward no other evidence showing that the services in question constitute such economic activities. In particular, although the Commission maintains in its action that there is a direct link between the part payment made by recipients of legal aid services and the services supplied by public offices, it has not developed, in support of that claim, any specific arguments and has not produced any evidence capable of establishing that such a direct link exists, particularly in view of the fact that, for the purpose of determining that contribution, account is taken of the amount of the recipient's income and assets. According to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations it nonetheless falls to the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled and in so doing the Commission may not rely on any presumptions (see, in particular, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41 and the case-law cited).

53 In those circumstances, since the public offices do not engage in an economic activity and since, for the first subparagraph of Article 4(5) of the Sixth Directive to apply, there must be a prior finding that the activity considered is of an economic nature (see, to that effect *Hutchison 3G and Others*, paragraph 42; and *Götz*, paragraph 15), it is not necessary to consider, in the second place, the Commission's arguments concerning (i) the question whether those offices act as a public authority within the meaning of the first subparagraph of Article 4(5) when providing the legal aid services in question and (ii) whether the failure to levy VAT on that activity leads, in any event, to significant distortions of competition for the purposes of the second subparagraph of that provision.

54 In light of the foregoing, the present action must be dismissed.

Costs

55 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 Republic of Finland has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the action;

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

[Signatures]