JUDGMENT OF THE COURT

12 September 2000 *

In Case C-260/98,

Commission of the European Communities, represented by D. Gouloussis, Legal Adviser, and H. Michard, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of that service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by P. Mylonopoulos, Deputy Legal Adviser in the European Law Department of the Special Legal Service of the Ministry of Foreign Affairs, and A. Rokofyllou, Legal Assistant in the same service, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by failing to subject to value added tax tolls paid by users as consideration for the service of providing access to

* Language of the case: Greek.

motorways and related infrastructures, contrary to Articles 2 and 4 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), and by thereby avoiding payment of the own resources and interest due under Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom, on the system of the Community's own resources (OJ 1989 L 155, p. 1), and Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ 1989 L 155, p. 9), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann, H. Ragnemalm, V. Skouris and F. Macken, Judges,

Advocate General: S. Alber,
Registrar: D. Louterman-Hubeau and H.A. Rühl, Principal Administrators,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 July 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to subject to value added tax (hereinafter 'VAT') tolls paid by users as consideration for the service of providing access to motorways and related infrastructures, contrary to Articles 2 and 4 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, hereinafter 'the Sixth Directive'), and by thereby avoiding payment of the own resources and interest due under Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom, on the system of the Community's own resources (OJ 1989 L 155, p. 1), and Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ 1989 L 155, p. 9), the Hellenic Republic had failed to fulfil its obligations under the EC Treaty.

Legal background

2 Article 2 of the Sixth Directive provides as follows:

'The following shall be subject to value added tax:

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(1), (2) and (5) 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.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

Member States may consider activities of these bodies which are exempt under Articles 13 or 28 as activities which they engage in as public authorities.'

4 It is common ground that the activity of providing access to roads and related infrastructures (hereinafter 'roads') on payment of a toll is not one of the activities listed in Annex D to the Sixth Directive.

5 Regulation No 1553/89, which replaced with effect from 1 January 1989 Council Regulation (EEC, Euratom, ECSC) 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 (OJ 1977 L 336, p. 8), last amended by Council Regulation (ECSC, EEC, Euratom) No 3735/85 of 20 December 1985 (OJ 1985 L 356, p. 1), provides in Article 1:

'VAT resources shall be calculated by applying the uniform rate, set in accordance with Decision 88/376/EEC, Euratom, to the base determined in accordance with this regulation.'

6 Under Article 2(1) of Regulation No 1553/89:

'The VAT resources base shall be determined from the taxable transactions referred to in Article 2 of 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 as last amended by [Directive] 84/386/EEC, with the exception of transactions exempted under Articles 13 to 16 of that directive.'

7 Regulation No 1552/89, applicable from 1 January 1989 and repealing Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources

(OJ 1977 L 336, p. 1), last amended by Council Regulation (ECSC, EEC, Euratom) No 1990/88 of 30 June 1988 (OJ 1988 L 176, p. 1), provides in Article 9(1):

'In accordance with the procedure laid down in Article 10, each Member State shall credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.'

8 Under Article 11 of Regulation No 1552/89:

'Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by 2 percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

Pre-litigation procedure

Procedure relating to the Sixth Directive

9 By letter of 12 August 1987, the Commission called on the Hellenic Republic to amend its legislation on road tolls to comply with Article 2 of the Sixth Directive.

10 By letter of 20 April 1988 the Commission gave the Hellenic Government formal notice, pursuant to Article 169 of the Treaty, that it should submit its observations on the alleged failure to fulfil obligations under the Sixth Directive as a result of its failure to levy VAT on motorway tolls.

11 The Hellenic authorities replied on 4 July 1988 that tolls constituted an indirect tax and that therefore their collection was a transaction carried out by a public authority in the exercise of public authority and did not fall within the scope of VAT.

12 The Commission considered that the explanations given by the Hellenic authorities were not convincing, and therefore sent a reasoned opinion to the Hellenic Government on 8 August 1989 in which it claimed that the Hellenic Republic was not fulfilling its obligations under the Sixth Directive by failing to levy VAT on tolls collected as consideration for the use of roads. Accordingly, it called on that Member State to take the measures necessary to fulfil its obligations within two months.

13 By letter of 21 November 1989, the Hellenic authorities replied that they maintained their view that the Sixth Directive did not preclude exemption from VAT for the tolls collected.

The procedure relating to the system of own resources

14 By letter of 24 October 1989, the Commission drew the attention of the Hellenic Government to the fact that the infringement of the Sixth Directive resulting from

the failure to levy VAT on motorway tolls entailed an unwarranted reduction in the Community's own resources. It asked the Hellenic Government to pay by 31 January 1990 the amounts due for the financial years 1987 and 1988, together with interest for late payment. The Commission also requested that the own resources for each financial year be made available to it by the first working day of December of the following financial year, together with interest for late payment from that date.

15 In their reply of 31 January 1990, the Hellenic authorities challenged those demands, invoking the same arguments as they relied on in their replies to the letter of formal notice and the reasoned opinion sent to them by the Commission in the course of the procedure for failure to fulfil obligations under the Sixth Directive.

16 By letter of 21 June 1990, the Commission gave the Hellenic Government notice that it should submit its observations on the alleged failure to fulfil obligations.

17 In the absence of a reply from the Hellenic authorities, the Commission sent a reasoned opinion to the Hellenic Government by letter of 6 May 1992 asking it to take the measures necessary to fulfil its obligations as regards payment of own resources within two months.

18 By letter of 10 September 1992, the Hellenic Republic replied that it would not accede to the Commission's request.

19 Accordingly, the Commission decided to bring the present action concerning both the alleged infringement of the provisions of the Sixth Directive and the repercussions of that infringement on the payment of the Community's own resources.

Substance

20 By its application the Commission claims that the Hellenic Republic, first, did not comply with the provisions of the Sixth Directive by failing to charge VAT on tolls collected as consideration for the use of roads, and second, breached the rules relating to the system of the Communities' own resources by not paying in to the Community budget the own resources accruing from VAT (hereinafter 'VAT own resources') relating to the sums which should have been collected by way of VAT on those tolls.

The first claim

21 The Commission submits that providing access to roads on payment of a toll by the user is an economic activity within the meaning of Articles 2 and 4 of the Sixth Directive. That activity must be considered to be a supply of services carried out by a taxable person in the course of the exploitation of property for the

purpose of obtaining income therefrom on a continuing basis, within the meaning of Article 4(1) and (2) of the Sixth Directive.

22 The fact that this activity is carried out by a body governed by public law, as it is in Greece, where the National Road Construction Fund, a legal person governed by public law, has the exclusive right to collect road tolls, cannot, in its view, remove the transactions in question from the scope of the Sixth Directive.

23 In that regard the Commission points out that under the first paragraph of Article 4(5) of the Sixth Directive it is only in respect of activities or transactions in which they engage as public authorities that bodies governed by public law are not considered to be taxable persons. The activity at issue does not come into that category, as it does not fall within the core responsibilities of public authority which can never be delegated to private bodies, bearing in mind that the rule that bodies governed by public law are not taxable persons must be interpreted strictly.

24 The Court notes, first, that by including amongst the taxable transactions defined in Article 2 not only the importation of goods but also the supply of goods or services effected for consideration within the territory of a country and by defining 'taxable person' in Article 4(1) as any person who independently carries out an economic activity, whatever the purpose or results of that activity, the Sixth Directive attributes to VAT a very wide scope (Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 6).

25 'Economic activities' are defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services. In particular, the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis is also to be considered an economic activity.

26 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 (*Commission* v *Netherlands*, cited above, paragraph 8).

27 In view of the scope of the term 'economic activities' it must be held that, in providing access to roads in return for payment, the National Road Construction Fund in Greece is carrying out an economic activity within the meaning of the Sixth Directive.

28 In view of the objective character of the term 'economic activities', the fact that the activity in question consists in the performance of duties which are conferred and regulated by law in the public interest is 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*, cited above, paragraph 10).

29 It must also be remembered that according to the case-law of the Court (in particular Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs and Excise* [1988] ECR 1443, paragraph 12, and Case C-258/95 *Fillibeck* v *Finanzamt Neustadt* [1997] ECR I-5577, paragraph 12), the concept of the supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive requires the existence of a direct link between the service provided and the consideration received.

30 As the Commission rightly submitted, providing access to roads on payment of a toll fits that definition. Use of the road depends on payment of a toll, the amount of which varies *inter alia* according to the category of vehicle used and the distance covered. There is, therefore, a direct and necessary link between the service provided and the financial consideration received.

31 Accordingly, providing access to roads on payment of a toll constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

32 It must therefore be ascertained whether, as the Hellenic Government contends, the National Road Construction Fund is entitled to the exemption provided for by Article 4(5) of the Sixth Directive in respect of the activity of providing access to roads on payment of a toll.

33 The first paragraph of that article provides that bodies governed by public law are not considered to be taxable persons in respect of activities or transactions in which they engage as public authorities.

34 As the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the exemption to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see, in particular, Case C-202/90 *Ayuntamiento de Sevilla* v *Recaudadores de Tributos de las Zonas primera y segunda* [1991] ECR I-4247, paragraph 18).

35 As regards the latter condition, it is clear from the settled case-law of the Court of Justice (Joined Cases 231/87 and 129/88 *Ufficio Distrettuale delle Imposte*

Dirette di Fiorenzuola and Others v *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 16; Case C-4/89 *Comune di Carpaneto Piacentino and Others* v *Ufficio Provinciale Imposta sul valore aggiunto di Piacenza* [1990] ECR I-1869, paragraph 8, and Case C-247/95 *Finanzamt Augsburg-Stadt* v *Marktgemeinde Welden* [1997] ECR I-779, paragraph 17) that activities pursued as public authorities within the meaning of the first paragraph of Article 4(5) of the Sixth Directive are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private traders.

36 In the light of that case-law, the Commission's argument (see paragraph 23 of this judgment) that a body acts 'as a public authority' only in respect of activities falling within the definition of public authority in the strict sense of that term, which do not include providing access to roads on payment of a toll, must be rejected.

37 The Commission, whose legal argument has thus not been upheld by the Court, has not established, or even sought to establish, that the National Road Construction Fund operates under the same conditions as a private trader within the meaning of the case-law of the Court of Justice. In contrast, the Hellenic Government took pains to demonstrate that the activity in question was carried out by that body under a special legal regime applicable to it within the meaning of the same case-law.

38 Accordingly, it must be held that the Commission has failed to put before the Court the evidence required to substantiate the alleged failure to fulfil obligations as regards the condition relating to pursuance of an activity as a public authority.

39 However, as also noted in paragraph 34 of this judgment, the non-taxable status provided for in Article 4(5) of the Sixth Directive requires that the activities be carried out not only as a public authority but also by a body governed by public law.

40 In that regard the Court has held that an activity carried on by a private individual is not excluded from the scope of VAT merely because it consists in the performance of acts falling within the prerogatives of the public authority (*Commission* v *Netherlands*, cited above, paragraph 21, and *Ayuntamiento de Sevilla*, cited above, paragraph 19). The Court held, in paragraph 20 of the latter judgment, that it follows that if a commune entrusts the activity of collecting taxes to an independent third party the exclusion from VAT provided for by Article 4(5) of the Sixth Directive is not applicable. Similarly, the Court held in paragraph 22 of the judgment in *Commission* v *Netherlands*, cited above, that even assuming that in performing their official services notaries and bailiffs in the Netherlands exercise the powers of a public authority by virtue of their appointment to public office, they cannot enjoy the exemption provided for in Article 4(5) of the Sixth Directive because they pursue those activities, not in the form of a body governed by public law, since they are not part of the public administration, but in the form of an independent economic activity carried out in the exercise of a liberal profession.

41 In the present case it is common ground that, in Greece, the activity of providing access to roads on payment of a toll is carried out by the National Road Construction Fund, which is a body governed by public law.

42 Accordingly, in so far as the argument put forward by the Commission cannot be upheld, the claim relating to infringement of the Sixth Directive must be rejected.

The second claim

43 The Commission submits that where the Sixth Directive has been infringed and the basis of assessment of VAT own resources thereby reduced it must be credited with the amount of own resources attributable to the tax which should have been collected, or suffer financial disadvantage which must be made good out of the gross domestic product. Such breaches therefore cause financial damage to the other Member States and consequently subvert the principle of equality.

44 However, since the first claim alleging failure to comply with the Sixth Directive was dismissed as unfounded, the second claim cannot be upheld.

45 Accordingly, the action must be dismissed in its entirety.

Costs

46 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. As the Hellenic Government has applied for an order for costs against the Commission and the latter has been unsuccessful, the Commission must be ordered to bear the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

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

Rodríguez Iglesias	Moitinho de Almeida		Sevón
Schintgen	Kapteyn	Gulmann	Puissochet
Jann	Ragnemalm	Skouris	Macken

Delivered in open court in Luxembourg on 12 September 2000.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President