JUDGMENT OF THE COURT
13 March 1990 *

In Case C-30/89

Commission of the European Communities, represented by John Forman and Alain van Solinge, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Edwige Belliard, Sub-Director in the Directorate for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, and Claude Chavance, Principal Attaché in the Central Administration of the Directorate for Legal Affairs in the said ministry, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy, 9, boulevard du Prince-Henri,

defendant,

supported by

Kingdom of Spain, represented by Javier Conde de Saro, Director-General for Coordination in Matters involving Community Law and Institutions, and Rosario Silva de Lapuerta, abogado del Estado in the State Legal Department for matters before the Court of Justice, acting as Agent, with an address for service in Luxembourg at its embassy, 4-6 boulevard E. Servais,

intervener,

APPLICATION for a declaration that the French Republic has

(i) failed to comply with the obligation to make the necessary calculations, to forward a copy of those calculations and to make available to the Commission on 31 October 1986 the own resources unpaid for 1980 to 1985 for which it is

* Language of the case: French

accountable under 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 (Official Journal 1977, L 336, p. 8) owing to the exemption granted in respect of transport between mainland France and the *départements* of Corsica as regards the part of the journey occurring outside the mainland territory, in breach of the Sixth Council Directive (77/388/EEC) 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 (Official Journal 1977, L 145, p. 1), and

(ii) failed to comply with the obligation to pay interest on those sums, as from 31 October 1986, in accordance with Article 11 of 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 (Official Journal 1977, L 336, p. 1),

THE COURT

composed of: O. Due, President, F. A. Schockweiler and M. Zuleeg, Presidents of Chambers, T. Koopmans, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General: C. O. Lenz
Registrar: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing and further to the hearing on 24 January 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 February 1990,

gives the following

Judgment

1 By an application lodged at the Court Registry on 3 February 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by exempting from value-added tax (hereinafter referred to as 'VAT'), in breach of the Sixth Council Directive (77/388/EEC) 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 (Official Journal 1977, L 145, p. 1), transport between mainland France and the *départements* of Corsica as regards the part of the journey occurring outside the mainland territory, the French Republic had

(i) failed to comply with the obligation to make the necessary calculations, to forward a copy of those calculations and to make available to the Commission on 31 October 1986 the own resources unpaid for 1980 to 1985, for which it is accountable under Council Regulation (EEC, Euratom, ECSC) No 2892/77 of 18 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 (Official Journal 1977, L 336, p. 8), and

(ii) failed to comply with the obligation to pay interest on those sums, as from 31 October 1986, in accordance with Article 11 of 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 (Official Journal 1977, L 336, p. 1).

2 The Commission took the view that it was apparent from the provisions of the Sixth Directive, in particular Articles 2 and 3, that transport by sea and air where the places of departure and arrival are situated within French territory is to be regarded as carried out entirely within France and thus subject to VAT in so far as there is no stop in another country, regardless of whether or not the transport involves a journey in or above international waters.

3 The Commission accepts that the French Republic may, on the basis of Article 28(3)(b) and point 17 of Annex F to the Sixth Directive, continue to exempt from VAT transport between mainland France and the *départements* of Corsica as far as the part of the journey occurring outside the mainland territory is concerned.

4 In that case, the French Republic must, however, in the Commission's view, compensate for that exemption by including in the VAT own resources basis, in accordance with Article 9(2) of Regulation No 2892/77, the turnover corresponding to the whole of the transport operations in question, including the part relating to the journeys made in or above international waters between mainland France and Corsica.

5 Consequently, on 6 May 1987 the Commission sent a letter of formal notice to the Government of the French Republic, thereby initiating the procedure provided for in Article 169 of the EEC Treaty.

6 By letter dated 7 July 1987, the French Republic challenged the Commission's view. It contended *inter alia* that the non-taxation of the part of transport operations between mainland France and Corsica occurring in international waters or in the airspace above such waters ensues from Article 9(2)(b) and not from the transitional measures provided for in Article 28(3)(b) of the Sixth Directive. The word 'place' in Article 9(2)(b) of the Sixth Directive is a geographical concept enabling the place of supply of a service to be determined so that the taxation of an economic activity carried on at that place may be attributed to the country which exercises territorial sovereignty over it. The high seas and international airspace are not part of the territory of a Member State so that, as far as transport between mainland France and Corsica is concerned, the part of the journey occurring in or above international waters does not take place in France. The French Republic accordingly concluded that the part of journeys between mainland France and Corsica occurring in or above international waters did not have to be included in the VAT own resources basis.

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 In order to determine whether the French Republic was bound to make available to the Commission, as own resources, the amount of VAT corresponding to the part of the journey taking place in or above international waters in the case of transport between its mainland territory and the *départements* of Corsica, it is necessary to consider the obligations which the Sixth Directive imposes on Member States.

9 In that regard, it should be recalled first of all that, with a view to establishing in the Community a common system of VAT, the directive requires the Member States to adjust their national systems of VAT to the common rules which it lays down.

10 Those rules govern, amongst other matters, the determination of the place where taxable transactions are effected, which, according to the seventh recital in the preamble to the Sixth Directive, is necessary in order to avoid conflicts concerning jurisdiction as between Member States.

11 Thus, Article 2(1) of the Sixth Directive requires Member States to subject to value-added tax the supply of services 'effected for consideration within the territory of the country'.

12 Article 3(1) defines the territorial scope of the Sixth Directive as the area of application of the Treaty establishing the EEC as stipulated in respect of each Member State in Article 227 of the Treaty.

13 As regards the supply of services, Article 9(1) of the Sixth Directive lays down the general rule that the place where a service is supplied 'shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or

fixed establishment, the place where he has his permanent address or usually resides'.

14 However, as regards transport services, Article 9(2)(b) of the Sixth Directive provides, by way of exception to the general rule, that the place where such services are supplied 'shall be the place where transport takes place, having regard to the distances covered'.

15 It follows from those provisions that the only obligation which the Sixth Directive imposes on Member States in relation to the taxation of transport services is to tax services carried out within the territorial limits of the States.

16 The specific attachment rule for transport services, which constitutes a derogation from the general rules for determining the place where a service is supplied laid down in Article 9(1) of the Sixth Directive, is thus intended to ensure that each Member State taxes transport services as regards the parts of the journey carried out in its territory.

17 On the other hand, the Sixth Directive contains no rule requiring the Member States to subject to VAT the parts of the journey constituting a transport service which take place beyond the territorial limits of the Member States in international space. More particularly, no provision in the directive requires Member States to subject to VAT transport services corresponding to the distances covered in international space where the transport takes place without a stop in another Member State between two points in the same national territory.

18 Although, as the Court held in the judgment of 23 January 1986 in Case 283/84 *Trans Tirreno Express* v *Ufficio Provinciale IVA* [1986] ECR 231, paragraph 21, the Sixth Directive, in particular Article 9(2)(b), does not prohibit a Member State from charging to VAT a transport service effected between two points within its national territory, even where a part of the journey is made outside its national territory, provided that it does not encroach on the tax jurisdiction of other States,

it may not be inferred from that ruling that the Sixth Directive has the effect of requiring the Member States to subject to VAT transport operations carried out within their territory in respect of that part of the journey occurring in or above international waters. The only consequence which may be inferred from the general aim of the Sixth Directive is that Member States who make use of their freedom to extend the scope of their tax legislation beyond their strict territorial limits are bound, when taxing such operations, to observe the common rules laid down by the directive.

19 In those circumstances, it must be concluded that the wide interpretation advocated by the Commission in the present case has no foundation in the Sixth Directive itself.

20 Such an interpretation is, moreover, unlikely to create a common system of VAT. Even if, in accordance with the Commission's argument, Member States were required to tax the part of the journey taking place in or above international space in the case of a transport operation directly connecting two points of the same national territory, there would be no uniformity in the system of VAT since the interpretation advocated by the Commission would leave open the case of a transport operation effected between two points in different Member States.

21 In support of its argument the Commission also referred to the Member States' common view which it purports to infer from the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (Official Journal 1985, L 302, p. 23, hereinafter referred to as 'the Act'). The Act added a point 15 to Article 15 of the Sixth Directive allowing the Portuguese Republic to treat as international transport, and therefore not to subject to VAT, sea and air transport between the islands making up the autonomous regions of the Azores and Madeira and between those regions and the mainland (see Annex I, V, point 2 of the Act). However, according to the second paragraph of Article 374 of the Act, 'the derogation referred to in point 15 of Article 15 of the Sixth Directive . . . shall not affect the amount of duties due [as own resources from VAT]'.

22 In that regard, it is to be observed first of all that no provisions similar to those applying to the Portuguese Republic have been provided for in the case of the Kingdom of Spain, which is, however, in an identical situation to that of the Portuguese Republic as far as sea and air transport between the mainland and the islands under its sovereignty is concerned. It must therefore be accepted that the provisions of the Act referred to by the Commission were adopted with the aim of resolving specific problems which accession entailed for the Portuguese Republic. In those circumstances, it is not possible to infer from those provisions an intention on the part of the Member States to give a certain interpretation to the wording of a provision of pre-existing secondary law.

23 In addition, it must be remembered that the Court has repeatedly held that certainty and foreseeability are requirements which must be observed all the more strictly in the case of rules liable to entail financial consequences (see the judgments of 15 December 1987 in Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24, and of 22 February 1989 in Joined Cases 92/87 and 93/87 *Commission* v *France and the United Kingdom* [1989] ECR 405, paragraph 22). Owing to the obligation on the Member States to make available to the Community as own resources a proportion of the amounts collected as VAT, the Community rules on VAT have important financial consequences for the Member States.

24 Since it follows from the foregoing arguments that the Sixth Directive cannot be interpreted as requiring the French Republic to make transport operations between its mainland territory and the *départements* of Corsica subject to VAT as regards that part of the journey occurring in or above international waters, France was under no obligation to include, in accordance with Regulation No 2892/77, the turnover relating thereto for the years 1980 to 1985 in the VAT own resources basis and to make those sums available to the Commission on 31 October 1986 or to pay interest for late payment on such sums from 31 October 1986 pursuant to Article 11 of Regulation No 2891/77.

25 In those circumstances, it must be concluded that the Commission has not established that the French Republic has failed to fulfil its obligations under the provisions of Regulations Nos 2891/77 and 2892/77. The Commission's application must therefore be dismissed.

Costs

26 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful in its submissions, it must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the Commission to pay the costs, including those of the intervener.

Due Schockweiler Zuleeg Koopmans

Mancini O'Higgins Moitinho de Almeida Grévisse Díez de Velasco

Delivered in open court in Luxembourg on 13 March 1990.

J.-G. Giraud
Registrar

O. Due
President