JUDGMENT OF THE COURT
27 October 1992 *

In Case C-74/91,

Commission of the European Communities, represented by Bernd Langeheine and Daniel Calleja y Crespo, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, and Joachim Karl, Regierungsdirektor in the same Ministry, acting as Agents, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Emile Reuter,

defendant,

APPLICATION for a declaration that, by applying to travel agents' margins a value added tax scheme which is incompatible with Article 26 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the

* Language of the case: German.

Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President of Chamber, acting for the President, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: C. Gulmann,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 June 1992, at which the Commission was represented by Daniel Calleja y Crespo, of its Legal Service, assisted by Claus-Michael Happe, a German civil servant seconded to the Commission under the scheme for exchanges of officials,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 February 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by applying to travel agents' margins a value added tax ('VAT') scheme which is incompatible with Article 26 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 (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 Article 26 of the Sixth Directive provides for a special VAT scheme applicable to the operations of travel agents where they deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. Under that scheme, the transactions performed by travel agents in respect of a journey are to be treated as a single service supplied by the travel agent to the traveller and the taxable amount for such supplies of services comprises the travel agent's margin, that is to say the difference between the total amount to be paid by the traveller, exclusive of VAT, and the actual cost to the travel agent of supplies and services provided by other taxable persons where such transactions are for the direct benefit of the traveller. If the transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the travel agent's service is to be treated as an exempted intermediary activity under Article 15(14). Where such transactions are performed both inside and outside the Community, only that part of the travel agent's service relating to transactions outside the Community may be exempted.

3 Article 28 of the directive contains transitional provisions, some of which directly affect the special scheme for travel agents. Under Article 28(3)(b) Member States may 'continue to exempt the activities set out in Annex F under conditions exist-

ing in the Member State concerned'. The list of activities contained in Annex F includes, under point 27, 'The services of travel agents referred to in Article 26 ... for journeys within the Community'. The Council, for whose intervention provision is made in Article 28(4) of the directive, has not yet decided to cancel the transitional provisions concerning the activities of travel agents and they are therefore still in force.

4 Under German law, Paragraph 25 of the Law of 29 November 1979 on turnover tax (Umsatzsteuergesetz: UStG 1980) lays down the arrangements for the application of value added tax to the provision of travel facilities. It contains provisions comparable to those of the Sixth Directive regarding the definition of travel agents' services and the taxable amounts for them. But the exemptions for which it provides for certain transactions carried out on behalf of travel agents by third parties which German law describes as 'intermediaries' are not limited to those of such transactions that are performed outside the Community, since they also cover all international air or sea transport operations or operations taking place entirely outside German tax territory.

5 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant national and Community legislation, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 In support of its application, the Commission claims that the provisions of German law governing the imposition of VAT on travel agents, in so far as they allow exemption for transactions performed wholly or partly inside Community territory, are contrary to Article 26 of the Sixth Directive, which allows such exemption only for services or parts of services relating to transactions outside the Community. The exclusion from the calculation of the tax of transactions not qualifying

for exemption under the Community provisions has the effect of abnormally reducing the taxable amount for travel agents, which may give rise to distortions of competition as regards agents in other Member States and have an adverse impact on the Community's own resources deriving from VAT.

7 The defendant government puts forward several arguments in response to the Commission's complaints. They concern the alleged nullity of, or impossibility of applying, Article 26 of the Sixth Directive, the application of the transitional provisions of Article 28 of the directive, the problems involved in the organization of sea voyages and, finally, the distortions of competition arising from exemptions authorized for various reasons.

The nullity of, or impossibility of applying, Article 26 of the Sixth Directive

8 The German Government contends that the implementation of Article 26 of the Sixth Directive is rendered impossible by insurmountable problems raised in particular by the imposition of the tax on transactions that include air voyages with itineraries both inside and outside the Community. As indicated by the discussions within the VAT Advisory Committee set up by Article 29 of the Sixth Directive, which at its 25th meeting on 10 and 11 April 1989 envisaged a simplified taxation scheme, it is extremely difficult in practice to determine the different parts of territory overflown because of the frequency of changes in air routes. The German Government concludes that Article 26 is void or in any event impossible to apply.

9 The Commission maintains that the Federal Republic of Germany is not entitled to plead the illegality of the provisions of the Sixth Directive at issue or justified in claiming the impossibility of applying them.

10 It must be borne in mind in the first place that the system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 169 and 170, which permit a declaration that a Member State has failed to fulfil its obligations, and those contained in Articles 173 and 175, which permit judicial review of the lawfulness of measures adopted by the Community institutions, or the failure to adopt such measures. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision (Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 14). Nor can it plead the unlawfulness of a directive which the Commission criticizes it for not having implemented.

11 The position could be different only if the measure in question contained such particularly serious and manifest defects that it could be deemed non-existent (Case 226/87, cited above, paragraph 16), and no allegation to that effect has been made by the German Government in this case.

12 Moreover, whilst the Court recognizes that, in an action for a declaration that a Member State has failed to fulfil its obligations, a Member State may plead that it was absolutely impossible for it to implement a Community decision properly (judgment in Case 213/85 *Commission* v *Netherlands* [1988] ECR 281, paragraph 22), the arguments put forward in support of that objection do not establish the absolute impossibility of properly implementing Article 26 of the Sixth Directive. It need merely be stated that, even if the technical difficulties pleaded by the defendant regarding the classification of air transport services as between Community and non-Community territory are real, they have not prevented the transposition of the contested provision into the national law of several Member States. The VAT Advisory Committee, whose proposals for simplification are referred to by Germany, has also expressly indicated that the measures advocated by it do not mean that travel agents cannot carry out the breakdown provided for in Article 26(3) of the Sixth Directive.

The application of the transitional provisions of the Sixth Directive

13 The German Government then refers to the transitional provisions of Article 28(3) of the Sixth Directive, which allow the Member States to continue to exempt certain activities under existing conditions and which it considers itself entitled to apply only partially with respect to the activities mentioned in points 27 and 17 of Annex F to the Sixth Directive. It contends, in particular in its replies to the questions put to it by the Court, that whilst the Law on turnover tax of 19 November 1979 (UStG 1980) modified the earlier system established by the UStG 1973, which did not provide for a special scheme for travel agents but taxed each of the various travel services under the general scheme, with the possibility of certain activities being the subject of an exemption or dispensation, the new system has had no impact on the extent of the contested exemptions. Both before and after that modification, both the intermediary services and the service supplied by the agent to the traveller as a whole are exempted from all tax as regards international air or sea transport.

14 The Commission maintains, on the contrary, that the defendant cannot rely on the transitional provisions of Article 28 of the Sixth Directive since it has chosen to apply the definitive scheme provided for in Article 26. It submits in particular that that definitive scheme provides for the taxation of travel agents' transactions as a single service and that the continued exemption of certain transactions making up that service is therefore incompatible with its application.

15 The very wording of the transitional provisions of Article 28(3)(b) of the Sixth Directive, which authorize the Member States to 'continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned', precludes the introduction of new exemptions or any extension of the scope of existing exemptions (Case 73/85 *Kerrutt* [1986] ECR 2219, paragraph 17) and the reintroduction of exemptions existing before VAT was imposed on the services in question in accordance with the Sixth Directive (Case C-35/90 *Commission* v *Spain* [1991] ECR I-5073, paragraphs 6 to 9).

16 Under the special scheme provided for by Article 26 of the Sixth Directive, transactions performed by a travel agent in respect of a journey are to be treated as a single service supplied by the travel agent to the traveller and it is that single service which is subject to VAT, the only exception expressly provided for concerning transactions performed outside the Community for which the supply of services or part of the supply of services by the agent is exempt from tax. Point 27 of Annex F to the Sixth Directive, which mentions 'the services of travel agents referred to in Article 26' amongst those which may continue to be exempt under Article 28(3)(b) can therefore refer only to the single service supplied by the travel agent which is normally subject to tax and not to one or other of the transactions making up that single service which were previously subject to another tax scheme.

17 Since Germany has not, and does not deny that it has not, maintained the general VAT scheme for the various transactions performed by travel agents and has adopted a special scheme based on the rules laid down in Article 26 of the Sixth Directive, it cannot rely on the possibility of continuing to exempt certain activities for which exemption is not envisaged by that article. As the Commission observes, moreover, to allow the maintenance of partial exemptions not expressly provided for by the transitional provisions of the Sixth Directive applicable to travel agents would run counter to the principle of legal certainty, which requires the clear and precise application of the rules laid down by Community directives.

18 Nor can the German Government, as the Commission correctly points out, rely on Point 17 of Annex F to the Sixth Directive, which is concerned with certain transport services which the Member States may continue to exempt under Article 28(3)(b), to justify maintaining exemptions for travel agents' services, they being subject to the special scheme laid down in Article 26, which is distinct from that applicable to transport services.

The organization of sea voyages

19 As regards more particularly the organization of sea voyages, the German Government relies on Article 27(5) of the Sixth Directive, which allows the Member States to maintain, under certain conditions, special derogating measures intended to simplify collection of the tax. It maintains that since sea transport operations are as a general rule carried out almost exclusively on the high seas, that is to say outside Community waters, cruises must be exempted, for the sake of simplification, even where they take place between two ports in Member States.

20 The Commission contests that view, stating in particular that the proposals of the VAT Advisory Committee on the taxation of services supplied by travel agents in connection with cruises show that the breakdown to be carried out in accordance with the rules laid down in Article 26(3) of the Sixth Directive is entirely practicable.

21 First, although Article 27(5) of the Sixth Directive allows the Member States which, on 1 January 1977, applied special derogating measures for the purpose of simplification to maintain them, that possibility is available only under certain conditions, including the requirement of notification of such measures to the Commission before 1 January 1978. However, the German Government admitted at the hearing that although, on the basis of that provision, it had notified such measures before the end of 1977, that notification covered not the activities of travel agents but the operation of sea transport services.

22 Secondly, if the Federal Republic of Germany intends, in a declared concern for simplification, to plead once more the difficulties involved in distinguishing between the Community and non-Community parts of services to which it has already drawn attention in relation to air transport, it need only be repeated that

such difficulties are not insurmountable. It must be pointed out that, whilst the VAT Advisory Committee envisaged a simplified scheme for the taxation of travel agents' services in respect of cruises 'where the cruise is exclusively between Community ports' or 'where the cruise leaves the Community bound for a non-member country', it also envisaged a scheme for the breakdown of transactions 'where the cruise is between ports both inside and outside the Community'. In its opinion, as the Court has found in relation to air travel in paragraph 12 of this judgment, the Advisory Committee also expressly states that it does not exclude from the possibilities which it envisages that of continuing to proceed, in respect of travel agents, in accordance with Article 26(3) of the Sixth Directive as now in force.

The distortions of competition mentioned by the defendant government

23 To justify the contested exemptions, the German Government also states that it is necessary to avoid distortions as regards competition both with travel agents in other Member States which still apply the transitional scheme provided for by Article 28 of the Sixth Directive and with travel agents which have their own aircraft and whose transport business is, on the basis of the same transitional scheme, exempted in all the Member States in respect of international air transport, and, finally, with individual travellers as well.

24 Those arguments, which the Commission rightly disputes, cannot be upheld.

25 First, even if it is true that maintenance of the transitional scheme in certain Member States may give rise to distortions of competition, that fact cannot authorize Germany, if it does not lawfully use that transitional scheme, not to apply Article

26 of the Sixth Directive correctly and thereby itself to create distortions of that kind to the detriment of the Member States which transposed the provisions of that article.

26 Secondly, the Sixth Directive provided, as indicated in paragraph 2 of this judgment, for a special VAT scheme applicable to the transactions of travel agents if those agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. That scheme does not cover transport services supplied without the involvement of any intermediary, which are covered by the general provisions applicable to transport undertakings. The tax position of those two types of transaction is thus not comparable. Even if maintenance of a transitional scheme under which certain transport services are exempted may be liable to accentuate the differences in the circumstances of travel organizers, according to whether or not they are themselves transport undertakings, and between travellers, according to whether or not they use the services of an agent, that fact likewise cannot justify incorrect application of the special scheme provided for in the directive.

27 It must therefore be stated that, by applying to travel agents' margins a VAT scheme which is incompatible with the provisions of Article 26 of the Sixth Directive, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

Costs

28 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by applying to travel agents' margins a VAT scheme which is incompatible with the provisions of Article 26 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, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Rodríguez Iglesias Zuleeg Murray Mancini

Joliet Schockweiler Moitinho de Almeida Grévisse Edward

Delivered in open court in Luxembourg on 27 October 1992.

J.-G. Giraud — G. C. Rodríguez Iglesias

Registrar — For the President