OPINION OF ADVOCATE GENERAL ALBER

delivered on 29 June 2000 *

I — Introduction

1. The present proceedings for a preliminary ruling essentially concern the question whether and to what extent parking charges collected by a municipality are subject to VAT.

II — Facts of the case

2. The City Council of Oporto raises income in several ways from the provision of parking facilities in the city. These are, first, parking meters on public highways, second, car parks located on public property of the city, and, third, car parks located on private property of the city or on private land belonging to private individuals who have made it available to the council.

3. The Fazenda Pública (hereinafter: 'the Treasury') issued a VAT assessment of PTE 98 953 911 against the Câmara Municipal do Porto (Oporto City Council; hereinafter: 'the CMP') for the years 1991 and 1992 and January to April 1993 in respect of income from parking meters and car parks in the city of Oporto.

4. The CMP contested this VAT assessment before the Tribunal Tributário da 1ª Instância, Oporto, on the grounds that it is not liable to VAT in the present case since it is exercising its 'powers of an authority'. The court of first instance upheld the action only in so far as it related to the CPM's receipts from the operation of a car park located on public property and parking meters on public highways. However, it dismissed the other heads of claim. In the view of the lower court the CMP is engaged in activities in which it exercises it powers as an authority, and which are thus not liable to VAT, only where the car parks or parking meters are located on public property of the CMP.

5. Both the Treasury and the CMP appealed to the Supremo Tribunal Administrativo against the part of the judgment which was unfavourable to them.

* Original language: German.

6. One of the grounds stated by the Treasury for its appeal is that the CMP is not exercising its power as an authority in placing parking meters on public highways, marking out the parking bays and charging for parking. It is merely converting a public area into an area for use of the CMP so as to raise income. In using these areas the CMP is behaving like any other market operator and is competing with private persons providing areas for the garaging or parking of vehicles for consideration.

7. In the view of the CMP, the collection of charges from parking meters and in car parks not under concession is an activity intended to regulate parking on the public highway by introducing the levying of charges and limits on parking times and accordingly forms part of public traffic policy. This is an activity which the CMP engages in pursuant to public law in the exercise of its powers and within its terms of reference.

8. The same applies to car parks located on private property of the CMP. The operation of such car parks is merely intended to supervise and regulate traffic and differs greatly from that of car parks operated by private persons who, as traders, operate them solely in pursuit of profit.

9. In the order for reference the national court stated as follows to describe the CMP and its activities in respect of the provision of parking areas:

'(a) The CMP is a public authority under Portuguese law;

(b) the letting of areas for the parking of vehicles — whether in the street, with parking meters, or in CMP car parks, whether or not forming part of the public domain — is not an activity which comes within the specific sphere of their tasks as public authorities. It need merely be borne in mind that for centuries that was not an activity coming within the specific sphere of the tasks of municipal authorities. It is an activity they have engaged in only in recent years, in competition with private operators;

(c) it is not known whether there have been significant distortions of competition, since the Minister of Finance has not said so in this case;

(d) it is not known whether that activity of the CMP has been carried out to an extent which is negligible ...;

(e) in transposing the Sixth VAT Directive, the Portuguese State did not regard as activities engaged in as a public authority the letting of areas for the parking of vehicles, nor could it do so since that activity is not exempt from VAT by virtue of Article 13(B)(b)(2) of the Sixth Directive;

(f) it is an activity which is carried on under the same legal conditions as those applicable to private economic operators: the CMP allows motorists temporary use of a space for parking in return for payment. The details of the service are irrelevant since, essentially, it is a letting contract of an industrial or commercial nature.'

10. The national court went on to state that: 'Under Article 235(2) of the Constitution of the Republic, local authorities are to pursue the interests of the people living within their areas. To that end, local authorities are vested with a wide range of powers, including that of letting areas for parking of vehicles. This activity is carried on in an *ambiance de droit publique*:

(a) the income received is fiscal income, charges;

(b) the activity is overseen by the municipal police;

(c) offenders are recorded and subject to a fine, which is paid under public law, like a charge;

(d) the operation of car parks and parking meters is subject to a prior resolution of the city council;

(e) the procedure for that operation is an administrative procedure and not merely a civil one;

(f) the car parks and parking meters form part of the CMP's public traffic policy;

(g) an aim pursued was to make it difficult for vehicles to gain access to certain zones in order to avoid congestion;

(h) the general authorisation for the operation of car parks and parking meters stems from a law;

(i) there are only car parks and parking meters in certain parts of the city, where the council considers it appropriate.'

III — Questions referred for a preliminary ruling

11. In order to be in a position to rule on the taxability of the CMP, the Supremo Tribunal Administrativo referred the following questions to the Court of Justice for a preliminary ruling:

'(a) Does the expression "activities or transactions in which they engage as public authorities" used in the first subparagraph of Article 4(5) of the Sixth VAT Directive cover the letting of spaces for the parking of vehicles (both on streets and in car parks) by the public authorities (a municipality)?

(b) May the significant distortions of competition referred to in the second subparagraph of Article 4(5) of the Sixth VAT Directive be defined case by case by the Minister of Finance of a Member State?

(c) If the national provision which empowers the Minister of Finance to define, case by case, significant distortions of competition is unconstitutional, in that it infringes the principle that taxation must have a legal basis, but conforms with Community law (with the Sixth Directive), must the national court comply with its constitution or must it, first and foremost, comply with Community law by virtue of the principle of the primacy of that law over constitutions?

(d) Will the public authorities always be regarded as taxable persons provided that the activities in which they engage are not negligible, or are they taxable persons only as regards the activities or transactions listed in Annex D, to which the third subparagraph of Article 4(5) of the Sixth Directive refers?

(e) May a national law authorise the Minister of Finance to define, case by case, what activities are being engaged in on a negligible scale?

(f) For the purposes of the fourth subparagraph of Article 4(5) of the Sixth Directive, may a Member State regard an activity of letting spaces for the parking of vehicles, when it is carried

on by a municipality, as an activity in which the municipality engages as a public authority, having regard to the provisions of Article 13 B(b)(2) of the Sixth Directive?

(g) As the parties to the main proceedings have not raised any question of the interpretation or application of the Sixth Directive, may the national court of its own motion interpret and apply the provisions of that directive when giving its final decision?'

IV — Relevant legal provisions

(1) *Community law*

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 [1] (hereinafter: 'the Sixth Directive'; unless stated otherwise, articles referred to are those of this directive)

1 — OJ 1977 L 145, p. 1.

Scope

12. Article 2 provides that:

'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. ...'

Taxable persons

13. Article 4(1) and (2) provides that:

'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.'

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 Article 13... as activities which they engage in as public authorities.'

Exceptions

Exemptions and exceptions thereto

14. Article 4(5) provides as follows:

15. Article 13B provides as follows in respect of other exemptions:

'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.

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any evasion, avoidance or abuse:

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) ...

(b) the leasing or letting of immovable property *excluding*: [2]

1. ...

2. the letting of premises and sites for parking vehicles;

3. ...

4. ...

(c) to (h) ...'

(2) *Portuguese law*

16. Article 2(2) of the Código do IVA (VAT Code) provides as follows:

'The State and other legal persons governed by public law shall not, however, be taxable persons as regards the tax where they undertake operations in the exercise of their powers as authorities even if, for those operations, they receive fees or other consideration, provided that this exemption does not lead to distortions of competition.'

17. Article 2(3) of this code essentially reproduces the third subparagraph of Article 4(5), read in conjunction with Annex D, of the Sixth Directive.

18. Article 2 ends with paragraph 4, which provides as follows:

'For the purposes of paragraphs 2 and 3 of this article, the Minister for Financial Affairs and the Plan shall define, case by case, those activities which are liable to give rise to distortions of competition and those which are exercised on a negligible scale.'

19. The legal basis for the taxation is Article 9(30)(b) of the Código do IVA, which provides as follows:

'The following shall be exempted from tax: the letting of immovable property. This exemption shall not extend to the letting of areas for the garaging or collective parking of vehicles.'

2 — Emphasis added.

V — Opinion

Question (a)[3] *(Is the provision of parking places by a municipality an activity in which it engages as a public authority? — first subparagraph of Article 4(5) of the Sixth Directive)*

Arguments of the parties

20. In the view of the Treasury, the CMP is behaving like any other market operator even though it is a body governed by public law. The placing of parking meters and charging for parking does not fall within the scope of the exercise of public powers and is therefore subject to VAT.

21. For the further submissions of the parties, I refer also to points 6 to 8 relating to the main proceedings.

22. The Austrian Government submits that the municipality operates the car parks in the exercise of its powers as a public authority in so far as it uses the classic means of administration (tax law, monitoring by bodies of public security, definition by the public powers of conditions of use) and engages in this activity in the public interest since it is intended to regulate traffic and manage the space available for parking. However, it is for the national court to make the relevant assessment, having regard to the criteria laid down by the Court of Justice.

23. The Portuguese Government proposes interpreting the first subparagraph of Article 4(5) as being applicable to the letting of spaces for parking on the highways and in car parks, where they are let directly by the public authorities and there are no significant distortions of competition.

24. In their answers the German Government and the Commission draw a distinction according to the nature of the parking facilities in the case in question. The German Government submits that the Court of Justice has ruled that Article 4(5) excludes from the scope of the exemption those activities which a body governed by public law engages in as a body subject to private law and not on the basis of its classification under public law. These two activities must be distinguished in accordance with applicable national law. In the light of the criteria laid down by the Court of Justice it must therefore be concluded that the operation of parking meters or parking ticket machines is an activity engaged in as a public authority since it is a public safety measure intended to regulate traffic. However, such activity is an

3 — In order to facilitate comparison, the questions are not numbered and the alphabetic listing of the national court has been retained.

economic one where it does not pursue such an aim, even if the parking facilities concerned are located on public property.

25. As regards the placing of parking meters on public highways, the Commission accepts that this constitutes an activity engaged in as a public authority, whereas it considers that car parks form part of general economic life, regardless of the underlying ownership, and therefore that the body governed by public law is subject to the general VAT liability under Article 4(1) of the Sixth VAT Directive.

Appraisal

26. Under the first subparagraph of Article 4(5), bodies governed by public law are not to be considered taxable persons even where they provide services and in connection therewith collect consideration in the form of public charges and thus carry on 'economic activities' within the meaning of Article 4(2).[4] Consequently, this provision constitutes an exception to the principle laid down in Article 4(1) and (2) under which any person who carries on an economic activity must be considered a taxable person.

27. According to the consistent case-law of the Court,[5] two conditions must be fulfilled for this exception to apply under the first subparagraph of Article 4(5), that is to say, 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.

28. The first condition is fulfilled since the CMP carries on the activities itself as a municipality.

29. As regards the question when does a body governed by public law engage in an activity as a public authority, the Court of Justice has observed that '[a] definition of the latter condition cannot be based ... on the subject-matter or purpose of the activity engaged in by the public body since those factors have been taken into account by other provisions of the directive for other purposes.'[6]

30. It should also be borne in mind that many tasks which were originally reserved for public authorities are now performed by private persons and therefore a definition based solely on the subject-matter of the activity is inappropriate.

4 — See to this effect also Joined Cases 231/87 and 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda and Others* v *Comune di Carpaneto Piacentino and Others* [1989] ECR I-3233, paragraph 11.

5 — See to this effect also Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 12) with reference to Case 107/84 *Commission* v *Germany* [1985] ECR 2655 and Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471.

6 — Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 13).

31. Although the CMP contends that the placing of parking meters and the operation of car parks is an activity of public traffic policy and thus an activity it engages in as a public authority, according to the case-law this contention is, by itself, neither sufficient nor decisive.

32. The Court classifies activities as activities engaged in 'as public authorities' on the basis of the way in which they are carried out and states that: 'An analysis of the first subparagraph of Article 4(5) in the light of the scheme of the directive shows that it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as that provision makes such treatment of bodies governed by public law conditional upon their acting "as public authorities", it excludes therefrom activities engaged in by them not as bodies governed by public law but as persons subject to private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law'. [7]

33. According to this case-law, the external (legal) framework of the activity is the decisive factor. In the view of the Court, only the criterion of the way in which the activity is carried out provides a clear distinction between taxable economic activities and those activities which bodies governed by public law engage in as public authorities.

34. However, it cannot conversely be inferred from the application of the definition criterion of the nature of the legal regime that any activity, that is to say even a purely commercial one, could be declared an activity engaged in as a public authority by a regime of public law. If that were so, there would be no need for the fourth subparagraph of Article 4(5) under which activities exempt under Article 13 — these are predominantly ones which serve the public good or are in the public interest (such as the renting out of accommodation) — may be considered as activities which bodies engage in as public authorities. The provision of the third subparagraph of Article 4(5) would also otherwise be inconsistent, since it conversely makes certain activities — possibly also those engaged in as public authorities — subject to VAT.

35. So, for defining an activity as one engaged in as a public authority the overall context and the way in which an activity is carried out are also important — supporting the fact that the body acts as a body governed by public law — (see point 32 and the case-law cited therein).

36. As the Court of Justice continues, '[i]t follows that the bodies governed by public

7 — Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 15).

law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities "as public authorities" within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting "as public authorities"...' [8]

37. It follows from this case-law that a body governed by public law engages in an activity as a public authority where it acts as a body governed by public law under the special legal regime applicable to it. Therefore, what is decisive is national law which determines whether the activity to be classified must be regarded as constituting the exercise of public administrative law or as private law which applies equally to all economic operators.

38. The classification by the national legislature of certain activities exercised by local authorities as 'administrative functions' [9] may constitute an indication that those activities are subject to public law. According to the case-law of the Court, [10] it is for the national court to make the appropriate classification of the activities concerned in the light of the criteria laid down by the Court. To do so it must assess all the circumstances of the specific case.

39. Therefore, as regards the question whether the letting of areas for the parking of vehicles constitutes an activity which the CMP engages in as a public authority, the ownership of the areas used is not important, in particular where the parking conditions on separate sites are the same as those for parking areas with parking meters and parking ticket machines on public highways.

40. Where the CMP operates parking meters on public highways and car parks on public or private municipal property or other private property, the only decisive factor for classifying the activities as engaged in 'as public authorities' is whether the CMP as a body governed by public law engages in these activities under the special legal regime applicable to it and not under the rules of private law.

41. What matters is the legal way in which the activity is carried out, although the attendant factual circumstances may be taken into consideration as an indication as to the classification of the underlying legal relationship.

42. Thus, as an additional indication, it may be relevant whether the parking regulations are intended to manage the space

8 — Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 16).

9 — See point 16 above.

10 — Case C-4/89 *Comune di Carpaneto Piacentino and Others* v *Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* [1990] ECR I-1869, paragraph 11, with reference to Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 16).

available for parking and aid traffic flows or merely to cover parking, whether a distinction is drawn between car parks in terms of restricted short-stay car parks and unrestricted long-stay car parks or whether long-term car parks are involved, or whether charges are made for them by parking meter, parking ticket or long-term parking permit. Furthermore, it may be significant whether or not the places are guarded and whether exceeding the parking time is punishable by a fine or provision is made merely for an additional payment or a contractual penalty (under civil law).

43. It must be concluded that the CMP engages in an activity as a public authority in so far as the operation of parking meters and the operation of car parks — irrespective of the ownership thereof — takes place under the special legal regime applicable to it and the CMP acts as a body governed by public law. The second subparagraph of Article 4(5), which provides for taxability as an exception to the exception where significant distortions of competition occur, is sufficient as a counterbalance in favour of private operators.

44. The answer to the first question must therefore be that the provision of areas for the parking of vehicles (both on streets and in car parks) by municipalities or bodies governed by public law is covered by the expression 'activities or transactions in which they engage as public authorities' where they engage in those activities themselves and under the special legal regime applicable to them — as bodies governed by public law — and in this case it is irrelevant to whom the areas belong. It is for the national court to classify the activity in question in the light of that criterion and of the way in which it is carried out.

Question (b) (May a significant distortion of competition be defined case by case by the Minister of Finance? — second subparagraph of Article 4(5) of the Sixth Directive)

Arguments of the parties

45. The German and the Portuguese Governments submit that it is for the individual Member States to determine in which cases failure to tax bodies governed by public law leads to significant distortions of competition, in order to implement the objectives of the Sixth Directive.

46. The Portuguese Government argues that 'significant distortions of competition' as referred to in the second subparagraph of Article 4(5) may legitimately be defined also by the Minister of Finance. Such action is not contrary to the second subparagraph of Article 4(5), since under the third subparagraph of Article 189 of the EC Treaty (now Article 249 EC) the directive is binding only in respect of the result and not in

respect of the form and methods which the Member States employ to achieve that result.

47. The Commission points to the spirit and purpose of the Sixth Directive and to the need for a uniform interpretation of its provisions. The regulation of what must be regarded as a significant distortion of competition in a specific case cannot, therefore, be effected through a simple administrative act.

Appraisal

48. The second subparagraph of Article 4(5) of the Sixth Directive makes an exception to the exception in the first subparagraph and thus reverts to the general rule concerning taxability. In this case bodies governed by public law are subject to VAT where their treatment as non-taxable persons would give them an advantage leading to significant distortions of competition and adversely affecting competitors.

49. The Court has held that 'the second subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that the Member States are required to ensure that bodies subject to public law are treated as taxable persons in respect of activities in which they engage as public authorities where those activities may also be engaged in, in competition with them, by private individuals, in cases in which their treatment as non-taxable persons could lead to significant distortions of competition, but they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for such treatment.' [11]

50. When the Court of Justice states that the Member States are not obliged to transpose that criterion literally into their national law, it is referring to the criterion of significant distortions in competition. The Member States are free to choose any other wording or to lay down a general, quantitative limit unrelated to a specific case — corresponding, for example, to the special scheme in Article 24(2) for small undertakings with a fixed amount of annual turnover — in order to make bodies governed by public law taxable where their treatment as non-taxable persons could lead to significant distortions of competition as envisaged in the directive.

51. However, as is clear from the wording of the directive, the Member States are obliged to subject bodies governed by public law to tax without exception where their treatment as non-taxable persons could lead to significant distortions of competition, irrespective of the legal form in which the Member States transpose this criterion.

11 — Case C-4/89 (cited in footnote 10, paragraph 13) with reference to Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 23).

52. The directive lays down no specific rules as to the possibility of authorising the national Minister of Finance to determine, case by case, what constitutes a significant distortion of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive.

53. However, in view of the wording of the second subparagraph of Article 4(5) it must be assumed that bodies governed by public law become taxable persons where the circumstances indicating a significant distortion of competition arise, without a constitutive declaration by the Minister of Finance being necessary.

54. The underlying aim of the directive is to harmonise the rules governing VAT, not to impose, without reasonable grounds, VAT on public bodies in respect of activities which they engage in as public authorities, and to ensure the neutrality of VAT. [12]

55. In order to ensure uniform application of the directive, it must be guaranteed that the economic circumstances which could lead to a significant distortion of competition are assessed in a uniform manner. It follows that the answer to the question when there is a significant distortion of competition cannot depend on a decision of the national administration, in so far as that decision is binding and not amenable to judicial review.

56. The Court has ruled on this point that '[t]hat limitation placed on the rule of treatment as non-taxable persons is thus only a conditional limitation, and whilst it is true that its application involves an assessment of economic circumstances, that assessment is not exempt from judicial review.' [13]

57. Consequently, it is the duty of the national court to determine whether there is a significant distortion of competition. It is clear from this case-law — as an *argumentum e contrario* — that the Member States are barred by the directive from authorising an administrative office to define, case by case and with binding effect, which distortions of competition are significant for the purpose of the second subparagraph of Article 4(5) of the Sixth Directive.

58. Therefore, the national court must determine whether a competitive market exists for these activities or transactions, that is to say, whether these services are also offered by private persons. In the case of the letting of areas for the parking of vehicles the national court will have to

12 — See to this effect Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 22).

13 — Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 32).

determine whether the provision of parking spaces at parking meters and the letting of car park spaces form one single market or two different markets. In that respect it may be important whether uniform prices apply or whether price differences exist between parking meters and parking ticket machines and car parks. In addition, the national court will have to determine whether the car park market is split in terms of short-term and long-term parking or whether it forms a single market for competition purposes.

59. The answer to question (b) must therefore be that the second subparagraph of Article 4(5) of the Sixth Directive is to be interpreted as precluding a national provision which authorises the Minister of Finance to define, case by case and with binding force, when there is significant distortion of competition within the meaning of the second subparagraph of Article 4(5).

Question (c) (Must a national court apply, by virtue of the primacy of Community law, a provision where that provision is in conformity with Community law but unconstitutional?)

Arguments of the parties

60. The Treasury and the Portuguese Government do not consider that it is necessary to answer this question, since no conflict exists between the directive and the Portuguese constitution.

61. Since the Sixth Directive does not require the Member States to empower a minister to define, case by case, what constitute significant distortions of competition, the question of a possible conflict between the Sixth Directive and the constitution does not — in the Commission's view — arise in the present case.

Appraisal

62. The national court clearly referred the question only in the event that the national provision of Article 2(4) of the Portuguese VAT Code, which authorises the Minister of Finance to define, case by case, what activities could lead to distortions of competition, is compatible with Community law.

63. However, Community law precludes the national VAT Code in this respect, and therefore there is no conflict between Community law and the national constitution.

64. As the Commission correctly submits, there is therefore no need to answer this question in the present case.

Question (d) (Will the public authorities always be regarded as taxable persons provided that the activities in which they engage are not negligible, or are they taxable persons only as regards the activities listed in Annex D provided that they are not negligible? — third subparagraph of Article 4(5) of the Sixth Directive)

Arguments of the parties

65. The German Government takes the view that this question should be answered to the effect that the Member States have the option — without, however, also having to avail themselves of it — of exempting the activities referred to in Annex D from tax provided that they are negligible.

66. The Austrian Government submits that the term 'negligible' relates only to the activities referred to in Annex D and is applicable only in this context.

67. The Portuguese Government argues that the activities referred to in Annex D are subject to VAT in any case, without this list being exhaustive.

68. The Commission answers the question to the effect that the authorities must in principle be regarded as taxable persons in respect of their economic activities, even where these activities are not listed in Annex D, unless these activities are negligible, which is not so in the present case on account of the amounts of money involved.

Appraisal

69. The third subparagraph of Article 4(5) re-excludes the activities listed in Annex D from the scope of the exception in the first subparagraph of Article 4(5). Consequently, the general rule in Article 4(1), which results in taxability, applies again if the activities are not engaged in only to a negligible extent. This is appropriate because the activities referred to in Annex D are activities where the economic connection is primary and clear. [14]

70. The Court has ruled that: 'The third subparagraph of Article 4(5) thus seeks to

14 — Annex D lists a total of 13 types of activity, including telecommunications, the supply of water, gas, electricity, port and airport services, the running of trade fairs and exhibitions, advertising and travel agencies, and supplies for canteens.

ensure that certain categories of economic activity the importance of which derives from their subject-matter are not excluded from VAT on the ground that they are carried out by bodies governed by public law as public authorities.' [15]

71. Even though the provision *de facto* constitutes a return to the rule, *de jure* it is an exception to an exception and as such must be construed strictly.

72. Therefore, the exception contained in the third subparagraph of Article 4(5) cannot be applied to activities which are not listed in Annex D. The catalogue in Annex D gives no indication that it is merely a list of examples. It must be assumed, therefore, that the list is enumerative. It cannot be extended by the Member States.

73. Although it could be concluded from the expression 'in any case, these bodies shall be considered taxable persons' that cases other than those listed in Annex D are conceivable, the expression 'in any case' must be construed only as meaning that these activities are subject to VAT even where they are engaged in as public authorities.

74. As the Court states, 'a body governed by public law may rely on Article 4(5) of the Sixth Directive for the purpose of opposing the application of a national provision making it subject to VAT in respect of an activity in which it engages as a public authority, which is not listed in Annex D and whose treatment as non-taxable is not liable to give rise to significant distortions of competition.' [16]

75. Consequently, case-law rules out the possibility of extending the catalogue in Annex D, since a body governed by public law could challenge such unauthorised extension by a Member State.

76. A body governed by public law must be regarded as a taxable person in respect of activities referred to in Annex D where those activities are not negligible. Under the second subparagraph of Article 4(5), it is taxable in respect of activities not listed in Annex D only where its treatment as a non-taxable person would lead to significant distortions of competition.

15 — Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 26).

16 — Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 33).

77. As mentioned above, this applies only to activities which it engages in as a public authority. As regards other, purely economic, activities, bodies governed by public law are also to be regarded as taxable persons.

78. Consequently, the answer to question (d) must be as follows:

Municipalities and bodies governed by public law are not always taxable persons where the activities in which they engage are not negligible, but only as regards the activities or transactions listed in Annex D, in so far as these activities which they engage in as public authorities are not negligible.

Question (e) (May the Minister of Finance define what activities are being engaged in on a scale that is negligible? — third subparagraph of Article 4(5) of the Sixth Directive)

Arguments of the parties

79. The Treasury and the Portuguese Government conclude that the Minister of Finance may determine, case by case, what activities are being engaged in on a scale that is negligible, since the directive contains no provisions to the contrary.

Appraisal

80. The question is actually irrelevant to the present case, because in terms of the wording the qualification 'negligible scale' relates only to activities referred to in Annex D. However, there is no such activity in this case.

81. The power of the Minister of Finance to define what activities are engaged in on a scale that is negligible makes the application of the third subparagraph of Article 4(5) conditional on a decision of the national administration.

82. The directive does not expressly grant the Member States the right to empower the Minister of Finance to define activities which are engaged in on a scale that is negligible.

83. Although the directive makes it possible to exclude negligible activities from the scope of the third subparagraph of Article 4(5), according to the case-law the Member States are not required to do

so. [17] Each Member State is free to subject these activities to VAT even though they are engaged in only on a scale which is negligible.

84. The objective of ensuring uniform application of the directive and with it the definition of the activities which establish the taxability of bodies governed by public law and thus of attaining harmonisation of VAT, and also the wording of the provision, which does not provide for the conferring on the Minister of Finance of the power to define, case by case and with binding effect, what constitutes an activity engaged in on a scale that is negligible, preclude such a national law, even having regard to the third subparagraph of Article 189 of the EC Treaty.

85. It is therefore for the national court to ensure uniform application of the directive by defining, case by case, what constitutes activities engaged in only on a scale that is negligible.

86. Therefore, the answer to question (e) must be that the third subparagraph of Article 4(5) of the Sixth Directive is to be interpreted as precluding a national provision which authorises the Minister of Finance to define, case by case and with binding force, what activities are being engaged in on a scale that is negligible for the purposes of the third subparagraph of Article 4(5).

17 — Joined Cases 231/87 and 129/88 (cited in footnote 4, paragraph 27).

Question (f) (May a Member State also regard as activities engaged in as public authorities the non-exempt activities referred to in Article 13B(b)(2)? — fourth subparagraph of Article 4(5) of the Sixth Directive)

Arguments of the parties

87. The German Government argues that the letting of premises and sites for parking cars is not an activity in respect of which a body governed by public law can be regarded as a non-taxable person, since this activity is specifically excluded from the exempted activities by Article 13B(b)(2).

88. The Austrian Government takes the view that a Member State may not regard an activity of a body referred to in the fourth subparagraph of Article 4(5) which is excluded from the scope of the exemption in Article 13 as an activity engaged in as a public authority.

89. The Portuguese Government considers that a distinction must be drawn between the assessment of taxability on the one hand and of exemption on the other. Although Article 13B(b)(2) provides for an exception from the exemption relating to letting, this has no bearing on the application of the criterion of non-taxation under Article 4(5) which relates to taxable persons.

90. The Commission considers that since the letting of premises and sites for parking cars is taxable under Article 13 B(b)(2), this means that it is an economic activity which falls within the scope of VAT and cannot be regarded as an activity engaged in as a public authority.

Appraisal

91. Under the fourth subparagraph of Article 4(5), Member States may consider activities of bodies governed by public law which are exempt under Article 13 or 28 as activities which they engage in as public authorities.

92. However, under Article 13B(b)(2) the 'letting of premises and sites for parking vehicles' is specifically not exempt. Since, however, only exempt activities can be considered activities engaged in as public authorities under the final subparagraph of Article 4(5), it could be concluded that the provision of parking spaces could never be regarded as an activity engaged in as a public authority. However, I cannot concur with that view. If the provision of parking spaces *is* an activity which a body governed by public law engages in as a public authority, there is no taxability, simply by virtue of the first subparagraph of Article 4(5). Therefore, there is no need at all to *regard* it as such within the meaning of the fourth subparagraph of Article 4(5).

93. Moreover, Article 13B(b)(2) also contains no rule stating that the letting of areas for the parking of vehicles can never be an activity engaged in as a public authority. That could not be reconciled with the systematic context of the rule in Article 4(1) or the various exceptions in Article 4(5).

94. Consequently, under the first subparagraph of Article 4(5) a body governed by public law can engage in an activity as a public authority and thus be a non-taxable person even where that activity is not exempt (in respect of private individuals) but falls within the scope of the exception laid down in Article 13B(b)(2) and would therefore be subject to VAT.

95. Therefore, the answer to question (f) must be that where the provision of parking spaces by a municipality must be regarded as an activity it engages in as a public authority, it constitutes a non-taxable person in accordance with the first subparagraph of Article 4(5). In this case the fourth subparagraph of Article 4(5) is irrelevant.

Question (g) (May the national court apply Community law even though the parties have not relied thereon?)

Arguments of the parties

96. The Treasury, the Portuguese Government and the Commission point out that the courts of the Member States must apply Community law of their own motion.

Appraisal

97. As the Commission, the Portuguese Government and the Treasury correctly submit, the national courts must, of their own motion, comply with and apply the provisions of Community law. According to the case-law of the Court, [18] this applies even where the parties have not relied on these provisions.

98. The interpretation of Community law falls within the jurisdiction of the Court of Justice and not within that of the national court. This is intended to ensure the uniform interpretation and application of Community law. Under Article 177 of the EC Treaty (now Article 234 EC), where doubts exist as to the interpretation of Community law national courts may or, as the case may be, must stay proceedings and refer a question concerning interpretation to the Court of Justice.

99. According to the case-law of the Court of Justice, 'that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice.' [19]

100. Consequently, the answer to this question must be that the national court must, of its own motion, apply the provisions of the directive when giving its final decision, even where none of the parties to the main proceedings has raised any question of the application of that directive. It is not for the national court to interpret the provisions of the directive.

18 — Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* v *Sociale Verzekeringsbank* [1991] ECR I-3757, paragraph 16, and Joined Cases C-430/93 and C-431/93 *Van Schijndel and Others* v *SPF* [1995] ECR I-4705, paragraph 15.

19 — Case C-337/95 *Parfums Christian Dior* v *Evora* [1997] ECR I-6013, paragraph 25, with reference to Case 283/81 *CILFIT and Others* v *Ministry of Health* [1982] 3415, paragraph 7.

VI — Conclusion

101. For the foregoing reasons I therefore propose that the Court should answer the questions referred for a preliminary ruling as follows:

(1) The provision of areas for the parking of vehicles (both on streets and in car parks) by municipalities or bodies governed by public law is covered by the expression 'activities or transactions in which they engage as public authorities' where they engage in those activities themselves and under the special legal regime applicable to them — as bodies governed by public law — and in this case it is irrelevant to whom the areas belong. It is for the national court to classify the activity in question in the light of that criterion and of the way in which it is carried out.

(2) The second subparagraph of Article 4(5) of the Sixth VAT Directive 77/388/EEC is to be interpreted as precluding a national provision which authorises the Minister of Finance to define, case by case and with binding force, when there is significant distortion of competition within the meaning of the second subparagraph of Article 4(5).

(3) Municipalities and bodies governed by public law are not always taxable persons where the activities in which they engage are not negligible, but only

as regards the activities or transactions listed in Annex D, in so far as these activities which they engage in as public authorities are not negligible.

(4) The third subparagraph of Article 4(5) of the Sixth Directive is to be interpreted as precluding a national provision which authorises the Minister of Finance to define, case by case and with binding force, what activities are being engaged in on a scale that is negligible for the purposes of the third subparagraph of Article 4(5).

(5) Where the provision of parking spaces by a municipality must be regarded as an activity it engages in as a public authority, it constitutes a non-taxable person in accordance with the first subparagraph of Article 4(5). In this case the fourth subparagraph of Article 4(5) is irrelevant.

(6) The national court must, of its own motion, apply the provisions of the directive when giving its final decision, even where none of the parties to the main proceedings has raised any question of the application of that directive. The national court is barred from interpreting the provisions of the directive, because of the necessity of uniform interpretation.