JUDGMENT OF THE COURT (Fifth Chamber)
14 December 2000 *

In Case C-446/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Supremo Tribunal Administrativo, Portugal, for a preliminary ruling in the proceedings pending before that court between

Fazenda Pública

and

Câmara Municipal do Porto,

third party:

Ministério Público,

on the interpretation of Article 4(5) of 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),

* Language of the case: Portuguese.

THE COURT (Fifth Chamber),

composed of: A. La Pergola (Rapporteur), President of the Chamber, D.A.O. Edward and P. Jann, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Fazenda Pública, by M.A. Moreira, of the Legal Service of the Directorate-General for Taxes of the Ministry of Finance, acting as Agent,

— Câmara Municipal do Porto, by A. Nogueira dos Santos, Solicitador,

— the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate-General for Community Affairs in the Ministry of Foreign Affairs, Â. Seiça Neves, of that service, and T. Lemos, of the Centre for Fiscal Studies of the Directorate-General for Taxes of the Ministry of Finance, acting as Agents,

— the German Government, by W.-D. Plessing, Ministerialrat in the Federal Ministry of Finance, and C.-D. Quassowski, Regierungsdirektor in that ministry, acting as Agents,

— the Austrian Government, by C. Pesendorfer, Oberrätin in the Federal Chancellor's Office, acting as Agent,

— the Commission of the European Communities, by E. Traversa, Legal Adviser, and T. Figueira, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Portuguese Government, represented by V. Guimarães, of the Centre for Fiscal Studies of the Directorate-General for Taxes of the Ministry of Finance, acting as Agent, and the Commission, represented by E. Traversa and T. Figueira, at the hearing on 18 May 2000,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2000,

gives the following

Judgment

1 By order of 28 October 1998, received at the Court on 7 December 1998, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) seven questions on the interpretation of Article 4(5) of 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').

2 Those questions were raised in proceedings between Câmara Municipal do Porto (Oporto City Council, hereinafter 'the CMP') and Fazenda Pública (the Treasury) concerning the liability of the CMP to value added tax (VAT) in respect of its activities of letting spaces for the parking of vehicles.

The Sixth Directive

3 Article 4 of the Sixth Directive defines taxable persons for VAT purposes. With respect to bodies governed by public law, Article 4(5) provides:

'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 Article 13 or [Article] 28 as activities which they engage in as public authorities.'

4 Article 13 of the Sixth Directive provides that certain activities or transactions are to be exempt from VAT. Among them, Article 13B(b) mentions the leasing or letting of immovable property, excluding certain transactions, which include the letting of premises and sites for parking vehicles.

5 Annex D to the Sixth Directive lists 13 classes of activity, which are not relevant to the activity at issue in the main proceedings.

Portuguese legislation

6 Article 2(2) of the Portuguese VAT Code provides that the State and other legal persons governed by public law are not to be taxable persons for VAT purposes where they carry out transactions in the exercise of their public powers, even if they receive fees or other consideration on that occasion, in so far as their treatment as non-taxable persons does not cause distortions of competition.

7 Article 2(3) of the VAT Code provides that the State and other legal persons governed by public law are in any event to be taxable persons for VAT purposes when engaging in certain activities and for the ensuing taxable transactions, unless it is shown that those activities are negligible.

8 Finally, Article 2(4) of the VAT Code provides that, for the purposes of paragraphs 2 and 3 of that article, the Minister for Financial Affairs and the Plan is to define case by case the activities which may cause distortions of competition and those which are negligible.

The main proceedings and the questions referred for a preliminary ruling

9 The Portuguese tax authorities claimed from the CMP the sum of PTE 98 953 911, representing VAT on the receipts from parking meters and car parks of the city of Oporto for 1991 and 1992 and January to April 1993.

10 Since it considered that it was not a taxable person for VAT purposes, in that it had acted within the framework of the exercise of its public powers, the CMP brought an action for breach of law before the Tribunal Tributário de Primeira Instância (Tax Court of First Instance), Oporto, against the notices of assessment issued by the VAT authorities.

11 By its judgment the Tribunal Tributário granted the CMP's application in so far as it related to its receipts from the operation of the Trindade car park, which was on the public property of the city, and from the operation of parking meters installed on public highways. The court ruled that the application was unfounded, on the other hand, as regards the revenue from the operation of car parks forming part of the city's private property.

12 As neither party accepted the part of the judgment which was unfavourable to it, they both appealed to the Supremo Tribunal Administrativo.

13 In those circumstances, the Supremo Tribunal Administrativo referred the following questions to the Court for a preliminary ruling:

'1. Does the expression "activities or transactions in which they engage as public authorities" in the first subparagraph of Article 4(5) of Directive 77/388/EEC (the Sixth Directive) cover the letting of spaces for the parking of vehicles (both on streets and in car parks) by the public authorities (a municipality)?

2. 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?

3. 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?

4. Will the public authorities always be regarded as taxable persons where 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?

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

6. 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 13B(b)(2) of the Sixth Directive?

7. 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?'

Question 1

14 By its first question, the national court essentially asks whether the letting of spaces for the parking of vehicles is an activity which, when carried out by a body governed by public law, may be regarded as being engaged in by that body as a public authority, within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive.

15 On this point, it should be noted that, as the Court has held on numerous occasions, it is clear from that provision, when examined in the light of the aims of the Sixth Directive, that two conditions must be fulfilled for the rule of treatment as a non-taxable person 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).

16 As regards the latter condition, 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 (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 3233, paragraph 15, and Case C-4/89 *Comune di Carpaneto Piacentino and Others* v *Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* [1990] ECR I-1869, paragraph 10).

17 It is thus clear from the settled case-law of the Court that activities pursued as public authorities within the meaning of the first subparagraph 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 economic operators (see in particular Case C-276/97 *Commission* v *France*, [2000] ECR I-6251, paragraph 40, Case C-358/97 *Commission* v *Ireland*, [2000] ECR I-6301, paragraph 38, Case C-359/97 *Commission* v *United Kingdom*, [2000] ECR I-6355, paragraph 50, Case C-408/97 *Commission* v *Netherlands*, [2000] ECR I-6417, paragraph 35, and Case C-260/98 *Commission* v *Greece*, [2000] ECR I-6537, paragraph 35.

18 In the main proceedings, the activity engaged in by CMP, which is a body governed by public law within the meaning of Article 4(5) of the Sixth Directive, consists in making available to motorists in return for financial consideration spaces for parking their vehicles, either on the public highway or in car parks established on the city's public property, its private property, or land belonging to private individuals.

19 In determining whether such an activity is engaged in by the CMP as a public authority, it must be noted, first, that this cannot depend on the subject-matter or purpose of the activity (Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, paragraph 13).

20 Similarly, whether or not CMP owns the land on which the activity at issue in the main proceedings is carried on, or whether that land is part of its public or private

property, is not in itself determinative of whether it is carrying on that activity as a public authority.

21 The national court must, in accordance with the case-law referred to in paragraphs 16 and 17 above, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators.

22 The fact that the pursuit of an activity such as that at issue in the main proceedings involves the use of public powers, such as authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time, shows that this activity is subject to a public law regime.

23 In view of the nature of the analysis to be carried out, however, as the Court has already held, it is for the national court to classify the activities at issue in the light of the criterion adopted by the Court (Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, paragraph 16, and Case C-4/89 *Comune di Carpaneto Piacentino*, paragraph 11).

24 The answer to the first question must therefore be that the letting of spaces for the parking of vehicles is an activity which, where it is carried on by a body governed by public law, is carried on by that body as a public authority within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive if it is carried on under a special legal regime applicable to bodies governed by public law. That is the case where the pursuit of the activity involves the use of public powers.

Question 4

25 By its fourth question, which should be examined immediately after the first, the national court seeks to know whether the third subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that bodies governed by public law are necessarily regarded as taxable persons in respect of their non-negligible activities, or whether the criterion of the negligible scale of those activities applies only to the activities listed in Annex D to the Sixth Directive.

26 On this point, the Court has held that the third subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that under that provision the Member States are free to exclude the activities listed in Annex D from the scope of compulsory tax liability in so far as they are negligible, but are not required to do so (Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, paragraph 27).

27 It follows from that interpretation that the third subparagraph of Article 4(5) of the Sixth Directive gives Member States the option of taking account of the negligible scale of activities or transactions engaged in by bodies governed by public law, in order to exclude them from being taxable persons for VAT, solely with respect to the activities set out in Annex D.

28 The answer to the fourth question must therefore be that the third subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that bodies governed by public law are not necessarily regarded as taxable persons in respect of the activities they engage in which are not negligible. Only if those bodies engage in an activity or perform a transaction listed in Annex D to the Sixth Directive may the criterion of the negligible scale of that activity or transaction be taken into account with the aim, if national law makes use of the option provided for in the third subparagraph of Article 4(5) of the Sixth Directive, of excluding them from being taxable persons for VAT purposes where their activities are negligible.

Questions 2 and 5

29 By its second and fifth questions, which should be examined together, the national court essentially asks whether the Finance Minister of a Member State may be authorised by a national law to define, first, the activities which are liable to bring about significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive and, second, the activities which are negligible within the meaning of the third subparagraph of Article 4(5) of the Sixth Directive.

30 It should be recalled that under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods.

31 In accordance with that provision, the Court has already held that the second subparagraph of Article 4(5) of the Sixth Directive, under which the Member States are required to ensure that bodies governed by public law are treated as taxable persons where the contrary would lead to significant distortions of competition, does not, on the other hand, require them to transpose that criterion literally into their national law or to lay down precise quantitative limits for treatment as non-taxable persons (Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, paragraph 23).

32 Similarly, Member States are free to choose, from the various methods of achieving the results defined by the second and third subparagraphs of Article 4(5) of the Sixth Directive, that of entrusting an administrative body with the task of specifying the situations in which an activity carried on by a body governed by public law may be regarded as bringing about significant distortions of competition or as being negligible and of applying those criteria to individual cases, provided that its decisions on application may be reviewed by the national courts.

33 That conclusion is consistent with the settled case-law of the Court, relied on by the Commission, under which mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting proper fulfilment of obligations under the Treaty (see in particular Case C-203/98 *Commission* v *Belgium* [1999] ECR I-4899, paragraph 14).

34 A distinction must be drawn between the case where a Member State attempts to ensure the transposition of a directive by giving an administrative authority a discretionary power to apply its provisions, without circumscribing the administrative authority's discretion, and the case, examined here, where the national legislature adopts, in a binding rule of law, the criteria set out in the directive and then leaves it to an administrative authority to implement them.

35 The answer to the second and fifth questions must therefore be that the Finance Minister of a Member State may be authorised by a national law to define what is covered by, first, the concept of significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive and, second, the concept of negligible activities within the meaning of the third subparagraph of Article 4(5) of the Sixth Directive, provided that his decisions of application may be reviewed by the national courts.

Question 3

36 By its third question, the national court essentially asks the Court whether, if the provision of national law which gives the Finance Minister power to specify the activities which may lead to significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive is unconstitutional, although consistent with Community law, the national court

must comply with the national constitution or apply the principle of the primacy of Community law.

37 The Sixth Directive does not require the Member States to select from the possible methods of transposition that of giving an administrative authority power to specify what is covered by the concept of significant distortions of competition.

38 It is therefore possible for a Member State to adopt other methods of transposition which are consistent both with the Sixth Directive and with the Member State's constitution.

39 In those circumstances, there is no incompatibility as contemplated by the national court between the second subparagraph of Article 4(5) of the Sixth Directive and the national constitution. There is therefore no need to answer the question.

Question 6

40 By its sixth question, the national court seeks to know whether the fourth subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that the absence of an exemption for the letting of spaces for the parking of vehicles, which follows from Article 13B(b) of that directive, prohibits the Member States from treating that activity, when engaged in by a body governed by public law, as one engaged in by that body as a public authority.

41 It must be noted that the fourth subparagraph of Article 4(5) of the Sixth Directive, besides activities of bodies governed by public law which are not taxable by virtue of the first subparagraph of that provision, gives Member States the option of excluding bodies governed by public law from treatment as taxable persons in respect of activities exempt from VAT *inter alia* under Article 13 of that directive (see Case C-247/95 *Finanzamt Augsburg-Stadt* v *Marktgemeinde Welden* [1997] ECR I-779, paragraph 19).

42 The fourth subparagraph of Article 4(5) of the Sixth Directive is thus not intended to limit the benefit of treatment as a non-taxable person for VAT under the first subparagraph of that provision, but on the contrary permits Member States to extend that treatment to certain activities pursued by bodies governed by public law which, although not activities engaged in by those bodies as public authorities, may nevertheless be considered as such under the fourth subparagraph of that provision.

43 Where those activities are thus treated as activities engaged in by bodies governed by public law acting as public authorities, they must also, in order to be non-taxable under the first paragraph of Article 4(5) of the Sixth Directive, satisfy the conditions in the second subparagraph of that provision (see *Marktgemeinde Welden*, paragraph 21).

44 The letting of spaces for the parking of vehicles is excluded from the activities exempted under Article 13B(b) of the Sixth Directive by point 2 of that provision, with the consequence that such an activity cannot be treated under the fourth subparagraph of Article 4(5) of the Sixth Directive as an activity engaged in by a body acting as a public authority within the meaning of the first subparagraph of that provision, if it does not in itself satisfy that condition.

45 Consequently, as the Advocate General observes in point 92 of his Opinion, it may not be inferred from the fourth subparagraph of Article 4(5) read together with Article 13B(b)(2) of the Sixth Directive that the provision of parking spaces never constitutes an activity of a public authority, since where that activity is carried on by a public body acting as a public authority it is on the sole basis of the first subparagraph of Article 4(5) of the Sixth Directive that it is not taxable, and there is no need to have recourse to the fourth paragraph of that provision.

46 The answer to the sixth question must therefore be that the fourth subparagraph of Article 4(5) of the Sixth Directive must be interpreted as meaning that the absence of an exemption for the letting of spaces for the parking of vehicles, which follows from Article 13B(b) of the directive, does not prevent bodies governed by public law which carry out that activity from being treated as non-taxable persons for VAT in respect of it, where the conditions stated in the first and second subparagraphs are satisfied.

Question 7

47 The national court's seventh question should be understood as asking whether a national court may decide of its own motion to refer a question of interpretation of the Sixth Directive to the Court and whether, after having done so, it must draw the consequences of the Court's decision in the main proceedings.

48 It is settled case-law that national courts are entitled, and in certain cases obliged, to refer a question of the interpretation or validity of Community law to the Court, either of their own motion or at the request of the parties to the main proceedings, if they consider that a decision on that point by the Court is necessary to enable them to give judgment (see in particular Case 166/73 *Rheinmühlen-Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, paragraph 3, and Case 126/80 *Salonia* v *Poidomani and*

Giglio [1981] ECR 1563, paragraph 7). That power to raise of its own motion a question of Community law presupposes that the national court considers either that Community law must be applied and, if necessary, national law disapplied or that national law must be interpreted in a way that conforms with Community law (see Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* v *Sociale Verzekeringsbank* [1991] ECR I-3757, paragraph 13).

49 It is also settled case-law that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings (see in particular Case 52/76 *Benedetti* v *Munari* [1977] ECR 163, paragraph 26, and the order in Case 69/85 *Wünsche Handelsgesellschaft* [1986] ECR 947, paragraph 13).

50 The answer to the seventh question must therefore be that a national court is entitled, and in certain cases obliged, to refer to the Court, even of its own motion, a question concerning the interpretation of the Sixth Directive, if it considers that a decision on the point by the Court is necessary for it to give judgment, and once it has made that reference it is bound by the Court's decision when it gives final judgment in the main proceedings.

Costs

51 The costs incurred by the Portuguese, German and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by order of 28 October 1998, hereby rules:

1. The letting of spaces for the parking of vehicles is an activity which, where it is carried on by a body governed by public law, is carried on by that body as a public authority within the meaning of the first subparagraph of Article 4(5) of 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, if it is carried on under a special legal regime applicable to bodies governed by public law. That is the case where the pursuit of the activity involves the use of public powers.

2. The third subparagraph of Article 4(5) of Sixth Directive 77/388 must be interpreted as meaning that bodies governed by public law are not necessarily regarded as taxable persons in respect of the activities they engage in which are not negligible. Only if those bodies engage in an activity or perform a transaction listed in Annex D to that directive may the criterion of the negligible scale of that activity or transaction be taken into account with the aim, if national law makes use of the option provided for in the third subparagraph of Article 4(5) of Sixth Directive 77/388, of excluding them from being taxable persons for value added tax purposes where their activities are negligible.

3. The Finance Minister of a Member State may be authorised by a national law to define what is covered by, first, the concept of significant distortions of competition within the meaning of the second subparagraph of Article 4(5) of Sixth Directive 77/388 and, second, the concept of negligible activities within the meaning of the third subparagraph of Article 4(5) of that directive, provided that his decisions of application may be reviewed by the national courts.

4. The fourth subparagraph of Article 4(5) of Sixth Directive 77/388 must be interpreted as meaning that the absence of an exemption for the letting of spaces for the parking of vehicles, which follows from Article 13B(b) of that directive, does not prevent bodies governed by public law which carry out that activity from being treated as non-taxable persons for value added tax in respect of it, where the conditions stated in the first and second subparagraphs are satisfied.

5. A national court is entitled, and in certain cases obliged, to refer to the Court, even of its own motion, a question concerning the interpretation of Directive 77/388, if it considers that a decision on the point by the Court is necessary for it to give judgment, and once it has made that reference it is bound by the Court's decision when it gives final judgment in the main proceedings.

La Pergola Edward Jann

Delivered in open court in Luxembourg on 14 December 2000.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber