OPINION OF MR ADVOCATE GENERAL LENZ delivered on 24 February 1988 *

Mr President,
Members of the Court,

A — The facts

1. The proceedings under Article 169 on which I today give my opinion relate to the question whether the Italian Republic, the defendant, correctly applied a specific value-added tax scheme intended for certain farmers.

2. Article 25 of the Sixth Directive on value-added tax [1] (the 'Sixth Directive') gives Member States the power to apply a specific regime to farmers in respect of whom the operation of the normal value-added tax scheme or, where appropriate, the simplified scheme, would encounter difficulties. The farmers concerned, referred to in the Sixth Directive as 'flat-rate farmers', receive, pursuant to Article 25 (1), (3) and (6), flat-rate compensation for the value-added tax charged on goods and services supplied to them, which is paid either by the taxable person to whom they supply goods or services, or by the public authorities.

3. In order to implement this scheme, Member States fix, where necessary, the flat-rate compensation percentages which are applied to the price of the agricultural products and agricultural services supplied by the flat-rate farmers to taxable persons other than a flat-rate farmer. This compensation excludes all other forms of deduction of input tax. The flat-rate compensation percentages are based on the macro-economic statistics for flat-rate farmers alone for the preceding three years. They may not have the effect of obtaining for flat-rate farmers refunds greater than the value-added tax charges on inputs. Member States must notify the Commission of the flat-rate compensation percentages before applying them.

4. The general flat-rate scheme for farmers introduced in Italy in 1979 by Article 34 of Decree No 633 of the President of the Republic of 26 October 1972 instituting value-added tax in order in particular to give effect to the Sixth Directive, applies to all goods and services. It does not therefore include the restriction contained in Article 25 (5) of the Sixth Directive which authorizes the flat-rate scheme only for goods and services supplied to taxable persons other than flat-rate farmers. Flat-rate compensation amounts were also introduced in 1979.

5. When these flat-rate compensation percentages were increased in 1981 in respect of the products in question, namely beef, pork and fresh milk, the Commission of the European Communities objected to

* Translated from the German.

1 — 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 L 145, 13.6.1977, p. 1).

the fact that the Italian scheme included supplies made by flat-rate farmers to other flat-rate farmers. It also informed Italy that it considered the compensation rate of 15%[2] to be too high. Finally, it challenged the method of calculation used in order to determine the Italian compensation rates, as it did not cover the requisite period of three years and used macro-economic statistics relating to the whole of Italian agriculture and not to flat-rate farmers alone, as required by the Sixth Directive. Those complaints were repeated in the reasoned opinion of 25 March 1985.

6. The defendant did not formally state its position within the period laid down by the applicant in the reasoned opinion, or before this action was brought.

7. Within the framework of checking procedures relating to the collection of the Communities' own resources, whereby the transactions carried out by flat-rate farmers must be taken into consideration under Article 5 of Council Regulation No 2892/77 of 19 December 1977,[3] the Italian authorities acknowledged that the flat-rate compensation had entailed, in respect of the years 1979 to 1982, over-compensation of the value-added tax charged on inputs.

8. The applicant claims that the Court should:

Declare that, by introducing and maintaining in force a flat-rate scheme which is incompatible with Article 25 (3) and (5) of the Sixth Directive, Council Directive 77/388/EEC of 17 May 1977, as regards its unlimited nature and the percentages of value-added tax refunds paid to producers in respect of beef, pork and fresh milk, the Italian Republic has failed to fulfil its obligations under the EEC Treaty and the Sixth Directive;

Order the defendant to pay the costs.

9. The defendant submits that the action should be dismissed and the applicant ordered to pay the costs.

10. The defendant maintains that Article 25 (8) of the Sixth Directive authorizes the Italian flat-rate compensation scheme to be applied over and above the terms of Article 25 (5) thereof. It considers that the level of flat-rate compensation percentages is justified. It bases them on the macro-economic statistics for the whole of Italian agriculture, which must, however, be corrected to take account of the specific situation of flat-rate farmers. It rejects a number of allegations which, as the applicant only made them in its reasoned opinion and in the application, but not in its letter of formal notice, are said to be inadmissible.

11. At the Court's request, the parties gave further information. In particular, the defendant produced the following macro-economic statistics relating to flat-rate farmers alone concerning final production and value-added tax charged on inputs:

2 — It was however reduced to 14% by Ministerial Decree of 25 February 1983.

3 — Council Regulation No 2892/77 of 19 December 1977 implementing in respect of own resources accruing from value-added tax the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ L 336, 27.12.1977, p. 8).

For the years 1978 to 1980 the final production (in million lire) reached 5 193 200, 6 092 400 and 7 129 300 respectively, and the VAT on inputs (in million lire) reached 329 500, 423 600 and 537 300 respectively. Comparing the value-added tax charged on inputs with the equivalent final production, one arrives at the figures of 6.34, 6.95 and 7.54% respectively.

12. I will revert to the other arguments of the parties when necessary during the course of this opinion. It should, however, be stated that a large number of the questions raised, in particular as regards indirect evidence of over-compensation of the value-added tax charged on inputs, have been dealt with thanks to the information provided by the defendant at the Court's request. For the rest, I refer to the Report for the Hearing.

B — Analysis

13. The applicant is thus alleging that the defendant has failed to comply with the Sixth Directive and hence with its obligations under the EEC Treaty in three respects:

the flat-rate compensation percentages are based on erroneous statistics since they are derived from macro-economic statistics relating to the whole of agriculture and not to statistics calculated in respect of flat-rate farmers alone;

the sphere of application of the flat-rate scheme in question is too wide because it also includes goods and services supplied to flat-rate farmers;

the flat-rate compensation percentages for beef, pork and fresh milk are excessively high.

1. *The macro-economic statistics used*

14. The defendant does not dispute that it used macro-economic statistics relating to the whole of agriculture and did not confine the statistics to figures relating to flat-rate farmers. After seeking initially to justify its position by pointing to the unavailability of appropriate statistics relating to flat-rate farmers alone, it did however produce, at the Court's request, the macro-economic statistics for flat-rate farmers envisaged in the Sixth Directive.

15. The applicant's complaint is therefore well founded.

2. *The sphere of application of the flat-rate scheme*

16. It is not disputed that the defendant's flat-rate scheme goes beyond the flat-rate scheme provided for in Article 25 (5) of the Sixth Directive, as it is also applicable to goods and services supplied to flat-rate farmers. The question arises therefore whether the scheme provided for in Article 25 (5) is exhaustive, or whether an extension of the flat-rate scheme may be justified under Article 25 (6), (7) and (8).

17. Under Article 25 (8) of the Directive, the flat-rate compensation for all supplies of agricultural products and agricultural services other than those covered by Article 25 (5), is deemed to be paid by the purchaser or customer. The terms used do not enable this deeming provision to be clearly understood, as is demonstrated by the fact that the applicant interpreted them differently in the reasoned opinion and the application, on the one hand, and in the reply, on the other. It first argued that Article 25 (8) applied only to cases where the flat-rate scheme was permissible but ended up by arguing that this provision applied to situations unrelated to the flat-rate scheme. In the case of goods or services supplied to other flat-rate farmers or to non-taxable persons, it was not necessary to apply the flat-rate compensation percentages since, under Article 25 (8) of the Sixth Directive, payment of the compensation is deemed to be made in the payment by the purchaser of a global price. As such purchasers are not taxable persons, it would be superfluous to charge them a flat-rate amount, as they would not be able to deduct the tax paid on inputs.

18. This argument of the applicant seems to me to be convincing, especially as it is confirmed by another line of reasoning. As, under the terms of the seventh subparagraph of Article 25 (2), the flat-rate compensation percentages are fixed by Member States in such a way as to enable flat-rate farmers in the case specified in Article 25 (5) to benefit from flat-rate compensation for the value-added tax charged on inputs, there is no further scope for the application of flat-rate compensation percentages, since otherwise there would be over-compensation of the value-added tax charged on inputs. That is, however, not permitted by Article 25 (3) of the Sixth Directive.

19. It should therefore be held that the application of the flat-rate scheme cannot go beyond the cases mentioned in Article 25 (5) of the Directive. The applicant's complaint that the defendant's flat-rate scheme infringes this principle is therefore well founded.

3. *The amount of the flat-rate compensation percentages for beef, pork and fresh milk*

20. The applicant alleges that the defendant fixed flat-rate compensation percentages which were too high, thereby over-compensating for the value-added tax charged on inputs and granting to flat-rate farmers a subsidy contravening Article 25 (3) of the Sixth Directive.

21. As the defendant undeniably did not adhere to the method of calculation indicated in Article 25 (3) of the Sixth Directive for fixing the flat-rate compensation percentages on the ground that macro-economic statistics relating to flat-rate farmers alone for the three preceding years were not available, the applicant was only indirectly able to form an idea of the amount of such percentages which was actually justified. Thus, the applicant came to the overall conclusion that flat-rate compensation of only 7% was justified rather than 14%.

22. The defendant sought to justify the amount of the flat-rate compensation percentage by the fact that, in the first place, the macro-economic statistics for the

whole of the agricultural sector in question had to be corrected by reason of the specific structure of flat-rate farming, consisting of small farms and family businesses. It also relied in particular at the hearing, on Italy's low rate of self-sufficiency as regards the products in question and the difficult economic situation of the farmers concerned.

23. Although it is not for the Court in these proceedings to calculate the correct amount of the flat-rate compensation percentage, it does seem to be necessary to determine its amount in a sufficiently reliable manner in order to be able to assess whether the percentage applied by the defendant is in fact too high.

24. As the defendant has produced, at the Court's request, additional figures, which are not, however, entirely exhaustive, it is no longer necessary to assess the indirect evidence adduced by the applicant, or even to consider the defendant's argument to the effect that certain evidence adduced by the applicant was inadmissible because it was not contained in the applicant's letter of formal notice.

25. Examination of the at first sight somewhat complicated scheme resulting from the combination of Article 25 and Annex C of the Sixth Directive reveals that the purpose and technique of the method of calculation originate from the following considerations.

26. The aim of the scheme is to compensate all flat-rate farmers for the value-added tax which they have paid on goods and services purchased by them for their holdings in so far as this tax would be deductible under Article 17 of the Sixth Directive by a farmer subject to the normal value-added tax scheme. Such compensation is paid in accordance with the method opted for by the defendant under Article 26 (6) (a) of the Sixth Directive in such a way that the flat-rate farmer, when he supplies the goods and services mentioned in Article 25 (5) of the directive, invoices to the buyer the flat-rate compensation percentage fixed by the State and keeps it for his own account. The purchaser is then entitled to deduct the flat-rate compensation paid to flat-rate farmers as an input tax, when he pays his own value-added tax.

27. Since the flat-rate compensation is designed to neutralize the value-added tax charged on inputs and must be operated on the basis of the transactions referred to in Article 25 (5), only two statistics are decisive in calculating the correct flat-rate compensation percentage: The total amount of value-added tax charged on inputs and the sum total of the transactions referred to in Article 25 (5) of the Sixth Directive.

28. But a difficulty may arise in the context of the application of this method of calculation which is connected with the information which the defendant has given at the Court's request. It was asked to produce macro-statistics of flat-rate farmers in the sector concerned. It supplied information relating to inputs and outputs, but for final production it gave the same figures as for outputs. It has provided no additional information as to whether, and if so in what amount, transactions were carried out which do not fall within Article 25 (5) of the Sixth Directive. In the calculation to be carried

out in this respect, any transactions not falling within Article 25 (5) must consequently be left out of account, particularly as the defendant has not challenged this method of calculation which the applicant also used in its observations on the defendant's replies.

29. If the statistics on outputs supplied by the defendant for the years 1978, 1979 and 1980 are now compared with the overall value-added tax charged on inputs, the flat-rate compensation for those years is 6.34, 6.95 and 7.54% respectively or, weighted over the three years, 7.007%.

30. It may be that these percentages are slightly too low, if there exist transactions not mentioned by the defendant which do not fall within Article 25 (5) of the Sixth Directive. However, the flat-rate compensation fixed by the defendant at 14% is clearly too high in relation to the figures calculated. The applicant's submissions on this point too are, therefore, well founded.

C — Conclusions

31. Consequently, I suggest that the Court's decision should be as follows:

(1) By establishing and maintaining in force for flat-rate farmers, a flat-rate scheme whose sphere of application is too wide and whose flat-rate compensation percentage is too high for beef, pork and fresh milk in contravention of Article 25 (3) and (5) of the Sixth Council Directive (77/388/EEC of 17 May 1977) the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

(2) The Italian Republic should bear the costs.