OPINION OF ADVOCATE GENERAL GULMANN
delivered on 13 July 1993 *

Mr President,
Members of the Court,

1. The Commission in the present cases seeks declarations that the French Republic, the Grand Duchy of Luxembourg and the Kingdom of Spain have introduced rules resulting in a failure by those Member States to comply with Article 9(2)(e) of the Council's Sixth VAT Directive. [1] The background to the cases lies in a disagreement between the parties as to the correct interpretation of the term 'advertising services' as used in Article 9(2)(e) of the directive.

2. Title VI of the directive sets out the rules which determine the *place of taxable transactions*. The rules are important in cases where the supply of goods and services affects several countries. The main purpose of the rules is to prevent a transaction being taxed twice or not being taxed at all.

Article 8 provides a definition for the place of supply of goods, while Article 9 determines the place where services are supplied.

Under Article 9(1), 'the place where a service is supplied shall be deemed to be the place where the supplier has established his business ...'. The Member State which is competent to levy the tax is thus that in which *the person supplying the service is established.*

Article 9(2) contains a series of exceptions to this general rule. Places of supply other than the supplier's place of business are laid down for certain specified services, for instance, the place where services are physically carried out (such as in the case of entertainment activities). Article 9(2)(e) provides that the *place where the customer is established* is the relevant place of supply for a number of practically important transactions (transfer of exclusive rights, services of lawyers, accountants and other consultancy services, banking transactions, and so forth). The list includes 'advertising services'.

If a transaction is regarded as being an advertising service, it will be taxable in the country of the customer, whereas if this is not so it will, in accordance with the general rule, be taxable in the country of the person supplying the service unless it comes under one of the other exceptions set out in Article 9(2).

The seventh recital in the preamble to the directive contains the following important contribution to an understanding of the

* Original language: Danish.

1 — Directive 77/388 of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

relationship between Article 9(1) and (2): '... the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards ... the supply of services; ... although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being *in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods*' (emphasis added).

3. The Commission claims that the three Member States have failed to fulfil their obligations under the directive by not bringing specified transactions within the scope of the Article 9(2) provision on advertising services.

France and Spain argue that the applications should be dismissed. Luxembourg did not lodge a defence.

4. As already mentioned, the dispute has its origin in the differing views of the parties on the correct interpretation of the term 'advertising services' as used in Article 9(2). The Commission argues in favour of a broad interpretation, while the French and Spanish Governments support a more restricted interpretation.

5. According to the Commission's statements, the cases concern clearly specified national rules or administrative practices regarding the definition of advertising services for the purposes of national VAT legislation. In this connection, the Commission also pointed out at the hearing that it merely wishes the Court to declare that the rules and practices referred to in the applications are contrary to the directive.

6. So far as France is concerned, the case involves rules set out in an administrative instruction of 14 December 1983 which state that the following services are not to be regarded as advertising services:

'(a) the invoicing by an advertising undertaking of costs which are regarded as the consideration for the sale of movable tangible property by that undertaking to its client, for example, the invoicing by an advertising undertaking to its client of goods intended to be given away free in connection with games, lotteries, gifts, competitions ... or exhibited in sales premises for the display of products;

(b) services which may be supplied by an advertising undertaking when it is employed in connection with various events such as recreational functions, cocktail parties, etc.;

(c) the production, in the strict sense, of aids for advertising, for example, the printing of advertising material by a printer, or the construction of an advertisement hoarding.'

In the case of Luxembourg, the Commission argues that it is contrary to the directive for the authorities, on their own admission, to engage in an administrative practice under which the

following transactions are not treated as advertising services within the meaning of the directive:

— the sale of movable tangible property in connection with an advertising campaign;

— services provided for public-relations purposes in connection with events such as press conferences, seminars, cocktail parties, recreational functions, and so on;

— letting of sites for advertising purposes.

So far as Spain is concerned, the Commission takes the view that the failure of national administrative practice to treat the following as advertising services is contrary to the directive: 'marketing carried out by way of services provided in connection with catering or recreational activities, such as lunches, dinners, entertainment events, games, competitions, parties and other similar events'.

7. In order for the Court to find against the Member States in question, it is sufficient if it is possible to rule that the above exceptions to the rule on advertising services in the directive are too wide.

I stress this because I take the view that it will scarcely be possible, or at any rate inappropriate, to consider, on the basis of the information in the present cases, how the term 'advertising services' within the meaning of the directive should be interpreted in general. For the Court to give a ruling, it is not necessary that it should take the view that the definition of advertising services which the Commission considers to be the correct one will be appropriate in all circumstances.

8. The Court will of course have to address the issues in dispute in order to determine whether the Commission's views can be accepted. However, as will become clear from what follows, this can be done without the Court's binding itself to a general and abstract definition of the disputed term, and therefore without the Court's addressing certain questions of demarcation which it may at present be advisable to leave to the Member States and the Commission to attempt to resolve within the context of the Advisory Committee on VAT, in such a way that agreement can be reached on a common and practically applicable definition of the concept of advertising services, as used in the directive.

This may be all the more advisable in view of the fact that the French and Spanish Governments have pointed out that in the Committee's negotiations to date, Member States other than the defendants in the present cases have also expressed doubts as to whether the Commission's view is correct in all respects. Furthermore, the two Governments have questioned whether it is true, as the Commission argues, that the disputed provision continues to be correctly and uniformly applied in all the Member States against which proceedings have not been brought. [2]

2 — The Commission's argument on this point now also applies to Ireland. The Commission had originally brought similar proceedings against Ireland at the same time as the present three cases. After the Irish Government had acknowledged that the Commission's submissions were well founded, the case was withdrawn.

9. In my opinion, the Court's judgments in the present cases will form a sound basis for further negotiations on a practicable definition of the provision's scope.

10. When the Court comes to consider the cases, it may take as its starting point one single and incontrovertible fact. As used in Article 9(2)(e), the term 'advertising services' must be uniformly interpreted and applied in the Member States. This is also a matter on which the parties are in agreement. Compliance with that requirement is absolutely vital in order to ensure that the scope of national VAT legislation can be rationally delimited and that conflicts of jurisdiction can be avoided. [3]

11. Essentially, the Commission argues that the concept of advertising services, for the purposes of the directive, covers all services — irrespective of their nature — which are provided by advertising agencies and are designed to promote the sale of goods and services.

The French and Spanish Governments argue that the provision on advertising services in Article 9(2)(e), along with the directive's other provisions, refers to specific transactions which are characterized according to their nature and are advertising services in the narrow sense. Thus, the French Government defines advertising services, within the meaning of the directive, as services which contribute to the production and dissemination of one or more advertisements intended to advertise a product or the taxable person responsible for the sale of that product, irrespective of the method used. The Spanish Government also defines the term as including dissemination by any means whatsoever and preparatory services which are directly linked to or necessary for the dissemination in question.

The main practical consequence of this definition is that the provision does not cover marketing services such as competitions, demonstrations, cocktail parties and supply of goods and so forth in connection with an advertising service.

The two Governments also point out that a uniform legal position will be attained whether one chooses their interpretation or that of the Commission.

12. It is correct that, in order to avoid the double charging of tax or the charging of no tax at all, the only matter of importance is that one single interpretation should be taken as a basis.

It is also correct, as pointed out by the two Governments, that the fact that, according to the Commission, its interpretation of the law is shared by the Member States against which proceedings have not been brought cannot have a determinant bearing on the view taken by the Court.

The decisive factor is how that provision is to be interpreted in the light of its wording, context and objectives.

3 — See the Court's judgment in Case 283/84 *Trans Tirreno Express* v *Ufficio Provinciale IVA* [1986] ECR 231.

13. The Commission initially argued that neither the provision's context nor its objectives can contribute to its interpretation, and that it is for that reason necessary to interpret it on the basis of ordinary usage. [4]

The parties have also discussed how the term 'advertising services' is to be understood — whether by 'the man in the street' or by professionals in the advertising business. These efforts are based on, *inter alia*, the definitions contained in French and Spanish dictionaries.

The two Governments have also based their interpretation on the definitions of the term contained in Directive 84/450 on misleading advertising and Directive 89/552 dealing with transfrontier television broadcasting, [5] as well as that in a Convention of the Council of Europe of 15 March 1989 on transfrontier television broadcasting.

14. I trust that the Court will forgive me if I pass over those arguments, which are set out in more detail in the Reports for the Hearing.

The variety of results to which this attempt at a linguistic interpretation of the provision may lead gives rise by itself to some scepticism regarding the prospects of achieving an authoritative solution on this basis.

Nor is it possible to find any significant interpretative assistance in the definition contained in the abovementioned Community and other measures in view of the fact that they were adopted in different contexts and with different objectives to those relevant in the area of VAT.

15. The most important reason for my rejection of any attempt to resolve the problem of interpretation by means of the natural understanding of the term 'advertising services', however, is that substantial interpretative assistance can be found in the objectives of the provision when considered in the light of the fundamental principles of the system of VAT.

It should be recalled that the preamble to the directive states that the *country of the person to whom the services are supplied* should be the place of supply and consequently the country where the tax is chargeable 'in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods'.

In its reply in the case against Spain, the Commission has also pointed out that the provision should be interpreted in the light of that recital in the preamble.

16. The fundamental principle governing VAT is that it must ultimately be borne by *the end consumer*, that is to say, the person purchasing the product in question, whether that product be in the form of goods or services.

While it is of course correct to point out that the system of VAT contains a number of exceptions to this principle, the principle must determine the interpretation of provisions which do not unequivocally constitute such exceptions.

4 — The Commission refers to the Court's judgment in Case 139/84 *Van Dijk's Boekhuis* v *Staatssecretaris van Financiën* [1985] ECR 1405, in which the word 'made' was interpreted in accordance with common usage.

5 — See OJ 1984 L 250, p. 17, and OJ 1989 L 298, p. 23, respectively.

17. In accordance with the abovementioned recital in the preamble to the directive, Article 9(2)(e) designates the country of the person to whom the services are supplied as being the country where the tax is chargeable, subject to the specific condition that the services in question are supplied between *taxable* persons and that the *cost of the services is included in the price of the goods.*

Services which are designed to promote the sale of goods or services to the *end consumer* are supplied by the *person supplying the service* (advertising agency) to *the trader* (manufacturer or dealer) who wishes to sell a product to the end consumer.

The present cases involve transactions between *taxable persons* (the trader is not the end consumer) and *costs which are included in the price which the end consumer is required to pay for the supplied product* and on which he will be required to pay VAT in the country where that tax is ultimately paid.

18. Reference was made in the case brought against France to a decision given by the Cour Administrative d'Appel de Paris on 10 December 1991 in a case where a French advertising agency had been commissioned by the Belgian Bass brewery to conduct an extensive marketing campaign designed to increase French consumers' familiarity with 'Bass' beer. Among other things, the French advertising agency organized on one of the quays along the Seine a promotional panorama consisting of a reconstructed English port, a terrace, a raised stage and a ship, which all together was supposed to constitute an advertisement for 'Bass' beer. The setting thus created was used for free sampling of 'Bass' beer by members of the public, and personalities from the worlds of sport, television and entertainment were invited along. The publicity event had been announced in the press and on local radio stations, and no form of tax payment was requested in that connection. The French authorities formed the view that the expenses associated with the event, which related to invitations, hire of the ship, fees for the personalities, the cost of the raised stage and security, as well as a portion of salaries, did not arise from advertising services within the meaning of the directive. The advertising agency took the opposite view.

The Cour d'Appel ruled that the term 'advertising services' covers 'all transactions which in fact make up such services. If all the various actions performed have one and the same objective, namely to provide advertising, they must for that reason — and irrespective of how they are presented to the public — be treated as direct links in the performance of a single service, from which they cannot individually be distinguished. On the basis of the foregoing, the [advertising agency] provided "advertising services" through all the transactions effected in performance of the advertising contract for "Bass" beer, in respect of which an overall price had been agreed. ... Since it is common ground that the recipient of the advertising services provided by [the advertising agency] is subject to VAT in another Member State of the Community, the argument put forward in this case by the government authorities [namely, that VAT was payable in France in respect of those services] cannot be accepted.'

That decision, against which an appeal was brought before the Conseil d'Etat, is in my opinion correct and is also a good illustration of the practical significance of the problems here under discussion.

19. In my view, it can be assumed that Article 9(2)(e) must apply at least in those cases where a trader resident in one country has made use of an advertising agency resident in another country with a view to organizing an advertising campaign and where the various methods employed in that campaign are genuinely intended to promote the sale of the products of the particular trader in question.

There is, in such a case, no reason to confer a narrow scope on the concept of advertising services. There is no reason to draw a distinction between the methods employed according to whether they can be regarded as belonging to the central features of the concept of advertising services or whether other marketing methods have been employed, such as competitions and demonstrations, or again whether the advertising agency's expenses are in respect of advertising services in the narrow meaning or whether it has also incurred expenses with regard to competition prizes, hire of premises or food and drink in connection with advertising services in the wide meaning.

The determinant factor is that the expenses should have been genuinely incurred for the purpose of promoting the sale of the products of the customer of the advertising services and that they are for that reason included in the price which the end consumer pays for the product.

20. There is also a more practical reason for preferring this interpretation of the term 'advertising services'. It prevents advertising agencies from dividing up the invoices which they send to their clients into, on the one hand, those relating to advertising services in the narrow sense and on which VAT is payable in the client's country of residence, and, on the other, those which are not regarded as relating to advertising services and on which VAT is payable in the advertising agency's own country of residence, with the result that the client will ultimately have to bear the VAT unless he can obtain a VAT refund under the relevant Community rules. [6]

21. There is, admittedly, a possibility that this wide application of the concept of advertising services may give rise to abuse. Member States must of course be in a position to take action against any such abuse. That is the reason why I have already mentioned that the transactions in question must have the genuine objective of promoting the sale of products.

22. It follows that the definition of the concept of advertising services laid down in French and Spanish law, which has the result that a series of transactions are not treated as advertising services, is contrary to the provision contained in Article 9(2)(e) of the directive. The Commission's application must for that reason be upheld.

23. I have not, in what I have said up to now, considered whether Article 9(2)(e), as argued by the Commission, covers only

6 — According to the information provided by the Spanish Government at the hearing, no VAT refund is payable to the recipient of services excluded from the concept of advertising services. The French Government pointed out that the question whether a VAT refund is payable depends on the nature of the services in question. See also on this point Directive 79/1072 on the harmonization of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11).

services provided by advertising agencies, or whether advertising services, within the meaning of the directive, can also be provided by persons or bodies other than advertising agencies.

Nor have I addressed the issue whether there may be grounds for restricting the scope of the provision in cases where advertising agencies merely provide individual services which are not advertising services in the narrow sense, such as a single event where potential customers of a product are invited to stay at a hotel in order to attend a demonstration of the product.

24. As already mentioned, Luxembourg did not lodge a defence, and in view of this the Commission has requested that the Court give judgment by default, although it has requested the Court not to give judgment prior to the conclusion of the proceedings in the cases brought against France and Spain.

Article 94(2) of the Rules of Procedure provides that the Court shall, before giving judgment by default, consider 'whether the application initiating proceedings is admissible, whether the appropriate formalities have been complied with, and whether the application appears well founded'. [7] Since there is no doubt that the application is admissible and that the appropriate formalities have been complied with, and since in the light of the foregoing it can be assumed that the Commission's application appears to be well founded, the Court should rule against Luxembourg in accordance with that application.

Conclusion

25. I accordingly propose that the Court rule as follows:

(1) By excluding a series of economic transactions from the concept of 'advertising services' in Article 9(2)(e) of the Sixth VAT Directive, the French Republic has failed to fulfil its obligations under that directive;

(2) By excluding a series of economic transactions (such as press conferences, seminars, cocktail parties, recreational functions and the letting of sites for advertising purposes) from the concept of 'advertising services' in Article

7 — Only on two previous occasions has the Court decided a case by way of default judgment. For the more recent of those judgments, see Case 68/88 *Commission* v *Greece* [1989] ECR 2965.

9(2)(e) of the Sixth VAT Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

(3) By introducing and maintaining a system for VAT in respect of advertising services which excludes a number of services, such as promotional activities, from the concept of 'advertising services' in Article 9(2)(e) of the Sixth VAT Directive, the Kingdom of Spain has failed to fulfil its obligations under that directive;

(4) The three Member States shall pay the costs in their respective cases.