OPINION OF ADVOCATE GENERAL ALBER

delivered on 27 January 2000 *

I — Introduction

1. In these proceedings for failure to fulfil Treaty obligations the Commission claims that France has failed to fulfil its obligations under the EC Treaty in so far as value added tax was not levied on motorway fees (tolls) and corresponding payments of own resources with interest were not made. [1]

2. In France fees are levied for the use of certain stretches of motorway. However, these fees are not subjected to VAT because in France they are considered to be payments made to the State. The fee is not regarded as consideration for an economic activity and therefore no VAT is levied. The operation and maintenance of stretches of toll road can — unlike planning and construction — be entrusted to others by granting concessions to State-owned, semi-State-owned and, in certain cases, private bodies. [2]

II — Pre-litigation procedure

3. By letter of 26 April 1984 the Commission asked the French authorities to express their view on the VAT rules in respect of French motorway concessionaires.

4. In their reply of 5 July 1984 the French authorities stated that the concessionaires

* Original language: German.

1 — The Commission has also brought actions against Ireland, the United Kingdom, the Netherlands and Greece on the same grounds: see Cases C-358/97, C-359/97, C-408/97 and C-260/98. Unlike the other defendant Member States, the Netherlands has made the corresponding amount of own resources available to the Commission pending clarification of the points at issue. In the Member States against which no action has been brought either no tolls are charged or VAT is levied on tolls. As a lower rate of tax is levied in Spain, the Commission has also brought an action against Spain (Case C-83/99).

2 — A proportion of the toll collected — the exact amount of which is unknown — must be paid by the concessionaires to the State.

are tax collectors in that they collect from users tax for the benefit of the State. Only their income, which they receive as consideration for the service supplied to the State, is liable to tax.

5. On 12 March 1986 the Commission sent the French Republic a letter of formal notice concluding that the activities of the French motorway concessionaires constituted a service supplied to the users and not to the State and that the failure to levy VAT distorted the Community VAT system.

6. The French authorities reaffirmed their view by letter of 22 May 1986.

7. On 28 April 1988 the Commission sent the French Republic an additional letter of formal notice setting out its complaints in the light of the information provided by France.

8. By letter of 17 February 1989 the French authorities again stated that the toll was essentially a parafiscal tax.

9. On 28 August 1989 the Commission sent the French Government a reasoned opinion which related both to the infringement of the provisions of the directive and the effects of that infringement on the payment of the Community's own resources.

10. France did not comply with the reasoned opinion, but did reply to it by letter of 29 November 1989. That reply essentially contained the arguments which had already been advanced.

11. By letter of 20 December 1985 the Commission's Director-General for Budgets pointed out to the French Government that the abovementioned infringement of the directive results in an unwarranted reduction in the Community's own resources and asked it to calculate which amounts had not been transferred in the financial years 1981 to 1984 and then to pay them to the Community budget with interest for late payment from 3 March 1986.

12. The French authorities rejected that request on legal and economic grounds by letter of 27 February 1986.

13. By letter of formal notice of 28 January 1988 the Commission asked the French

Government to submit its observations pursuant to Article 169 of the EC Treaty (now Article 226 EC).

14. In its letter of 19 September 1988 the French Government stated that levying VAT on the entire toll would, in the light of the deductions which the concessionaires themselves and motorway users liable for VAT could claim, have the result that the own resources contributions paid thus far had been set too high.

15. By letter of 17 January 1989 the Commission extended the payment claim to the financial years 1985 to 1987, together with interest for late payment from 1 May 1989, and to the subsequent financial years until cessation of the infringement.

16. By letter of 29 November 1989 France sent the Commission information and explanations so that it could calculate the VAT paid by the motorway concessionaires under the present system and the VAT which would accrue under the system advocated by the Commission.

17. The Commission was unable to concur with France's view and therefore brought the present action under Article 169 of the EC Treaty, which was lodged at the Court Registry on 30 July 1997.

18. It claims that the Court should:

(1) declare that in not subjecting motorway tolls as consideration for the supply of services to users to value added tax, contrary to Articles 2 and 4 of Sixth Council Directive 77/388/EEC of 17 May 1977 on VAT, the French Republic has failed to fulfil its obligations under the Treaty establishing the European Community;

(2) declare that by failing to make available to the Commission the corresponding amounts, together with interest on late payment, as own resources, France has failed to fulfil its obligations under the Treaty establishing the European Community;

(3) order the French Republic to bear the costs of the proceedings.

19. The French Republic contends that the Court should:

(1) dismiss the application,

(2) order the Commission to bear the costs of the proceedings.

III — Legal background

1. *The levying of VAT*

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 [3] (hereinafter 'the Directive')

3 — OJ 1977 L 145, p. 1.

20. Article 2 of the Directive provides:

'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;...'

21. Under Article 4(1), (2) and (5) of the Directive:

'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.

...

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.

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, [4] 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 [5]... as activities which they engage in as public authorities.'

2. *Own resources*

(a) Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax [6]

22. Article 1 provides:

'VAT resources shall be calculated by applying the uniform rate, set in accor-

4 — Annex D lists a total of 13 types of activity, including telecommunications, the supply of water, gas, electricity, port and airport services, and the running of trade fairs and exhibitions.

5 — Article 13(A) lists 17 exemptions for certain activities in the public interest. Thus *inter alia* the following are exempt from tax: the supply of services by the public postal services, hospital and medical care, the supply of services and of goods closely linked to welfare and social security work and to the protection of children and young persons, supply of services for their members by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civil nature, and activities of public radio and television bodies other than those of a commercial nature. Article 13(B) provides for further exemptions for insurance and reinsurance transactions, certain credit activities and — with four exceptions — the leasing or letting of immovable property.

6 — OJ 1989 L 155, p. 9.

dance with Decision 88/376/EEC, Euratom, to the base determined in accordance with this Regulation.'

23. Article 2(1) provides:

'The VAT resources base shall be determined from the taxable transactions referred to in Article 2 of Council Directive 77/388/EEC... with the exception of transactions exempted under Articles 13 to 16 of that Directive.'

(b) Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources [7]

24. Article 11 provides:

'Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by two percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

(c) Council Decision 88/376/EEC, Euratom, of 24 June 1988 on the system of the Communities' own resources [8]

25. Under this decision the missing income from VAT own resources is to be made up by own resources deriving from gross domestic product in order to provide the rest of the financing, which results in a redistribution of the burden to the detriment of the other Member States.

IV — Arguments of the parties

26. The Commission considers that the provision of roads infrastructure on pay-

7 — OJ 1989 L 155, p. 1.

8 — OJ 1988 L 185, p. 24, partly repealed or amended by Council Decision 94/728/EC, Euratom, of 31 October 1994 on the system of own resources of the European Communities, OJ 1994 L 293, p. 9.

ment of a toll by users, as is the case in France, constitutes an economic activity within the meaning of Articles 2 and 4 of the Sixth VAT Directive.

27. Even if, as in France, this activity is carried out under a special system of concessions which the State grants to State-owned, semi-State-owned or, in certain cases, private bodies, that does not mean that it falls outside the scope of VAT. First, it constitutes an economic activity within the meaning of Article 2 of the Sixth VAT Directive and, second, it is carried out by taxable persons within the meaning of Article 4 which can also include bodies governed by public law.

28. The term 'economic activity' must be appraised objectively in the light of the actual economic situation. It is not necessary for services to be primarily or exclusively orientated towards market life. It is sufficient that they are actually connected with economic life in some way or other.

29. The consideration for the toll consists in the service supplied to the users, namely convenience, speed, safety and, in certain cases, a shorter travelling distance. Since users are not compelled to use this toll road network, there is a direct link between the service and the price paid.

30. A distinction must be drawn between engagement in such an economic activity by State bodies, or for the account thereof, and the concept of the exercise of public authority. Under Article 4(5) of the Sixth VAT Directive, the only activities in respect of which a State and its local authorities are not to be regarded as taxable persons are those which they engage in as public authorities.

31. The general nature of VAT means that all economic transactions are liable to tax. The State and the other bodies governed by public law are not exempt from VAT in general, but only in respect of the activities which they engage in as public authorities in the strict sense. Moreover, under the second paragraph of Article 4(5) they are liable to VAT even then where treatment as non-taxable persons would lead to significant distortion of competition.

32. Where a concessionaire provides users with road infrastructure for whose operation it is responsible, it is not engaging in an activity as a public authority in the strict sense, but in a taxable transaction similar

to the supply of gas, electricity and water, postal and telecommunication services, or airport services. Those services which consist in obtaining income on a continuing basis from the operation of a property certainly fall within the scope of the Sixth VAT Directive.

33. Failure to levy VAT on the toll has serious consequences, not only at local level but in respect of all Community traders who use French toll roads infrastructure in the course of their taxable activities since they are unable to deduct such expenditure, which places a burden on their economic activity, in conformity with the Sixth VAT Directive. Failure to levy VAT has, therefore, considerable effects on the functioning of the harmonised VAT system which plays an important role in the single market. It must, therefore, be concluded that there is significant distortion of competition. There is also unequal treatment of the Member States in respect of the Community budget as they have to bear a higher financial burden because missing income has to be made up from gross domestic product.

34. As regards the allegation that the Community provisions on the payment of own resources from VAT have been infringed, the Commission states that, in the present case, the Communities' own resources revenues are reduced. The Commission must be able to ascertain how high the amount of own resources owing is in order to avoid financial damage which would have to made up from gross domestic product. Such an infringement has a detrimental effect on the other Member States and therefore breaches the principle of equal treatment.

35. However, France has not allowed the Commission to examine the figures and calculation method which the French authorities used to argue that, if the Commission's view is correct, France even has a claim to reimbursement of the amounts it has overpaid as own resources since 1981. At any rate, the claim for reimbursement asserted by France is non-existent since either the French system is in conformity with Community law and no correction to the assessment base for VAT own resources arises, or it infringes the Directive with the result that the assessment base increases.

36. As regards interest for late payment, the Commission refers to Article 11 of Regulation No 1552/89. It was pointed out to France that interest on late payment was due from 31 March 1986 in respect of contributions to own resources which had not been paid as a result of the failure to levy VAT.

37. The French Government maintains that the French legislature has provided for the possibility of granting concessions in respect of the operation of motorways and the collection of tolls. Under the French Law on Roads, motorways form part of the public road network. In the light of the national importance of the motorway network the State alone has the resources to extend that network in a coordinated manner and to ensure that any exceptions to the principle of the free use of the road network remain limited. Furthermore, the construction of a motorway is, in every case, the result of a decision by a public authority, that is to say a decree of the Conseil d'Etat (Council of State), which can make the motorway available for public use at the same time.

38. The term 'economic activity' laid down in the Sixth VAT Directive must be appraised objectively in the light of the actual economic situation in which the relevant transaction is made, but consideration of the domestic rules is also essential in order to be able to draw a clear distinction between those activities which public bodies engage in as State bodies and those which they engage in as private operators.

39. In the present case the French Government considers that the State is exercising State authority in collecting the toll. It owns the public road network and has sole State authority which it exercises in the form of administrative acts, namely in respect of the rules governing the use of the motorways and furthermore the State is required to provide road users with motorways. In the context of that activity the State has powers which go beyond general law such as, for example, the fixing of fees by order. Finally, the State has a monopoly on the construction and classification of motorways. It is clear from these factors that the present case concerns a State activity of a public body.

40. Since the activity does not fall within the scope of the Directive, no possible link between the service supplied and the consideration received can in any way undermine the previous exclusion of that activity by a public body acting as a State authority from the scope of the tax. Even the Commission does not always regard a toll as a mere fee for a service supplied to a user but sees it as having a role to play in particular in the management of demand. [9]

41. As regards the problem of distortion of competition, the French Government takes

9 — See the Proposal for a Council Directive on the charging of heavy goods vehicles for the use of certain infrastructures [COM(96) 331 final] and the Commission Green Paper "Towards fair and efficient pricing in transport — policy options for internalising the external costs of transport in the European Union" COM(95) 691 final.

the view that French and foreign traders are in the same position and therefore foreign traders are not at a disadvantage. As far as the alleged unequal treatment of the Member States as regards the Community budget is concerned, there is no distortion of competition within the meaning of Article 4(5) of the Sixth VAT Directive.

42. As regards the allegation that the provisions concerning own resources have been infringed, the French Government contends that there has been no infringement of the Sixth VAT Directive, nor any reduction in the assessment base for own resources. In this respect no additional payments can be requested. Moreover, France has not prevented the data and calculation methods from being considered. When it calculated VAT own resources it acted in accordance with the relevant provisions of Directive No 1552/89 and Directive No 1553/89. However, if the Commission's method of calculation were used, there would be a reduction in income of FRF 522 million for the financial year 1987 as a result of legitimate deductions of VAT by taxable persons which would consequently lead to a reduction of the VAT own resources base by FRF 3 249 billion and to a budget contribution by France reduced by FRF 45.5 million. This method, which is applicable to other years, demonstrates that there has been systematic overpayment to the Community budget if the Commission's method of calculation is used.

V — Appraisal

1. *Levying of VAT on tolls*

43. In accordance with the structure of the Directive, it must first be ascertained whether there is a taxable transaction within the meaning of Article 2 of the Sixth VAT Directive. That requires a supply of services in return for consideration. Next, it must be ascertained whether that transaction was carried out by a taxable person and, if so, whether it was an economic activity.

(a) Supply of services for consideration

44. The supply of services consists here in the provision of infrastructure.

45. Those services are supplied in return for consideration — the toll levied. On the question whether services are being provided for consideration the Court has ruled that, for the provision of services to be taxable, there must be a direct link between

the service provided and the consideration received. [10]

46. There is such a direct link in that a toll is paid for the provision of infrastructure, the amount of which, in turn, depends on the type of vehicle concerned and the length of the road.

47. The toll itself is not a tax, as a tax is payment of money, which is not made in return for a particular service, and which is imposed by a body governed by public law, in order to generate revenue, on all those who meet the statutory conditions for liability. Since, however, in the present case there is a specific service provided in return, in the shape of the supply of certain parts of the roads infrastructure, the money paid is a fee which must be seen as a consideration for a service provided.

48. There is thus a supply subject to value added tax within the meaning of Article 2 of the Sixth VAT Directive.

10 — Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs and Excise* [1988] ECR 1443, paragraph 11.

(b) Taxable persons

49. Under Article 4(1) and (2) of the Directive, a taxable person is any person who independently carries out any economic activity — and that includes all activities of producers, traders or persons supplying services.

50. Under Article 4(5)(1) of the Directive, States, regional and local government authorities and other bodies governed by public law are not to be considered taxable persons in respect of the activities or transactions in which they engage as public authorities. This is so even where they collect dues, fees, contributions or other payments in connection with these activities or transactions.

(aa) State activity

51. According to the case-law of the Court, two conditions must be fulfilled in order for public bodies to be treated as non-taxable persons: 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. [11]

52. This means, first, that not all activities of bodies governed by public law are automatically exempt from tax, but only those which also serve to discharge a specific responsibility in the exercise of public authority. Second, an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority. [12]

53. The subject-matter or purpose of the activity of the public body does not determine whether activities are carried out as public authorities. According to the case-law of the Court, it is the way in which the activities are carried out that determines to what extent public bodies are to be treated as non-taxable persons. [13]

54. The Court has thus ruled that the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities as public authorities when they do so under the special legal regime applicable to them. [14] 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.

55. Since, under Article 6(1) of the Sixth VAT Directive, even activities carried out in pursuance of the law are taxable, it is clear that the mere fact that an activity falls within the remit of public law is not sufficient to fulfil the requirements for VAT exemption in Article 4(5)(1). As that provision constitutes an exception to the definition of taxable person, it must be interpreted strictly. Thus, only those activities of public authorities which constitute the essential core of State activity can be considered exempt from VAT. This is also confirmed by Article 4(5)(3), which refers to the activities listed in Annex D (see above at point 21), in respect of which even bodies governed by public law are liable to VAT.

56. The planning and construction of roads, bridges and tunnels are State responsibilities which can only be discharged by bodies governed by public law. Such activities concern an essential part and thus the core of public responsibilities. They can even be regarded as the provision of

11 — Case 107/84 *Commission* v *Germany* [1985] ECR 2655, Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471 and Joined Cases 231/87 and 129/88 *Carpaneto and Others* [1989] ECR 3233, paragraph 12.

12 — *Commission* v *Netherlands*, cited above at footnote 11, paragraph 21.

13 — *Carpaneto*, cited above at footnote 11, paragraph 15.

14 — *Carpaneto*, cited above at footnote 11, paragraph 16.

essential facilities. If the State carries out such activities, it must be considered to do so in the exercise of public authority.

57. It is true that the provision of roads is not expressly classified as an activity subject to VAT, as the supply of water, gas and electricity is in Annex D. In reality, the provision of roads infrastructure without charge must be seen as an activity of the State. The question remains whether, conversely, the whole network of roads built with taxpayers' money in discharge of a State responsibility can be operated by private economic operators on payment of a toll which is collected from everyone. In any event, making available a stretch of road in a manner which is selective, inasmuch as payment is required, cannot be seen as an activity performed in the exercise of public authority. The levying of the toll is, indeed, also possible in connection with a State activity and, in itself, does not give rise to tax liability, as Article 4(5)(1) expressly confirms. It should be borne in mind that, in the present case, the road user has a choice between using the toll-free road infrastructure and using toll roads. In providing the toll-free road network, the State responsibility has, in any event, been discharged and the provision of additional stretches of road on payment of a toll must be viewed as a purely private economic activity. Anyone who needs planning permission which is subject to a fee has no option but to pay the fee. Anyone who is following a course of study for which everyone must pay fees has no other means of achieving the same goal, i.e. the relevant qualification. However, in the present case the user has a genuine choice between two possibilities — although one may be less convenient and slower — in order to achieve *the same* goal. The toll road network is made available to everyone who is prepared to pay, but only to them. This must be viewed as selection, which is alien to State activity. Tolls are levied principally for economic and financial reasons. Thus, the provision of a limited stretch of road on payment of a toll cannot be regarded as a State activity.

58. Article 4(5)(1) is, therefore, not applicable to the present case, since the provision of infrastructure on payment of a toll cannot be regarded as an activity carried out in the exercise of public authority. The bodies empowered to collect the tolls must, therefore, be considered to be taxable persons.

(bb) Economic activity

59. As I have already pointed out, under Article 4(1) of the Directive any person who independently carries out any economic activity is deemed to be a taxable person.

60. Article 4(2) of the Sixth VAT Directive defines economic activity as 'all activities of producers, traders and persons supplying services'.

61. The Court has consistently held that the scope of the term 'economic activities' is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. [15]

62. Under this wide definition of economic activity it is not necessary for services to be primarily or exclusively orientated towards the market or economic life. It is sufficient that they are actually connected with economic life in some way or other. [16] In the present case, the road infrastructure is provided, on payment of a toll, under a special system of concessions which the State can grant to State-owned, semi-State-owned, or even private bodies.

63. Even if the grant of concessions in France is subject to public law and the toll motorways form part of the public roads network, this is of no relevance in determining whether there is an economic activity. Under Article 6(1) of the Sixth VAT Directive taxable transactions may include the performance of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law. The objective nature of the definition of economic activity also calls for the classification of the activity in this case as an economic one as the activity itself must be considered, regardless of its purpose or result.

64. Consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system. [17] In the present case this means that given parts of the roads infrastructure are made available to road users on payment of a toll. As this activity is thus also carried out by the relevant bodies to generate revenue, in order to cover expenditure on materials and at the same time earn an income, it is clear that there is an economic activity in the case under consideration.

(c) (In the alternative) Distortion of competition

65. Under Article 4(5)(2) States, regional and local government authorities and other

15 — Case 235/85, cited above at footnote 11, Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatsecretaris van Financiën* [1989] ECR 1737, paragraph 10, and Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 17.

16 — Opinion of Advocate General Lenz of 12 February 1987 in Case 235/85, point 22, and judgment in that case, cited above at footnote 11.

17 — Case C-260/95 *Commissioners of Customs and Excise* v *DFDS* [1997] ECR I-1005, paragraph 23.

bodies governed by public law are considered taxable persons even in respect of the activities or transactions in which they engage as public authorities, where treatment as non-taxable persons would lead to significant distortion of competition. In the light of the observations made above, this sub-class should not require analysis as such activity must be considered not to form part of State activities. The following analysis is thus given only in the alternative.

66. Distortion of competition in the above sense would arise where a non-taxable State body was competing for the supply of the same services with a taxable private person and was therefore able to offer its services at a lower price because of the tax exemption. In the provision of road infrastructure such as we are concerned with here there is, however, no competitor covered by private law, so that there can be no competition either.

67. The examples of distortion of competition given by the Commission do not stand up to scrutiny here. First, the scope of the Directive — as is clear from a number of provisions — is limited to transactions at national level. There is no breach of the duty to treat other nationals equally in the present case. Second, the cases of distortion mentioned — no right to deduct input tax on the one hand and reduced costs on the other — are not the result of waiving tax or charging tax as the case may be, but of the misapplication of the law. Following clarification by the Court, the Member States will certainly levy VAT in a uniform manner. (The same will then be true of payments to own resources.) If the Commission's argument is taken to its logical conclusion, distortion of competition would most of all prejudice those countries where no road tolls are levied at all.

68. There is thus no distortion of competition within the meaning of Article 4(5)(2) which would justify treatment as a taxable person. However, as I explained in points 45 to 63, that is not the key issue. In the present case there is a supply subject to VAT because the levying of the toll is not a State activity.

(d) Interim conclusion

69. It must thus be concluded that France has failed to fulfil its obligations under the

Treaty in not subjecting the motorway tolls to VAT.

2. *Own resources*

70. Under Article 2(1) of Regulation No 1553/89, the VAT resources base is to be determined from the taxable transactions referred to in Article 2 of the Sixth VAT Directive. Contributions to own resources are then calculated by applying a fixed uniform rate to this base.

71. Since in the present case services were supplied by taxable persons, VAT should have been levied on the toll. However, as this did not happen, the relevant amounts for fixing the VAT resources base could not be taken into account.

72. That constitutes a breach of Community provisions on the payment of own resources from VAT. It is of no relevance that — as the French Government claims — the recalculation of contributions to own resources would lead to a result detrimental to the Community. Under the relevant legislation it is only important for those own resources to be calculated according to the correct base and the payments required of the taxable persons (by the Member State) to be established. It is thus the duty of the Member States to make the necessary calculations, communicate the result to the Commission and pay the resources due.

73. The claim for interest is based on Article 11 of Regulation No 1552/89, according to which any delay in making the entry in the account is to give rise to the payment of interest. According to the case-law of the Court, the reason for the delay is immaterial. [18]

3. *Temporal limitation on the effects of the judgment*

74. Once it is established that France has failed to fulfil its obligations under the EC Treaty, the question arises whether the Commission is also entitled to enforce the claims it has against France as a result in respect of the whole period concerned.

75. In proceedings for failure to fulfil obligations, Member States are required to take all necessary steps to remedy the

18 — Case 54/87 *Commission* v *Italy* [1989] ECR 385, paragraph 12.

failure to fulfil obligations, where the action is well founded. However, since the application is for a declaration, the Court cannot order the defendant State to remedy the breach or cancel or alter the contested measures.

76. Consequently, the Court is not empowered to make a formal order that France remedy the unlawful situation as regards the levying of VAT. However, in the course of the proceedings for failure to fulfil Treaty obligations, the Court can clarify the obligation of France to remedy the breach of the Treaty.

77. The practical implications of France's obligation to remedy its failure to fulfil Treaty obligations and the effect of the length of the proceedings must therefore be considered.

78. Since, under Article 155 (now Article 221 EC) and Article 169 of the EC Treaty, the Commission is bound to bring proceedings in respect of every failure to fulfil Treaty obligations of which it becomes aware, it has a fundamental duty to bring proceedings. However, it has a certain discretion, particularly as regards the time and manner of implementing the various stages of the procedure under Article 169. Despite its fundamental duty to bring proceedings, the Commission should always strive to enable Member States to restore conformity with the Treaty in the usual manner. The earliest possible time at which an action can be brought is on expiry of the period prescribed in the reasoned opinion. There is no general upper time-limit for bringing an action before the Court of Justice. [19] It is, therefore, for the Commission to judge, on expiry of the time-limit set, when to bring an action following the reasoned opinion. [20] However, in extreme cases, where the Commission waits a long time before bringing an action and takes no other steps against the Member State, the possible objection that the right of action has been *forfeited* and the admissibility of the action thereby affected cannot be ruled out entirely. [21] Nevertheless, the case-law of the Court tends to reject the idea that the Commission's right of action can be forfeited. [22]

79. Nor can the claims of the Communities be considered to be *time-barred* in the present case. First, there are no provisions of Community law regarding limitation of actions which would be applicable and, second, it is not possible to apply the national rules regarding the limitation of actions for tax debts. To fulfil its purpose, a limitation period must be established in advance. As it constitutes a plea it must be

19 — Case 7/71 *Commission* v *France* [1971] ECR 1003, paragraphs 5 and 6.

20 — Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039, paragraph 4, and Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 18 and the references contained therein.

21 — Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraphs 15 and 16.

22 — Ibid. footnotes 20 and 21.

properly raised, but it was not in the present case. As no submissions were made in that connection there is no need to discuss this point further. Moreover, no direct claim can be made for payment of resources in the course of an action for failure to fulfil Treaty obligations.

80. However, the Community's claims for the payment of contributions to own resources could have lapsed by failing to meet other *time-limits*.

81. For reasons of legal certainty, it might be necessary, in the present case, to limit in time the effects of a declaration of failure to fulfil Treaty obligations as regards the correction of annual statements.[23] The possibility of invoking the principle of legal certainty in the absence of a limitation period has been acknowledged by the Court of Justice in its case-law.[24]

82. The Treaty makes no express provision for a temporal limitation on the effects of judgments in proceedings for failure to fulfil Treaty obligations. However, that is not in fact necessary since a judgment in proceedings for failure to fulfil Treaty obligations is of a declaratory nature and is generally intended to remedy (for the future) a situation which is contrary to the Treaty. This type of proceedings does not concern the validity of a particular decision as does an action for annulment, the effects in time of which can be limited under the second paragraph of Article 174 of the EC Treaty (now Article 231 EC). An action for failure to fulfil Treaty obligations does not as a rule seek compensation for damage in individual cases, as cases subject to the rule regarding limitation periods in Article 43 of the EC Statute of the Court of Justice do. Rather, proceedings for failure to fulfil Treaty obligations seek a declaration of principle on the content of the rules of Community law. It is in the interests of legal certainty for the Court of Justice to make a declaration regarding the content of the rules in a dispute between the Commission and a Member State. The mere passage of time since the conclusion of the pre-litigation procedure does not alter this principle. Should events during that time diminish the interest of a party in a declaration, this might result in the inadmissibility of the action, but would not prejudice the claim for a declaration as such, which could be made afresh to the Court at any time.

83. However, in the present case, there is a claim by the Communities for payment from the defendant Member States attached to the declaration of failure to fulfil Treaty obligations. The financial implications of this also require careful consideration from the point of view of legal certainty.

23 — Under Article 7(1) of Regulation No 1553/89, before 31 July the Member States are to send the Commission a statement of the total amount of the VAT resources base for the previous calender year.

24 — Case 57/69 *ACNA* v *Commission* [1972] ECR 933, paragraphs 29 to 32.

84. On the face of it, the fact that the Court has consistently held that 'certainty and foreseeability are requirements which must be observed all the more strictly in the case of rules liable to entail financial consequences' constitutes an argument against temporal limitation. [25] Weighing up considerations of legal certainty diminishes such certainty and foreseeability. However, it must also be said that the considerable delay by the Commission in instituting proceedings for failure to fulfil Treaty obligations cannot be reconciled with the requirements of certainty and foreseeability either.

85. According to the case-law of the Court, a dispute between the Commission and a Member State over the collection of own resources cannot be permitted to upset the financial equilibrium of the Community. [26] In the present case, a temporal limitation on correction could have the result that some Member States paid resources to the Community in accordance with Community law, whilst others were exempted from payment. However, on that point, it must be observed that the Member States which have levied VAT and paid a share of it to the Community have not suffered a disadvantage. They, after all, retain a proportion of the VAT which is greater than that paid to the Community.

86. On the other hand, retrospective collection of VAT on fees paid for the use of roads must be ruled out for both practical and legal reasons. In a case such as the present one retrospective collection of VAT would also be ruled out under national law for reasons relating to the protection of legitimate expectations. Quite apart from that, the practical consequences of retrospective collection of VAT would be unreasonable in the case of business traffic as the tax debtors who might have to be tracked down are generally not those who pay the tax included in the prices.

87. Only those Member States which were already making back payments, without having levied VAT beforehand, would be at a disadvantage. It must be assumed, however, that such payments were made subject to the requisite correction to the annual statement. If that is not possible, the Member States in question may request reimbursement of the back payments.

88. It is clear from the time-limit in Article 9(2) of Regulation No 1553/89 that Member States should not be exposed for more than four years to the risk of paying to the Community a percentage of VAT which has mistakenly not been levied. On the other hand, Member States have in principle no protection if they have notice of a clear objection of the Commission

25 — Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23 and the references contained therein.

26 — Case C-96, cited above at footnote 21, paragraph 37.

before expiry of the time-limit. It is the responsibility of the Member State concerned if it does not act on an objection by the Commission and, for example, fails to levy VAT generally. Having notice of the objection it is able to assess in principle the obligations which arise from the VAT Directive and proceed accordingly.

89. However, if the Member States have reasonable grounds for disputing the Commission's view as to whether certain transactions are subject to VAT or not, the practical arrangements for the correction procedure, and in particular their application by the Commission in the present case, may have unreasonable consequences. As the Community is a Community governed by the rule of law, the Member States are entitled, as a matter of principle, to have a dispute over the content of the rules of the VAT Directive brought before the Court of Justice and decided by it within a reasonable time.

90. Moreover, the Member States cannot settle the matter themselves, if the proceedings for failure to fulfil Treaty obligations stagnate, as here, in the pre-litigation phase. The Commission is not bound to bring an action and the Member State cannot challenge the reasoned opinion. Taken together, these factors could be an incentive to circumvent proceedings for failure to fulfil Treaty obligations. However, such conduct on the part of the Commission would be contrary to the spirit of the correction procedure.

91. In the context of the Commission's relationship to the Member State, it must be considered that the previous financial years are closed and no correction is to be made.

92. The period to which the Commission's action relates does not appear to be clearly defined. The application merely seeks a declaration of failure, without citing a particular period. The application must be considered in the light of the apparent aim of the request for legal protection: in other words, the purpose of the action is to be determined in the light of the grounds stated.

93. It is clear from the Commission's letter of formal notice of 28 January 1988 amongst the documents on the Court file that the Commission's claims relate to the period from 1981 until cessation of the alleged infringement. It must therefore be assumed that this is the period at issue in the Court action too. Although the Commission took no further action in respect of subsequent years between the end of the pre-litigation procedure and the bringing of the action, it must be assumed that its intention was to put an end to the infringement with all that this implied for the subsequent years. The extent to which the financial years since 1981 are now closed so that the annual statements cannot now be corrected must therefore be examined.

94. The first part of Article 9(2) of Regulation No 1553/89 provides that no further corrections may be made to the annual statement after 31 July of the fourth year following the financial year concerned, that is to say, after 43 months. The annual statement for the 1981 financial year could accordingly no longer be corrected after 31 July 1985. The equivalent calculation is to be made for the subsequent years. It would, therefore, no longer be possible for the Commission to collect own resources for those years.

95. However, it is not clear how the exception in the second part of Article 9(2) is to be understood. It states, on the subject of the annual statements to which no corrections must be made: '... unless they concern points previously notified either by the Commission or by the Member State concerned.' For the 1981 to 1990 financial years, the underlying issues and various legal points which also underlie this application were discussed with France.

96. There is a strong case for interpreting the second part of Article 9(2) to mean that exceptions to the 43-month time-limit are only to be allowed if those concerned have continued in the intervening period to make an effort to solve the problems raised. However, if the proceedings come to a lengthy and unwarranted standstill, it would be contrary to the spirit and purpose of the provision to continue to apply it. In the present case there was not sufficient further dialogue in the years between 1990 and 1997 to enable a solution to the problems to be found. In response to questioning in the oral procedure the Commission stated that it regularly raised the problem of own resources with the Member States concerned and that there was an ongoing dialogue on the question of levying VAT.[27] However, this cannot be viewed as sufficient to have enabled an amicable agreement to be reached. That was not possible because of the stance taken by the parties. It should also be borne in mind that a compromise solution was not possible either because of the mutually exclusive alternatives inherent in the legal position.

97. Whilst the objective of this provision is to grant an extension of the time allowed in complex cases raising many problems, the parties must be seen to be making an effort to reach a solution; otherwise the Commission could circumvent the 43-month time-limit under the first part of Article 9(2) by routinely raising objections to the Member States' annual statements. It would then be able to investigate the circumstances for an unlimited time and postpone the closure of the financial year indefinitely. However, that would be neither desirable on economic grounds, nor compatible with the principle of legal certainty. The Commission would be able, without having to justify it, to circumvent the requirements of the first part of Article 9(2) according to which the time-limit for the closure of the annual statements is 31 July of the fourth year following the relevant financial year.

27 — At the oral procedure, the United Kingdom and Greece denied that there had been any dialogue with the Commission.

98. As the provisions of Article 9(2) do not impose a limitation period, it is of no relevance that the Member State has not raised a plea that the action is time-barred. Only claims can be out of time. However, Article 9(2) does not provide for any claims, but merely regulates the time allowed for the correction of annual statements.

99. It can therefore be considered that the length of time between the pre-litigation procedure and the bringing of the action gave rise to a legitimate expectation on the part of France that the Commission would observe the time-limits in the procedure for correction of annual statements.

100. Even if one were to take the view that the pre-litigation procedure itself had the effect of interrupting the running of the time allowed, such interpretation cannot continue beyond the 43-month time-limit. As more than four years — seven, to be exact — elapsed between the last exchange of letters in the pre-litigation procedure and the bringing of the action, an argument on the basis of the interruption of the time allowed cannot be sustained.

101. The principle of the protection of legitimate expectations and the general timetable resulting from the 43-month time-limit for the correction of annual statements mean that the collection of contributions to own resources must be limited to the four years before the bringing of the action. In the present case, since the Commission's action was lodged at the Court of Justice on 30 July 1997, that means that the financial years since 1993 are not yet closed and that corrections are still possible.[28] The action was brought within the 43-month time-limit since there are no other procedural time-limits. Although the application may have been served on France after 31 July 1997, no further conclusions in respect of the effects on third parties can be drawn since the date on which the action was lodged at the Court of Justice must be regarded as the material date.

102. As the claim for payment of the contributions to own resources was not the subject of the application as such, but arises indirectly from the failure to fulfil Treaty obligations, the remainder of the application cannot be dismissed despite the partial expiry of time-limits — which indirectly amounts to a partial success for France. The same applies to the decision as to costs.

VI — Costs

103. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been

28 — See point 93 for the calculations.

applied for in the successful party's pleadings. The Commission has asked for France to be ordered to pay the costs. Although the claim for payment of contributions to own resources has partially extended the time-limits, this has no implications for a costs order as this claim is only a consequence of the declared failure to fulfil obligations and cannot be pursued by means of this action. The subject at issue in the present case is only the declaration of conduct contrary to the Treaty. As the French Republic has essentially been unsuccessful, it should be ordered to pay the costs.

VII — Conclusion

104. For the foregoing reasons I therefore propose that the Court should rule as follows:

(1) In not subjecting motorway tolls to value added tax, contrary to Articles 2 and 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977, and by therefore failing to make available to the Commission the relevant amounts of own resources, the French Republic has failed to fulfil its obligations under the Treaty establishing the European Community; however, the Commission is entitled to collect the own resources retrospectively and claim interest for late payment only as from the financial year 1993.

(2) The French Republic shall bear the costs of the proceedings.