OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 11 February 2010[1]

I – Introduction

1. The French Republic has, since 1 April 1991, applied under Article 279 of the General Tax Code (code general des impôts) a reduced rate of value added tax ('VAT') of 5.5% to services provided by French *avocats*, *avocats au Conseil d'État et à la Cour de cassation* and *avoués* (together 'lawyers') for which they are paid in full or in part by the State under the legal aid scheme.

2. By its application, the Commission of the European Communities requested the Court to declare that, in applying that reduced rate, the French Republic failed to fulfil its obligations under Articles 96 and 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

3. In its defence, the French Republic argued that the services provided by lawyers under the legal aid scheme are covered by 'supply of services by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work', referred to in point 15 of Annex III to the VAT Directive, and so a reduced rate of VAT may be applied to such services.

II – Legal framework

A – *European Union law*[2]

4. The VAT Directive, for reasons of clarity and rationalisation, recast the provisions of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover

1 — Original language: French.

2 — Since the reasoned opinion which the Commission sent to the French Republic was dated 15 December 2006, reference will be made to the provisions of the EC Treaty according to the numbering applicable before the entry into force of the Treaty on the Functioning of the European Union.

taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive'), since the latter had been significantly amended on a number of occasions.

5. The provisions of the VAT Directive, which entered into force on 1 January 2007, repealed and replaced those of the Sixth Directive with effect from that date. The continuity between the two directives is made clear in Article 411(2) of the VAT Directive, in particular since it refers to the correlation table in Annex XII.

6. Article 96 et seq of the VAT Directive correspond in essence to Article 12(3)(a) of the Sixth Directive.

7. Article 96 of the VAT Directive provides:

'Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.'

8. Article 97(1) of the VAT Directive provides that from 1 January 2006 until 31 December 2010 the standard rate may not be less than 15%.

9. Article 98 of the VAT Directive states:

'1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

...'

10. Point 15 of Annex III to the VAT Directive, headed 'List of supplies of goods and services to which the reduced rates referred to in Article 98 may be applied', refers to 'supply

of goods and services by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work, in so far as those transactions are not exempt pursuant to Articles 132, 135 and 136.' [3]

(f) services for which *avocats*, *avocats au Conseil d'État et à la Cour de cassation* and *avoués* are paid in full or in part by the State under the legal aid scheme; ....' [5]

B – *National legislation*

11. Article 279 of the General Tax Code, resulting from Article 32 IV of the 1991 Finance Law (Law No 90-1168 of 29 December 1990), provides that, with effect from 1 April 1991: [4]

'Value added tax shall be charged at the reduced rate of 5.5% in respect of: ...

III – Pre-litigation procedure

12. Considering that application, under Article 279(f) of the General Tax Code, of a reduced rate of VAT to services provided by lawyers under the legal aid scheme must be regarded as incompatible with the provisions of Article 12(3)(a) of the Sixth Directive in conjunction with those of Annex H to that directive, the Commission decided to institute the procedure laid down in Article 226 EC and gave the French Republic formal notice by letter of 10 April 2006.

13. Since it was not convinced by the arguments put forward by the French authorities in their reply of 12 June 2006, the Commission sent them a reasoned opinion by letter

3 — Annex H to the Sixth Directive, which was inserted by Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates) (OJ 1992 L 316, p. 1), also contained the '[l]ist of supplies of goods and services which may be subject to reduced rates of VAT' and included a fourteenth category: '[s]upply of goods and services by organisations recognised as charities by Member States and engaged in welfare or social security work, insofar as these supplies are not exempt under Article 13'.

4 — That provision, which did not apply before the entry into force of the Sixth Directive, is not one of the transitional provisions laid down by that directive, and in particular those of Article 28(2) of that directive, to which the Commission refers in its application.

5 — Article 279 of the General Tax Code was last amended by Article 22 of Law No 2009-888 of 22 July 2009, but that amendment did not affect the provisions of point (f).'

dated 15 December 2006, requesting them to take the measures necessary in order to comply with that opinion within two months of receipt thereof.

14. In a letter of 13 February 2007, the French Republic stated that it considered the complaint concerned to be unfounded. The Commission, finding that the French Republic had not remedied the alleged infringement, brought the present action for failure to fulfil obligations, on the basis of Articles 96 and 98(2) of the VAT Directive, which replaced Article 12(3)(a) of the Sixth Directive with effect from 1 January 2007.

IV – Procedure before the Court

15. In its application, the Commission claims that the Court should declare that, in applying a reduced rate of VAT to services provided by lawyers for which they are paid in full or in part by the State under the legal aid scheme, the French Republic failed to fulfil its obligations under Articles 96 and 98(2) of the VAT Directive. It claims that such service providers cannot be considered to be 'organisations recognised as being devoted to social well-being by Member States and engaged in welfare or social security work' within the meaning of that directive. The Commission also claims that the French Republic should be ordered to pay the costs.

16. The defendant Member State contends that the action should be dismissed, adopting a different interpretation of the provisions concerned, and that the Commission should be ordered to pay the costs.

V – Analysis of the infringement

17. It seems to me necessary to make clear at the outset that legal aid is a fundamental right, as is the legal aid scheme in France. I shall go on to discuss the financial aspects of the case, and the methods of interpretation relevant here, before analysing the provisions concerned. However, as a preliminary point, clarification is needed regarding the application over time of those provisions.

A – *The provisions applicable ratione temporis*

18. By way of introduction, it should be pointed out, as the Commission has done, and without the French Republic raising

any objection, that it is the provisions of the VAT Directive that must be applied and not those of the Sixth Directive, since the time-limit imposed on the French authorities for complying with the reasoned opinion expired after the Sixth Directive was repealed, on 1 January 2007.

B – *Legal aid as part of the fundamental right of access to a court*

19. The right of effective access to a court, in particular through the removal of any financial obstacles to such access, has been recognised as a fundamental right both by the European Convention on Human Rights [6] ('the ECHR') and by the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations. [7] The right to be assisted free of charge by a lawyer assigned automatically is expressly guaranteed under those instruments only where a person is charged with an offence, hence in criminal proceedings.

20. However, the European Court of Human Rights has extended that prerogative to civil proceedings. [8] It held, in a judgment delivered on 9 October 1979, [9] that Article 6(1) of the ECHR compels Contracting States to take the measures necessary to provide for free legal assistance only where it proves indispensable for effective access to court either because legal representation is rendered compulsory or by reason of the complexity of the procedure or of the case. [10] The Court has interpreted that article as establishing the principle that legal aid is an instrument that is useful, but not always necessary, in order to provide effective access to a court and thus make proceedings fair for the purposes of that provision. That right is not therefore absolute. The award of legal aid is a requirement only where the absence of such assistance would render ineffective the guarantee of effective access to a court.

21. It seems to me that legal aid is increasingly regarded as a social factor necessary for ensuring the effectiveness of the fundamental right of access to justice and, hence, access to the law in general.

6 — Article 6(3) of the Convention on the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

7 — Article 14(3)(d) *in fine* of the International Covenant on Civil and Political Rights, opened for signature on 19 December 1966.

8 — In *Golder* v *United Kingdom*, judgment of 21 February 1975 (Series A, no 18, § 35 et seq), that Court held that 'Article 6 para. 1 (art. 6-1) [of the ECHR] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only'.

9 — *Airey* v *Ireland* (Series A, no 32, § 26).

10 — In the latter situation, the Court has pointed out that the denial of legal aid could deprive individuals of the opportunity to present their case effectively before the court and contribute to an inequality of arms that is unacceptable in the light of the concept of a fair hearing. See, in particular, *Steel and Morris* v *United Kingdom* judgment of 15 February 2005 (ECHR *Reports of Judgments and Decisions* 2005-II, § 72).

22. That evolving process is particularly apparent from the Charter of Fundamental Rights of the European Union, [11] Article 47 of which, headed 'Right to an effective remedy and to a fair trial', provides for and describes the right to legal aid, before any type of court. The last paragraph of Article 47 provides that '[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'. It is apparent that that document was drawn up in full accordance with the case-law of the European Court of Human Rights.

23. Likewise, Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [12] refers expressly to the ECHR and to the Charter of Fundamental Rights of the European Union.

24. It is clear therefore, as a preliminary point, that the objective of promoting access to justice and the law in general for persons with insufficient resources is in accordance with the fundamental values of the system of judicial protection prevailing within the European Union.

C – *The legal aid scheme in France*

25. Law No 91-647 of 10 July 1991 concerning legal aid [13] provides that natural or legal persons with insufficient resources [14] to assert their rights before a court may receive aid.

26. A recipient of legal aid is exempt from making either an advance payment (to the court) or payment of any expenses in connection with the proceedings for which that aid was granted, whether in full or in part.

11 — The Charter, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), was amended and given binding legal force at the time of the adoption of the Treaty of Lisbon (OJ 2007 C 303, p. 1).

12 — OJ 2002 L 26, p. 41.

13 — Article 1 of that law states, first, that it seeks to ensure access to justice and the law and, second, that legal assistance covers legal aid, aid enabling access to the law, and aid for intervention by a lawyer during police custody and in matters of mediation and arrangement in criminal proceedings.

14 — Certain categories of persons referred to in Articles 4, 6, 9-1 and 9-2 of that Law are not subject to that means test. This is so in particular in the case of minors and victims of the most serious crimes.

27. Where full legal aid is granted, the State bears all the expenses incurred by the individual concerned (lawyers' fees, bailiffs' fees, payments to notaries, costs for expert opinions, etc.). [15] The amount for the payment of lawyers, which is a flat rate, is calculated according to a scale with a base coefficient comprising a number of units of value, [16] determined for each type of proceedings that the courts [17] may hear.

28. If legal aid is only partial, the State bears only some of the cost of payments to persons concerned in the administration of justice. The State's contribution is fixed according to a percentage of the full legal aid which is inversely proportionate to the resources of the recipient of the aid. [18] The lawyer is then entitled to a supplementary fee, which will vary in size. The amount of those supplementary fees is negotiated freely between the lawyer and his client, but in the light of criteria defined by law, which include in particular financial considerations. [19] An agreement to that effect must be concluded in writing prior to any intervention and be submitted for inspection by the chairman of the bar, failing which it will not be valid.

29. There are no public legal assistance offices in France to supplement the services provided by lawyers, unlike the situation elsewhere, for example in Finland [20] and in some of the German *Länder.*

D – *Financial aspects of the case*

30. VAT is a general tax on consumption, which applies to all goods and services consumed or used in the Member States of the European Union. In the case of services provided by lawyers, it is the client who, as the

15 — It must be observed that, unlike *avocats* and comparable lawyers, a reduced rate of VAT is not applied under Article 279 of the General Tax Code to the services of the other categories of persons concerned in the administration of justice.

16 — See Article 27(2) et seq of the Law of 10 July 1991 and Article 90 et seq of Decree No 91-1266 of 19 December 1991 implementing that law. The contribution by the French State to the payment of lawyers who provide assistance to a recipient of full legal aid is determined by multiplying the amount of the unit of value (UV) laid down in the Finance Law by multiplier coefficients fixed by decree.

17 — The courts concerned are: administrative, civil, criminal or social, of first and second instance, and the Conseil d'État (Council of State) and the Cour de Cassation (Court of Cassation).

18 — Rates range from 85%, 70%, 55%, 40%, 25% down to 15%.

19 — The second paragraph of Article 35 of the Law of 10 July 1991 provides that the parties must, 'taking into account the complexity of the documents in the case, the formalities and costs involved as a result of the nature of the case, [lay down] the amount of, and arrangements for paying, the supplementary fees, under conditions that are compatible with the means and assets of the recipient'. The following words are added to the fourth paragraph: 'Where a lawyer's bar lays down a method for assessing fees in the light of the criteria set out above, the amount of the supplementary fees shall be calculated according to that method of assessment'.

20 — See Case C-246/08 *Commission* v *Finland* [2009] ECR I-10605, paragraph 5 et seq, and the Opinion of Advocate General Ruiz-Jarabo Colomer (point 8 et seq and point 28) in that case, which concerned the concept of economic activity for the purposes of the Sixth Directive.

end consumer, uses the service and therefore, according to the way in which VAT operates, is required to pay that tax. In the context of legal aid, that financial burden is borne, either in full or in part, by the State.

31. In the case of full legal aid, application of a reduced rate of VAT has no perceptible impact so far as the recipient of the aid is concerned. Since all his legal fees are paid, the individual concerned is not aware of the concession, to the detriment of the general finances of the State, that the reduction in the rate of VAT represents. [21] In fact, in such cases application of a reduced rate limits the amount of budgetary resources going directly to the funding of legal aid, but at the same time the State pays less tax to itself.

32. By contrast, an individual receiving partial legal aid must pay a negotiated supplementary fee to his lawyer. As a reduced rate of VAT is applied, the person concerned may indeed receive fiscal support to supplement the direct support he receives in the form of legal aid. However, he obtains a positive result of this kind only if the supplementary fee (excluding VAT) is set at the lowest level acceptable to the lawyer. On the other hand, where the fee (including VAT) is set at the absolute maximum admissible for the client, the tax advantage benefits the lawyer. Between those two extremes, the margin between the reduced rate and the standard rate is shared between the parties. It is clear that a reduction in the rate of VAT does not necessarily benefit the end consumer. [22]

33. A comparative law analysis shows that the French Republic is not the only Member State of the European Union to have decided to apply a special regime to services provided by lawyers under a legal aid scheme. It is apparent from a document prepared by the Commission [23] that a reduced rate of VAT is applied to such services not only in France but also in Portugal. The document states that

21 — Since VAT is painless and invisible so far as a person receiving full legal aid is concerned it is opaque fiscal assistance, as Mr Roland du Luart stated in a report to the French Senate dated 9 October 2007 (Information Report to the Senate No 23, ordinary session 2007-2008, available on the Senate website, p. 82).

22 — Terra, B. and Kajus, J., *A Guide to the European Directives, Introduction to European VAT*, IBFD, Amsterdam/Hombæk, 2009, volume 1, p. 298.

23 — See document entitled 'VAT rates applied in the Member states of the European Community, Situation at 1st July 2009' (taxud.d.1(2009)307669 – EN), available on the Commission's website, in particular p. 19 et seq. The Commission warns that, since the 'information has been supplied by the respective Member States, but part of it has not been verified by some of them yet' '[t]he Commission cannot be held responsible for its accuracy or completeness, neither does its publication imply any endorsement by the Commission of those Member States' legal provisions.'

in Portugal a reduced VAT rate of 5% (as compared with 5.5% in France) is applied to 'services paid for under the legal aid scheme or where a lawyer is assigned automatically, services relating to the law of persons or family law and services relating to employment law', whilst a VAT rate of 20% is applied to other services provided by lawyers in Portugal, as compared with 19.6% in France.

34. At this point there is one question that is particularly pertinent: would application of the standard rate of VAT result in limiting access to justice, as the French Republic claims?

35. The Commission does not share this view, since it states in its application, as I mentioned above, that where the State bears in full the fees charged to an individual the latter is not affected by application of the standard rate of VAT. There will be a negative effect only where partial legal aid is granted. In addition, application of the standard rate to services provided by lawyers under the legal aid scheme would enable the French Republic to collect additional resources that could, in particular, be allocated to increasing the funds available for granting such aid. The French Government could thus bear all the costs, including VAT, charged by lawyers to persons receiving aid. It is the level of aid afforded to recipients, and not the rate of VAT applied, which determines the accessibility of the services provided by lawyers.

36. In other words, the Commission maintains that application of the standard rate of VAT would have no effect on the financial situation of recipients where legal aid is paid in full by the contribution from the State, and that the French authorities could amend the rules applying with regard to partial legal aid if they wish to give their financial support to the individuals concerned. The analysis of the financial effects inherent in the provisions of Article 279(f) of the General Tax Code which is thus carried out by the Commission appears to me to be well-founded.

37. Moreover, the fiscal neutrality and the absence of distortions in competition engendered by the provision concerned, which are claimed by the French Republic, have no decisive significance as regards the interpretation of the terms used in point 15 of Annex III to the VAT Directive. In that regard, the argument that a transaction is fiscally neutral appears, in the scheme of the VAT

Directive and in the case-law of the Court, [24] to be a factor that is used to limit the scope of the exceptions to the rule of taxation at the standard rate (derogations, exemptions, etc.) rather than a criterion that is used to justify an extension of their scope. Also, on occasion, the principle of fiscal neutrality inherent in the common system of VAT provides the basis for a less narrow interpretation of the concepts concerned. [25] I do not regard that consideration as being essential in the present case, however, since the objective of Articles 96 and 98(2) and Annex III to the VAT Directive is not so much to prevent distortion of competition but rather to promote progressive harmonisation of the laws of the Member States, by approximating rates of VAT and limiting the transactions to which reduced rates may be applied.

E – *General observations on the interpretation of point 15 of Annex III to the VAT Directive*

1. Transposition of the case-law relating to exemptions from VAT

38. To the best of my knowledge there are no specific precedents in the case-law on this subject. It would appear that the Court has not so far been requested to interpret the concepts contained in point 15 of Annex III to the VAT Directive, nor the equivalent concepts which appeared previously in Category 14 of Annex H to the Sixth Directive.

39. Nonetheless, the French Republic considers it necessary to transpose the interpretation which the Court gave of the similar phrase 'organisation recognised as charitable' used in Article 13(A)(1)(g) of the Sixth Directive, which became Article 132(1)(g) of the VAT Directive. In support of that position it notes that Article 98 of the VAT Directive refers to Article 132, and infers from this that a uniform interpretation must be given of the terms used in connection with reduced rates of VAT and exemption from VAT.

40. The principles of interpretation laid down in the case-law concerning exemptions from VAT do appear to me to be relevant and could be usefully transposed in order to interpret Annex III concerning reduced rates of VAT. [26] I am of the view that, for the sake of consistency, the same criteria must be used for the same concepts, especially since in

24 — Rosas, A. 'Value Added Tax and Distortion of Competition', in *EU Competition Law in Context: Essays in Honour of Virpi Tiili*, edited by Kanninen, H., Korjus, N. and Rosas, A., Hart, Oxford & Portland, Oregon, 2009, pp. 275 et seq, in particular, pp. 277 to 282 and p. 289.

25 — Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 19, concerning the interpretation of the Sixth Directive.

26 — I would point out, however, that the exemptions are binding on the Member States, whereas reduced rates are optional.

the present case the rate concerned is so low (5.5%) in comparison with the standard rate (19.6%) that the effects of that reduction in VAT are close to those of an exemption.

2. The relevant methods of interpretation

41. The case-law of the Court clearly states that the interpretation of the provisions concerning exemptions from VAT must be consistent with, and in compliance with, the objectives pursued by those exemptions. [27] Thus, it has been stated that the purpose of an exemption for certain services that are regarded as being in the public interest was to alleviate the tax burden on consumers. [28]

42. The same teleological approach must be adopted with regard to the provisions concerning reduced rates of VAT. It is apparent from the list of goods and services to which a reduced rate may be applied, as set out in Annex H to the Sixth Directive and subsequently in Annex III to the VAT Directive, that the intention of the legislature seems to have been to allow Member States to apply a reduced rate of VAT to certain categories of activities having a social and/or public purpose. [29]

43. However, Annex III to the VAT Directive, like Annex H to the Sixth Directive before it, is not based on an approach that is fundamentally consistent. The various categories listed in that annex do not form a structured whole. [30] They seem to be the result of a summary of a number of reduced rates which existed previously in the Member States. The combination, which has no internal logic, makes no real sense and does not allow of a contextual interpretation. Consequently, few constructive answers can be expected from an analysis of the preparatory documents. [31]

3. A broad or less broad interpretation of the concepts concerned

44. The Commission considers that the concepts contained in point 15 of Annex III to the VAT Directive require a 'strict' or even 'narrow' interpretation, since these are

27 — See, in particular, Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 42; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 29, and Case C-442/05 *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-1817, paragraph 30.

28 — See points 23, 30 et seq of the Opinion of Advocate General Sharpston in Case C-434/05 *Horizon College* [2007] ECR I-4793 concerning the Sixth Directive.

29 — See also point 47 of the Opinion of Advocate General Mazák in *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* concerning the provisions of Annex H to the Sixth Directive.

30 — In her Opinion in *Horizon College*, Advocate General Sharpston points out that the lists contained in the annexes to the Sixth Directive are not of a systematic nature, which means, that the intention of the Community legislature must be worked out.

31 — Compare Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 19 *in fine*.

derogations from the principle that the standard rate of VAT applies. In that regard, it takes as a basis Case C-83/99 *Commission* v *Spain*, which concerns the reduced rate of VAT permitted under Category 5 of Annex H to the Sixth Directive. [32]

45. The scope of a rule introducing an exception to a general principle, in this case the principle of taxation, must indeed be interpreted strictly. [33] However, that does not mean a restrictive approach must be taken. Thus, concerning the exemptions permitted with regard to certain activities in the public interest, the Court has held that the concept of 'organisations recognised as charitable … does not call for a particularly narrow construction.' [34]

46. The interpretation of the VAT Directive must not be so restrictive that it would exclude solutions adopted by some Member States in order to make arrangements for an activity coming under a special regime expressly provided for by that directive. It is necessary to take into account the differences between national practices as regards provision of services connected with social wellbeing and not prevent the derogations concerned from having practical effect. It seems to me that that was the philosophy adopted by the Court in *Kingscrest*. [35] That consideration is also apparent from *Horizon College* [36] and two recent cases. [37]

47. The list of goods and services that may be eligible for a reduced rate, given in Annex III to the VAT Directive, was deliberately intended to be restrictive and not purely illustrative. The list is in principle exhaustive for the purposes of Article 98. However, although the list is also restrictive as regards exemption from VAT, that did not prevent the Court from giving a categorisation in this field that is not a reductive one.

48. I consider that the VAT Directive must be interpreted essentially on the basis of the fiscal and economic objectives of the general scheme of that tax on consumption, which also forms part of the basis of the European Union's own resources. Looking at it from this point of view, it may be stated that it is not possible to extend the scope of economic

32 — Case C-83/99 *Commission* v *Spain* [2001] I-445, paragraphs 19 and 20, in which the Court held that the provision concerning 'transport of passengers and their accompanying luggage' does not apply to tolls for road infrastructure.

33 — In particular Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13.

34 — *Kingscrest Associates and Montecello*, paragraphs 29 to 32, concerning the interpretation of Article 13(A)(1)(g) of the Sixth Directive. See also *Gregg*, paragraph 17; Case C-144/00 *Hoffmann* [2003] ECR I-2921, paragraph 24 et seq, and *Dornier*, paragraph 48.

35 — Ibid.

36 — *Horizon College*, paragraph 16: '… the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect.'

37 — Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 25, and Case C-473/08 *Eulitz* [2010] ECR I-907, paragraph 27.

practices enjoying an exception by giving a liberal interpretation.

4. The interpretation to be derived from the terms used

(a) The disparities between the different language versions

49. A comparison of the different language versions of the VAT Directive reveals that the terms they use in point 15 of Annex III do not correspond exactly to the concepts contained in the French version.

50. It may be noted that the concept of '*organisme*' ('organisation') which appears in the French version is not exactly the same in all the other versions. The different terms used to convey the concept of 'organisation', and the effect this has as regards difficulties of interpretation, have been discussed on other occasions. [38] It seems to me that that term should not raise any particular problem here since, and I will return to this later, it is accepted that in the case of VAT, even a natural person acting alone can be regarded as an 'organisation'. That interpretation may also apply to lawyers.

51. The difficulties seem to me to relate rather to the interpretation of 'caractère social' ['social wellbeing']. As regards this first part of the conditions laid down in point 15 of Annex III, the following observations may be made in the light of the different language versions:

— in the German version, the term 'gemeinnützige' refers to the idea of 'the common good',

— in the Danish version the word 'velgørende' corresponds directly to the English term 'charitable', bearing in mind that that term has been replaced by the concept of 'wellbeing' in the current English version; the term 'charitable' which was used in the English version of Annex H to the Sixth Directive was held to be too narrow in *Kingscrest*. [39]

52. As regards the second set of conditions laid down in point 15 of Annex III, the French

38 — See in particular the Opinion of Advocate General Kokott in Case C-505/07 *Compañía Española de Comercialización de Aceite* [2009] ECR I-8963, point 45.

39 — *Kingscrest Associates and Montecello*, paragraph 21 et seq, and Opinion of Advocate General Ruiz-Jarabo Colomer, point 23 et seq.

version refers to the idea of an individual act ('œuvre'), the English, Danish, Italian, Finnish and Swedish versions refer rather to an activity in the general sense, whilst the German and Polish versions refer to a sector or a field, terms that are even more neutral.

53. An extrinsic ambiguity results from those variations between the language versions which strengthens the intrinsic ambiguity of the terms used in the French version of point 15 of Annex III to the VAT Directive. [40]

54. It is established that in order to ensure uniform application of European Union law, in the event of differences between the language versions of one and the same measure, no version may be considered in isolation or take precedence over the others, but each must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part. [41]

55. Moreover, the harmonisation which is the primanry concern of the VAT Directive means necessarily that the same factual situations must be categorised in the same way and be subject to a single system. It is clear that the conditions laid down in that directive in order for a reduced rate of VAT to apply are autonomous concepts [42] and must therefore be given a definition specific to the European Union and not interpreted according to a definition that might exist in domestic law.

(b) The 'ordinary meaning of the words'

56. According to the Commission, the provisions of Article 98(2) of, and Annex III to, the VAT Directive must be interpreted in accordance with the ordinary meaning of the words in question.

57. That position is indeed supported by the case-law of the Court concerning other possibilities for reduced rates of VAT, namely

40 — Compare the ambiguity noted by Advocate General Mazák in his Opinion in *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*, point 38, with regard to Annexes D and H to the Sixth Directive.

41 — See in particular the Opinion of Advocate General Kokott in *Compañía Española de Comercialización de Aceite* and the case-law cited in footnote 29, and recently Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera* [2009] ECR I-10143, paragraph 54 et seq, and the case-law cited, and *Eulitz*, paragraph 22.

42 — Compare the case-law relating to exemptions from VAT, in particular *Kingscrest Associates and Montecello*, and the cases cited in *Eulitz*, paragraph 25.

those authorised under Categories 5 and 8 of Annex H to the Sixth Directive. [43]

58. The question might therefore be asked whether, in the light of the ordinary meaning of the words used in the VAT Directive, lawyers can be classified as being one of the organisations referred to in point 15 of Annex III where they are providing assistance to recipients of legal aid.

59. It does not appear to me to be of great benefit, however, to take this analysis any further, in view of the variations between the different language versions. The nuances that might be found in the French terminology would not necessarily apply in the case of the other concepts adopted in the other official languages.

60. The main lesson that will be drawn from that case-law is that where there is doubt as to which of two interpretations of the words used in point 15 of Annex III applies it is necessary to reject the wider interpretation of their meaning and opt for the meaning that is closest to the ordinary meaning of those words.

43 — See *Commission* v *Spain*, paragraph 18 et seq, and Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 23. In the first of those cases, Advocate General Alber suggests adopting a strict interpretation and referring to what is 'predominant' in the concept concerned, which was transport in that case.

F – *The scope of the provisions of point 15 of Annex III to the VAT Directive*

1. The cumulative nature of the criteria laid down in the directive

61. Point 15 of Annex III to the VAT Directive lays down two conditions if a supply of services or goods is to be eligible under it for a reduced rate of VAT: first, the suppliers concerned must have a certain status, that is to say, they must be 'organisations recognised as being devoted to social wellbeing by Member States' and, second, the services supplied must be of a certain kind, that is to say, they must consist in 'welfare or social security work.' [44]

62. Both parties to the proceedings appear to share the view that those conditions are cumulative. However, their interpretations differ over the scope of the terms in which the conditions are expressed.

63. The Commission considers, first, that lawyers working under a legal aid scheme cannot be regarded as organisations covered

44 — As regards the variations between the different language versions, particularly in the case of the second criterion, see point 49 et seq above.

by that provision and, secondly, that their services in that context cannot be equated to welfare or social security work.

64. By contrast, the French Republic argues that Article 279(f) of the General Tax Code is compatible with Articles 96 and 98 of the VAT Directive since the services for which lawyers are paid in full or in part by the State under the legal aid scheme meet both the conditions laid down in point 15 of Annex III to that directive.

65. In order to adopt a position in that regard, it seems to me more profitable to examine in reverse order the two conditions laid down in the annex in question.

2. The criterion of 'welfare or social security work'

(a) The arguments of the parties

66. The Commission considers that lawyers working under a legal aid scheme are not engaged in the type of work referred to in the annex at issue. It argues that the services provided constitute legal assistance and are therefore the same as those offered to clients who do not receive financial aid from the State. It challenges the French Republic's plea that a lawyer who assists a recipient of legal aid is no longer performing the role of providing advice and defence, but is performing a welfare role, and it points out that the expectations of the individual concerned lie in legal protection and not in social support. It adds that the fact that the fee paid to the lawyer under the legal aid scheme is generally regarded as being inadequate makes no difference to the nature of the services provided by the lawyer, since he must meet all the shortfalls in connection with his professional activity. It also states that lawyers are subject to various constraints under their professional rules, even outside the context of legal aid. Lastly, it considers that VAT, being a general tax on consumption, does not permit different rates of tax to be applied depending on the level of income of each recipient of goods or services.

67. The French Republic maintains that activities having the same content and nature should, or should not, be regarded as welfare work depending on the level of recipients' resources. It gives the following illustration: the preparation of meals may constitute welfare work where it is done for the benefit of persons in need, whereas the same activity is not

welfare work where it is done for the benefit of a clientele which is not in need. As in the case of catering, it is necessary to distinguish the activity of a lawyer assisting a recipient of legal aid from the conventional activity of a lawyer working for a person who is solvent. The French Republic concedes that the services provided in both cases are the same, but it maintains that the social purpose and the low income of the recipient combine to confer on the lawyer's legal aid services the nature of welfare work.

68. Above all, the French Republic proposes that the following four indicators should be used to determine whether an organisation is engaged in welfare and social security work: (1) the pursuit of a social objective for the benefit of disadvantaged persons, (2) the implementation of a national solidarity policy through redistributive funding, (3) the non-profit-making nature of the services provided and (4) the special constraints to which the service provider is subject. It considers that legal aid provided by lawyers fulfils all those conditions. It states that, contrary to the Commission's interpretation, it does not contend that one of those indicators by itself would be sufficient to establish that lawyers are engaged in welfare work.

(b) Analysis

69. The term 'social' is a vague concept. It comprises at least two separate dimensions that are relevant to this case. One of those aspects concerns the sphere of human interactions, relationships and institutions which are founded on the vulnerability of the individual and an individual's need for the support and protection that may be offered by the various communities within society against life's inherent risks. That interpretation of 'social' is reflected in the institutions which are normally taken to constitute the typical examples of the social phenomenon, such as financial support for disadvantaged persons, protection of children and young people, care services which provide for the specific needs of people who are ill or handicapped or suffer from dependence on psychotropic substances. The other aspect of 'social' concerns the solidarity or collective altruism which is necessary in order for the needs of all to be fairly met.

70. The case-law of the Court relating to VAT itself shows that those two aspects or dimensions of 'social' interact in a complex way. For example, the Court accepted that the profit motive did not prevent a private-law entity providing services in the form of homes for children and young persons from being regarded as being devoted to social wellbeing ('charitable'), the particular context of that

case making that solution possible. [45] Also, in *Kügler*, [46] the Court held that 'the provision of general care and domestic help by an out-patient care service to those in a state of physical or economic dependence … is in principle linked to social assistance'.

71. In the present case, it seems to me that the work of providing assistance carried out by a lawyer under the legal aid scheme does not replace his ordinary work of providing advice and defence but rather supplements it. His contribution to the legal aid service adds, as it were, a social tone to the lawyer's traditional function.

72. The criterion of the nature of the service, which the Commission mainly relies upon and which is clearly the same in the context of legal aid and in the context of the traditional activities of lawyers, does not appear to me to be sufficient in itself to make an activity devoted to social wellbeing or not. In my view, the Court's finding in *Kügler* [47] is illuminating for that purpose.

73. The risk of applying a reduced rate to all services providing support for persons most in need, which is alleged by the Commission, appears to me to be unfounded. There would be a risk if the only criterion adopted was that of the persons for whom the service is intended. However, the French Republic proposes a weighting by other criteria, using four indicators which it lists.

74. As regards the low level of remuneration for lawyers, which is invoked by the French Republic, I would however point out that a lawyer's fees depend on his individual expectations of what level of remuneration is acceptable to him. It appears there is a group of lawyers in France who regard the level of income provided under the legal aid scheme as satisfactory, since work of this type appears to be concentrated in the hands of that group of lawyers. [48]

75. I am of the view that the decisive factor is the context in which a lawyer provides his services. There are many examples, in different Member States, of the fact that legal services, including those of legal advice and representation in court, may be provided in circumstances which link them to social wellbeing. That is true of the aid given by public

45 — *Kingscrest Associates and Montecello*, paragraphs 29 to 32.

46 — Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 44.

47 — Ibid.

48 — See Mr Roland du Luart's report to the Senate dated 9 October 2007, cited above, pp. 64-65: 'A concentration which is probably excessive is even taking place at present, since 9.4% of lawyers (4,492 lawyers) are carrying out 64% of legal aid work. … [O]n the part of the public authorities, a suspicion may also be creeping in regarding the nature of the contribution of legal aid to the financial profitability of certain chambers. It is not unusual, in fact, to hear that some of them "live entirely off legal aid"'.

legal assistance offices, by various civil society organisations and even by lawyers acting *pro bono* for disadvantaged persons, for victims of crime or for asylum seekers.

76. As regards the French legislation at issue, it is traditionally justified at the national level by a welfare aspect inherent in the situation of recipients of legal aid. [49]

77. It seems to me that legal aid may indeed be interpreted without too much difficulty as being 'welfare work' since, because it is based on social solidarity, it may be described as a measure of social policy. [50]

78. By contrast, there are real doubts concerning the first set of conditions laid down in point 15 of Annex III to the VAT Directive.

49 — In a report to the French Senate dated 30 June 1999, Mr Denis Badré states that a reduced rate of VAT is applied to services provided by lawyers under the legal aid scheme because those services are clearly 'related to social well-being' according to an official answer given by the National Assembly, taking into account the fact that the grant of legal aid is subject to conditions relating in particular to the resources of the recipient (Information Report No 74, Ordinary Session 1998-1999, available on the Senate's website).

50 — To that effect, Mr Roland du Luart, Member of the French Senate, notes that legal aid is 'the successor to a practice stemming from both charity and the duty of solidarity towards the most needy' (Report cited above, p. 64). By way of comparison, the Swedish authority responsible for legal aid (the Rättshjälpsmyndigheten) defines it as being social protection legislation to help those who cannot get legal support in any other way (http://www.rattshjalp.se/templates/DV_infoPage___3526.aspx).

3. The criterion of 'organisations recognised as being devoted to social wellbeing by Member States'

(a) Arguments of the parties

79. The Commission claims that the service providers concerned must have a certain status, that is to say, permanence and stability. It maintains that the VAT Directive requires a degree of permanence in the relationship between the Member State and the taxable person to whose services the reduced rate is applied. It states that in France application of the reduced rate to certain supplies of services by lawyers is not linked to the permanent nature of the service provider but solely to the fact that such services are provided, from time to time, under the legal aid scheme. It also considers that following the interpretation proposed by the French Republic would pose a risk, in so far as it would amount to applying the exception provided for in point 15 to any taxable person solely on condition that the services in question are paid for in full or in part by the State, and not just to service providers who have a privileged status conferred by the State because they are devoted to social wellbeing.

80. The French authorities refute the Commission's arguments, point by point. Concerning the permanence of the link between the State and lawyers, the French Republic maintains that, assuming this is a relevant criterion, such permanence is provided by the fact that the services in question are covered by Article 279(f) of the General Tax Code. It adds that although not all lawyers necessarily undertake legal aid work on a regular basis, any lawyer may at any time be assigned as a legal representative by a president of chamber or by a chairman of the bar and is required to undertake that assignment.

81. Also, it points out that since there was no definition given in the Sixth Directive, the Court decided that it was, in principle, for the national law of each Member State to lay down the rules for recognising an organisation as 'being devoted to social wellbeing', and case-law has given the national authorities the following indications for determining which organisations are devoted to social wellbeing: [51] (1) the existence of special legislative provisions, (2) the public interest nature of the activities of the taxable person concerned, (3) the fact that the other taxpayers providing the same services receive similar recognition, [52] and (4) the fact that the costs of the services in question may ultimately be met largely by social security bodies. According to the French Republic, the provisions of Article 279(f) of the General Tax Code meet all those criteria.

(b) Analysis

82. The Court has already ruled on the interpretation of the concept of 'organisation recognised as charitable by the Member State concerned' in the light of Article 13(A)(1)(g) of the Sixth Directive, which provides for 'exemptions for certain activities in the public interest' corresponding to those set out in Article 132(1)(g) of the VAT Directive. It is appropriate to maintain a uniform interpretation of the concepts of 'organisations' or 'bodies' and 'being devoted to social wellbeing' which are used in various parts of the VAT Directive and its Annexes, [53] and not give them a 'variable geometry' style interpretation.

83. The judgments delivered on VAT exemption state that the concept of 'organisation recognised as being devoted to social wellbeing' ['organisation recognised as charitable'] is sufficiently broad to include private profit-making entities, or even one natural person

51 — See, in particular, *Kügler*, paragraph 54 et seq, and *Kingscrest Associates and Montecello*, paragraph 53 et seq.

52 — The need to respect the principle of fiscal neutrality has frequently been recalled by the Court, in particular in *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*, paragraph 42, concerning reduced rates of VAT.

53 — See point 40 of Advocate General Mazák's Opinion in *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien*.

running a business, in particular where the objective is to reduce the cost of providing certain services in the general interest in the social sector and thus making them more accessible to the individuals who may benefit from them. [54]

84. That extensive approach which has been adopted by the Court with regard to exemptions from VAT is all the more appropriate with regard to reductions in the rate of VAT. It allows lawyers to be included in the category of organisations falling within the scope of point 15 of Annex III to the VAT Directive. The term 'organisation' admittedly suggests an individualised entity performing a particular function. [55] However, it is not disputed that that autonomous concept of European Union law may refer to one or more natural persons running a business, and not just legal persons. In the present case, the persons subject to the system of VAT are lawyers working under the legal aid scheme considered individually. The organisation, bar or bar council to which the lawyers concerned belong is of little importance, and in particular it is irrelevant whether the methods for assigning and paying them to carry out that work are centralised.

85. It is clear from the foregoing that there is no doubt at all that lawyers working under a legal aid scheme are covered by the concept of 'organisation'. Furthermore, the dispute did not principally concern this point since, in that regard, the parties have both referred to the extensive case-law of the Court. The Commission recognises this, noting that the point at issue is merely whether the organisation providing the service is 'devoted to social wellbeing'.

86. The parties hold strongly opposing views on this last criterion. The VAT Directive, just like the Sixth Directive before it, does not lay down the conditions and procedures whereby the organisations referred to in point 15 of Annex III can be recognised as being 'devoted to social wellbeing'. It must be noted that in the French version that phrase in Annex III to the VAT Directive is an exact reproduction of the equivalent provision in the Sixth Directive. By contrast, in the English version the wording changed in relation to the earlier text, as I observed above. [56]

87. The requirement of permanence, which is formulated by the Commission, is not taken expressly from the terms of the VAT Directive, or, it seems to me, from the case-law of the Court. Is it necessary, however, to accept that permanence is implicitly required?

54 — *Gregg*, paragraphs 17 and 18; *Kingscrest Associates and Montecello*, paragraphs 30, 35 and 43, and Case C-415/04 *Stichting Kinderopvang Enschede* [2006] I-1385, paragraph 23.

55 — See *Gregg*, ibid., and the Opinion of Advocate General Cosmas in that case (point 27), who refers to an 'autonomous operator', distinct from the persons who have set it up.

56 — The term 'charitable' became 'as being devoted to social wellbeing', which appears to be more in line with the position taken by the Court in *Kingscrest Associates and Montecello*.

88. I am of the view that a degree of stability, if not permanence, is necessary in activities connected with social wellbeing. Permanence however is relative in that the time factor is not sufficient in itself. It appears to me that it is necessary that the preponderant, indeed almost exclusive, activity of the service provider should be devoted to social wellbeing. It is not enough merely to possess a welfare aspect. The 'functional' interpretation given by the French Republic is not consistent either with the wording of the VAT Directive or with its objectives. That approach leads to the odd situation that an organisation may have two sides to it, namely that it could be considered to be devoted to social wellbeing when it carries out actions of a welfare nature, but not devoted to social wellbeing in other cases. Such an interpretation seems to result in a fusion of the two conditions in a situation where welfare work would be the only indication that the organisation is 'devoted to social wellbeing'. If that were so it would have been sufficient for Annex III to the VAT Directive to provide that a reduced rate is possible where service providers engage in an activity relating to social wellbeing.

89. That is not the position taken by the legislature, however. Having two sides cannot be contemplated since the VAT Directive does not permit it, in contrast to the possibility of variation which it expressly provides for in the case of public bodies. The decisive factor in my view is the field in which the activity takes place, and not the organisation's purpose. It is necessary to look at the operators and what they do rather than the objectives they pursue.

90. It is apparent from the case-law of the Court that the national authorities have discretion to recognise an entity as being an organisation devoted to social wellbeing, but that that discretion must be exercised in accordance with European Union law. [57] However, in the light of that case-law it appears that the process whereby recognition of being devoted to social wellbeing may be granted is not dependent on a purely national approach. It is admittedly for the authorities of the Member States to attribute that status, but subject to review by the national courts, which must themselves work in the light of the requirements of European Union law and take into account the non-restrictive criteria laid down in the judgments of the Court. [58]

91. With regard to the work carried out by a lawyer under the legal aid scheme, referred to in the French General Tax Code, I do not think that we can refer to the organisation concerned as being 'devoted to social wellbeing', because that concept in my view refers to a purpose which must have a degree of permanence and some preponderance in the light of the nature of the organisation's activities. In order to safeguard the effectiveness of the VAT Directive and preserve the restrictive nature of Annex III, it is necessary to adopt an interpretation of the provisions of point 15 whereby not only the activity but

57 — In particular *Kügler*, paragraphs 54 to 56; *Stichting Kinderopvang Enschede*, paragraph 23, and *Kingscrest Associates and Montecello*, paragraphs 52 and 53.

58 — In addition to the three cases above, see Case C-267/99 *Adam* [2001] ECR I-7467, paragraph 35 et seq, and the Opinion of Advocate General Sharpston delivered on 10 September 2009 in Case C-262/08 *CopyGene*, pending before the Court, point 73 et seq.

also the organisation in question must be sufficiently, even predominantly, devoted to social wellbeing. That latter criterion, construed according to the ordinary meaning of the words, is not met by lawyers, since in my view it is necessary to take into account all of an organisation's activities in order to determine whether it meets the conditions laid down by the provision in question. [59] Unless they are doubly 'devoted to social wellbeing' the supplies of services concerned do not meet all the conditions laid down in the directive for applying a reduced rate of VAT.

92. I therefore consider that the action for failure to fulfil obligations is well-founded, since the services provided by *avocats* and comparable lawyers, covered by Article 279(f) of the General Tax Code, do not come into the category set out in point 15 of Annex III to the VAT Directive, the only provision relied upon by the French Republic in its defence, namely, the 'supply of goods and services by organisations recognised as being devoted to social wellbeing by Member States and engaged in welfare or social security work', and that a reduced rate of VAT cannot therefore be applied to them. [60]

59 — Compare Case C-174/00 *Kennemer Golf* [2002] ECR I-3293, paragraph 21 et seq, which states that 'the categorisation of an organisation as non-profit-making' must take into account 'all its activities'.

VI – Costs

93. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

94. The Commission has applied for costs to be awarded against the French Republic. The latter will therefore have to be ordered to pay the costs if, as I propose, the action for failure to fulfil obligations is allowed.

60 — Furthermore, as the Commission pointed out, that was the finding clearly made in 2007 by Mr Roland du Luart, Member of the French Senate, in the light of the provisions of the Sixth Directive: '[t]he Member States of the European Community may choose to apply one or two reduced rates, of 5% or over, to a limited list of goods and services. The services of lawyers do not appear on that list …' [t]he reform of the legal aid scheme, which has now become necessary and urgent, must also be the opportunity to bring France into line with the rules applying to all the Member States of the European Community (Information Report to the Senate of 9 October 2007, p. 83).

VII – Conclusion

95. In the light of the above considerations, I suggest that the Court should:

'(1) Declare that, in applying a reduced rate of value added tax to services provided by *avocats, avocats au Conseil d'État et à la Cour de cassation* and *avoués* for which they are paid in full or in part by the State under the legal aid scheme, the French Republic has failed to fulfil its obligations under Articles 96 and 98(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;

(2) Order the French Republic to pay the costs.'