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 Greece has failed to fulfil its obligations under the EC Treaty in so far as value added tax was not levied on road fees (tolls) and corresponding payments of own resources with interest were not made. [1]

2. In Greece a toll may be levied on roads and motorways in order to improve, promote or ease traffic conditions, the construction of new roads and the maintenance of existing roads. The monies thus collected are paid directly into the national Road Construction Fund, a body governed by public law. Consequently, the toll is not subjected to VAT because it is collected — according to the Greek Government — in the exercise of public authority.

II — Pre-litigation procedure

3. By letter of 12 August 1987 the Commission asked the Greek authorities to bring the existing national rules concerning the collection of the toll into line with the provisions of Article 2 of the Sixth VAT Directive.

4. By letter of 20 April 1988 the Commission sent a letter of formal notice informing the Greek authorities that the collection of the toll for the use of motorways constituted an economic activity which fell within the scope of the Sixth VAT Directive. It stated that the Greek authorities would be infringing that directive if the toll were not subjected to VAT.

* Original language: German.

1 — The Commission has also brought actions against France, Ireland, the United Kingdom and the Netherlands on the same grounds: see Cases C-276/97, C-358/97, C-359/97 and C-408/97. 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).

5. In its reply of 4 July 1988 the Greek Government claimed that the toll was an indirect tax levied by a public body in the exercise of public authority and therefore it did not fall within the scope of the Sixth VAT Directive.

6. The reasoned opinion was sent to the Greek Government by letter of 8 August 1989.

7. A reply was made by letter of 21 November 1989 which reiterated the arguments contained in the letter of 4 July 1988.

8. As regards the question of own resources, the Commission's Director-General for Budgets pointed out to the Greek Government by letter of 24 October 1989 that the alleged infringement of the Sixth VAT Directive resulted in an unjustified reduction in the amounts of own resources and therefore asked it to calculate the amounts due for the financial years 1987 to 1989 and to make them available to the Commission together with interest for late payment from 31 January 1990. In respect of the subsequent years the relevant amounts were to be transferred within a specific period, subject to interest for late payment.

9. By letter of 31 January 1990 the Greek authorities refused to make back payments, referring to the arguments which had already been advanced in the reply to the reasoned opinion in respect of the alleged infringement of the Sixth VAT Directive.

10. By letter of formal notice of 21 June 1990 the Commission initiated proceedings for failure to fulfil Treaty obligations also in relation to that point.

11. Since no reply was given, the Commission sent the reasoned opinion by letter of 6 May 1992 and asked the Greek Government to comply therewith within the prescribed period.

12. The Greek Government rejected that request by letter of 10 September 1992.

13. The Commission therefore brought an action pursuant to Article 169 of the EC Treaty (now Article 226 EC) — received by the Registry of the Court of Justice on

16 July 1998 — claiming that the Court should:

(1) declare that in not subjecting road fees, which constitute a consideration paid by users for the supply of a service to them, consisting in the provision of motorways and other transport infrastructure facilities, to value added tax, contrary to the provisions of Articles 2 and 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on VAT, and, moreover, by thus evading payment of own resources and interest due (Regulations No 1552/89 and No 1553/89) the Hellenic Republic had failed to fulfil its obligations under the Treaty establishing the European Community;

(2) order the Hellenic Republic to make available to the Commission the own resources which it has failed to pay since 1987 together with interest for late payment;

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

14. The Greek Government 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 [2] (hereinafter 'the Directive')

15. 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;...'

2 — OJ 1977 L 145, p. 1.

16. 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, [3] 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

3 — 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.

Article 13[4]... 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[5]

17. Article 1 provides:

'VAT resources shall be calculated by applying the uniform rate, set in accordance with Decision 88/376/EEC, Euratom, to the base determined in accordance with this Regulation.'

18. 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[6]

19. 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

4 — 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.

5 — OJ 1989 L 155, p. 9.

6 — OJ 1989 L 155, p. 1.

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 [7]

20. 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

21. The Commission considers that the provision of infrastructure on payment of a toll constitutes an economic activity within the meaning of Articles 2 and 4 of the Sixth VAT Directive. Even if this activity is engaged in by public bodies, that does not mean that the person providing the services is exempt from VAT since the activity constitutes a service liable to VAT supplied by a taxable person. Exemption from tax liability is possible only where the activities concerned are carried out in the exercise of public authority pursuant to Article 4(5).

22. It constitutes an economic activity since — from an objective point of view and in the light of the actual economic situation — road users are supplied a service for consideration in respect of the movement of goods and persons. Since a connection with economic life exists in this respect, the activity falls within the scope of the Sixth VAT Directive. The legal classification of the activity under the law of a Member State, in particular, cannot guarantee the uniform application of the VAT system.

23. As regards the failure to apply the rules on VAT on account of the possible exercise of public authority in the present case, the Commission argues that both the term 'economic activity' and the term 'public authority' must be defined in an objective and uniform manner.

24. The Commission further concludes that public bodies are not exempt from VAT in general, but only in respect of the activities which they engage in as public authorities. Here, too, a narrow definition must be applied. At issue are responsibilities which, by their very nature, cannot be discharged by private individuals. Moreover, the fact that a tax exemption can apply only where

7 — 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.

there is no significant distortion of competition demonstrates the intention of the legislature to apply the VAT system in as general a manner as possible.

25. In the view of the Commission the provision of road infrastructure is comparable to supply to the public of gas, water and electricity. However, it is common ground that such activities are liable to VAT and the requirements for exemption are not fulfilled.

26. In the present case the toll constitutes a direct consideration from the road users for the provision of the infrastructure. The amount of the toll to be paid varies according to distance and the type of vehicle.

27. If the toll is not subjected to VAT, as is the case in Greece, traders from other Member States are placed at a disadvantage, since they are unable claim a deduction of input tax in respect of the toll paid.

28. As regards the question of own resources, the Commission considers that the failure to levy VAT upsets the equilibrium of the common VAT system and the system of Member States' contributions to own resources.

29. The Greek Government responds to the Commission's allegations by stating, first, that the action is not founded on the proper legal basis. It claims that the provisions of the Sixth VAT Directive, in particular Articles 2 and 4 thereof, are not so precise, unconditional and strict that proceedings for failure to fulfil Treaty obligations can be based thereon.

30. Since the collection of a toll for the provision of infrastructure is not listed in Annex D pursuant to Article 4(5)(3), which would make it liable to tax, it was the legislature's intention to exempt that activity from VAT.

31. Under Greek law it is possible to levy a toll in order to improve, promote or ease traffic conditions, the construction of new roads and the maintenance of existing roads.

32. The toll collected is paid directly into the national Road Construction Fund, a body governed by public law. This means that it forms part of the overall State budget. On account of these characteristics

the toll is an indirect tax[8] which is collected in the exercise of public authority. Consequently, Article 4(5) is applicable to the present case.

33. However, there is no economic activity within the meaning of Articles 2 and 4 of the Sixth VAT Directive because the toll does not constitute consideration for services supplied to users.

34. Furthermore, the infrastructure is provided in the exercise of public authority, a matter to be determined solely in accordance with the relevant national law. In the present case it must be concluded that the toll is an indirect tax,[9] as is evident from the nature of the toll, its aim, its function and the direct link with the State budget and with the applicable national public law.

8 — At the oral procedure the Greek Government stated otherwise, claiming that the toll was not an indirect tax. Although it was a fee which exhibited certain characteristics of a tax, as, amongst other things, it was paid directly into the State budget, it constituted a public fee levied in the exercise of State authority in the same way as a heavy goods vehicle fee or a court fee.

9 — See footnote 8 as regards what constitutes an indirect tax.

35. The national Road Construction Fund in Greece carries out activities only as a public, and thus a State, authority. Therefore, it cannot be regarded as forming part of national economic life. The toll is collected in the exercise of State authority, is obligatory in nature and involves the use of powers which go beyond general law and are derived from the nature of this activity as a legal monopoly.

V — Appraisal

1. *Levying of VAT on tolls*

36. 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

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

38. 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]

39. 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.

40. 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.

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

(b) Taxable persons

42. 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.

43. 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.

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

(aa) State activity

44. 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]

45. 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]

46. 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]

47. 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.

48. 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 16), in respect of which even bodies governed by public law are liable to VAT.

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.

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

50. 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, however, 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.

51. 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

52. 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.

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

54. 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]

55. 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]

56. Even if the provision of road infrastructure on payment of a toll 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.

57. 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

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.

clear that there is an economic activity in the case under consideration.

(c) (In the alternative) Distortion of competition

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

59. 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.

60. 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.

61. 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 36 to 56, 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

62. It must thus be concluded that Greece has failed to fulfil its obligations under the Treaty in not subjecting the motorway tolls to VAT.

2. *Own resources*

63. In respect of this point the Commission claims that the Court should order the Hellenic Republic to make available to the Commission the own resources which it has failed to pay since 1987 together with interest for late payment. However, since in proceedings for failure to fulfil obligations the application is for a declaration, the Court cannot order that certain measures be taken, cancelled or altered, but can merely declare that the defendant Member State has committed one or more infringements of Community law. In the present case the purpose of the Commission's action, which must be determined in the light of the pleas raised and the grounds stated, is in the first place to obtain a declaration that the motorway toll was not subjected to VAT — contrary to the Treaty — with the result that the corresponding contributions to own resources were not paid. Therefore, this plea by the Commission must be seen as relating to that subsequent effect of the declaration of failure to fulfil obligations, so that the Court of Justice may — provided that a situation contrary to the Treaty exists — declare a failure to fulfil obligations also in this respect.

64. 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.

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

66. That constitutes a breach of Community provisions on the payment of own resources from VAT. It is of no relevance that 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.

67. 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*

68. Once it is established that Greece 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 Greece as a result in respect of the whole period concerned.

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

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

70. Consequently, the Court is not empowered to make a formal order that Greece 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 Greece to remedy the breach of the Treaty.

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

72. 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]

73. 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 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.

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

75. 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]

76. 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

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.

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 31 to 33.

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.

77. 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.

78. 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.

79. 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.

80. 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

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

26 — Case C-96/89, cited above at footnote 21, paragraph 37.

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.

81. 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.

82. 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 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.

83. 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.

84. 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.

85. 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.

86. The period to which the Commission's action relates does not appear to be clearly

defined. The application seeks a declaration of failure and relates to the period from 1987. 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 1987 are now closed so that the annual statements cannot now be corrected must therefore be examined.

87. 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 1987 financial year could accordingly no longer be corrected after 31 July 1991. 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.

88. 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 1987 to 1992 financial years, the underlying issues and various legal points which also underlie this application were discussed with Greece.

89. 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 1992 and 1998 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.

90. Whilst the objective of this provision is to grant an extension of the time allowed in complex cases raising many problems, the

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

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.

91. 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.

92. 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 Greece that the Commission would observe the time-limits in the procedure for correction of annual statements.

93. 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 — six, 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.

94. 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 16 July 1998, that means that the financial years since 1994 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 Greece after 31 July 1998, 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.

95. 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

28 — See point 86 for the calculations.

obligations, the remainder of the application cannot be dismissed despite the partial expiry of time-limits — which indirectly amounts to a partial success for Greece. The same applies to the decision as to costs.

VI — Costs

96. 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. The Commission has asked for Greece 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 Hellenic Republic has essentially been unsuccessful, it should be ordered to pay the costs.

VII — Conclusion

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

(1) In not subjecting road fees 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 Hellenic 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 1994.

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