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

2. In Ireland there are two public bridges for the use of which a toll is charged. These are the East-Link and West-Link Bridges, East and West of Dublin respectively. The competent authorities may either collect the toll themselves or delegate collection to a third party, which is then responsible for maintenance of the relevant infrastructure in return. However the toll collected is not subject to VAT in either case.

II — Pre-litigation procedure

3. The Commission raised the question of VAT on tolls in a letter to the Irish authorities on 3 March 1987. The authorities replied by letter of 14 December 1987.

4. The Commission sent a letter of formal notice on 20 April 1988, pursuant to Article 169 of the EC Treaty (now Article 226 EC), concluding that the failure to levy VAT on the tolls collected for the use of the East Link toll bridge in Dublin was contrary to Articles 2, 4(1), 4(2) and 4(5) of the Sixth VAT Directive. By letter of 17 October 1988 the Irish authorities asserted that the tolls in question constituted rent for immovable property and as such were exempt from VAT.

* Original language: German.

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

5. By letter of 27 November 1987, the Commission pointed out to the Irish authorities that the VAT at issue had to be taken into account in the assessment of the contributions due to the Community budget under the system of own resources.

6. By letter of 22 April 1988 the Irish authorities expressed the view that since VAT was not chargeable on the East Link toll bridge toll no further contributions to own resources were due.

7. By letter of 31 January 1989 the Commission initiated proceedings for failure to fulfil Treaty obligations in relation to the Communities' own resources. The Commission took the view that Ireland had failed to fulfil its obligations under the Treaty in not making the necessary calculations to ascertain whether and to what extent own resources deriving from VAT were underpaid for the years 1984 to 1986 and in not making that information available to the Commission. The Commission therefore asked the Irish authorities to make the necessary calculations, pay the amounts due with interest for late payment from 31 March 1988 to the Commission and make the necessary calculations for every subsequent year until the infringement ended and forward them to the Commission.

8. In their reply of 4 October 1989 the Irish authorities reiterated the arguments they had already put forward.

9. By letter of 19 October 1989 the Commission delivered its reasoned opinion, which covered both the VAT and the own resources aspects of the dispute.

10. As regards own resources the Irish Government replied by letter of 23 May 1999 and as regards liability to VAT by letter of 12 October 1990 in which it claimed that the exception provided for by Article 4(5) of the Sixth VAT Directive was applicable in this case.

11. In its application lodged at the Court Registry on 21 October 1997 the Commission claimed that the Court should

(1) declare that in not subjecting tolls for the use of existing toll roads and toll bridges in Ireland to value added tax contrary to the provisions of Articles 2, 4(1), 4(2) and 4(5) of the Sixth VAT Directive and by failing to make available to the Commission the amounts of own resources and interest for late payment as a consequence of this

infringement Ireland has failed to fulfil its obligations under the EC Treaty;

(2) order Ireland to bear the costs.

12. The Irish Government contends that the Court should

(1) declare that in not subjecting tolls for the use of existing toll roads and toll bridges in Ireland to value added tax and by failing to make available to the Commission the amounts of own resources and interest for late payment Ireland has not failed to fulfil its obligations under the EC Treaty;

(2) order the Commission to bear the costs.

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')

13. 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.

14. 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 Article 13 [4]... as activities which they engage in as public authorities.'

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.

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 civic 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.

15. Article 13 provides as follows with regard to other domestic exemptions:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

(a)...

(b) the leasing or letting of immovable property excluding:

1. The provision of accommodation... in the hotel sector...,
2. The letting of premises and sites for parking vehicles;
3. Lettings of permanently installed equipment and machinery;
4. Hire of safes.

...'

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]

16. 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.'

17. 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.'

5 — OJ 1989 L 155, p. 9.

(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]

18. Article 11 provides:

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

(c) Council Decision 88/376/EEC, Euratom, of 24 June 1988 on the system of the Communities' own resources [7]

19. 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

20. The Commission points out first that the system of tolls in Ireland is regulated first by the Local Government (Toll Roads) Act 1979, and subsequently by the Roads Act 1993. [8] Under this legislation a Road Authority may charge tolls for the use of certain roads. The amount of the toll is set by that authority. The powers of road authorities are exercised by local authorities or in the case of national roads by the National Roads Authority. A Road Authority may, with the consent of the Minister for the Environment, enter into an agreement with another person by which the latter undertakes to finance a new road and to operate a toll system on it. Such an agreement can cover some or all of the costs of constructing and maintaining the road.

6 — OJ 1989 L 155, p. 1.

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.

8 — The rules in force since 1979 were reproduced in the 1993 provisions. The Commission therefore assumes that the legal position has been the same since 1979.

21. The Commission states further that operating a road and charging a toll for its use is an example of the exploitation of tangible property for the purpose of obtaining income therefrom on a continuing basis. Under Article 4(1) of the Directive such an operation is an economic activity carried out by a taxable person.

22. The question whether there is an economic activity must be appraised objectively in the light of the actual economic situation. In the light of the actual circumstances it must, therefore, be considered that there is an economic activity in the present case. It is carried out for consideration and there is a direct link between the service rendered and the consideration received in the form of the toll, since payment is made by the user every time he wishes to use the road in question.

23. As the terms 'supply' and 'economic activity' must be interpreted in accordance with Community law, the fact that a private operator carries out activities which contribute to the general good does not affect the position taken by the Commission.

24. Contrary to the view of the Irish Government, there can be no question of an exception under Article 13B(b), under which the leasing or letting of immovable property is exempt from VAT. The Commission argues that there are three essential elements in the definition of leasing: first, there must be an identified area with space which is occupied, second, it must be for an agreed period of time and, third, it must be in exchange for an agreed payment by the occupier to the owner. In the case of travel along a road or over a bridge, however, there is no time element. Moreover, a user cannot use an identified area and exclude others from use of that area. Payment of a toll does not entitle the user to the exclusive use of property but merely gives him the right to travel on a certain stretch of road. The terms 'leasing' and 'letting' must be given their ordinary meaning. Both imply a relationship between landlord and tenant or at least an element of possession of the property. As the provisions of Article 13B(b) constitute an exception to the rule of liability to tax, it must be construed narrowly.

25. Nor can there be any question of an exemption under Article 4(5)(1) of the Directive in the present case, as the operation of infrastructure on payment of a toll is not an activity of a body governed by public law which is incumbent upon it as a public authority. Since this Article also constitutes an exception to the definition of taxable person, it, too, must be construed narrowly.

26. The Commission observes that the Irish legislation allows businesses not covered by public law to operate a road and collect a

toll. In such circumstances the businesses are private economic operators.

27. Moreover, only bodies governed by public law are eligible for a tax exemption and then only if they are acting as public authorities.

28. As economic considerations arise for the user of a road where a toll is levied (price of toll, savings of time and fuel consumption), an economic decision is made, with the result that the provision of a road and collection of a toll is not a specific duty discharged in exercise of public authority. Even if the competent authorities continue to supervise the business operating the infrastructure and even fix the price of the toll, the economic activity is not carried out by public authorities in the exercise of public authority. These are economic activities which fall within the private sector. In the present case the only relevant fact is that the supply of infrastructure on payment of a toll constitutes a taxable transaction.

29. As regards own resources the Commission therefore concludes that the wrong basis of assessment was chosen through failure to levy VAT on tolls, with the result that inequalities between the Member States of the Community in respect of the collection of own resources have arisen.

30. However, the Irish Government takes the view that those responsible for collecting the toll are not taxable persons within the meaning of the Directive. Under Article 4(5) activities engaged in as public authorities are exempt from tax even when they are carried out for consideration. In the present case, it is argued, the Irish authorities are acting as public authorities in building roads and bridges for public use. Funding and maintaining such infrastructure is a public responsibility. Under the applicable Irish legislation such funding can be provided by levying a toll. However, that does not alter the fact that the activity is governed by public law.

31. Furthermore, the Irish Government considers that the supply of certain infrastructure on payment of a toll constitutes leasing and that the rules on tax exemption under Article 13B(b) therefore apply.

32. The essential elements of leasing listed by the Commission are not derived from the Directive. In the present case there is an identified area — the road or bridge to be

crossed — which is made available to the user for an agreed period of time — the time taken to travel along the road or bridge.[9] For this rental the user pays consideration — the toll — the price of which is fixed by a public authority.

33. The transaction does not grant the user any right of possession but a classic landlord and tenant relationship is not required as the other activities listed in Article 13B(b) demonstrate.[10] These are not typical examples of leasing either so there is no reason why the present case should not be covered by the term too.

34. As regards the exemption from VAT for public bodies acting in exercise of public authority the Irish Government contends that the regulation of roads and bridges falls entirely within the remit of public authority. The construction and maintenance of such infrastructure is the responsibility of the local or national authorities. Provision can be made for the levying of a toll on national roads. When construction and maintenance work on roads and bridges is delegated the authorities can allow the allocation of all or part of the proceeds of the tolls to a third party. However, those authorities alone are entitled to charge tolls, and they are therefore levied in exercise of public authority.

35. A public authority is always at the root of the activity in question. The third parties authorised to collect the tolls are not acting independently. The supply of infrastructure for public use is and remains an exercise of public authority by public bodies. The user of the infrastructure pays the toll because the public bodies have a right to it in exchange for the provision of infrastructure.

36. If, in the present case, tolls are not subject to VAT, there can be no question of Ireland's contributions to the Community's own resources being too low. The Commission's action is therefore unfounded in respect of this claim too.

V — Appraisal

1. *Levying of VAT on tolls*

37. 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

9 — The term 'leasing' also covers situations in which a short period of time is involved.

10 — For the wording of subparagraph (b) see above at point 15.

was carried out by a taxable person and, if so, whether it was an economic activity.

(a) Supply of services for consideration

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

39. 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. [11]

40. 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.

41. The toll itself is not a tax, as a tax is a 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 consideration for a service provided.

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

(b) Taxable persons

43. 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.

44. 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

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

payments in connection with these activities or transactions.

(aa) State activity

45. 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. [12]

46. 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. [13]

47. 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. [14]

48. 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. [15] 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.

49. 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

12 — 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.

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

14 — *Carpaneto*, cited above at footnote 12, paragraph 15.

15 — *Carpaneto*, cited above at footnote 12, paragraph 16.

above at point 14), in respect of which even bodies governed by public law are liable to VAT.

50. 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 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.

51. It is true that the provision of roads is classified as an activity subject to VAT, though not expressly so as in the case of the supply of water, gas and electricity in Annex D. In reality, the provision of road 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 a 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.

52. 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

53. 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.

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

55. 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. [16]

56. 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. [17] In the present case, the road infrastructure is provided, on payment of a toll, by the competent authorities or by third parties to whom the activity is delegated.

57. Even if such delegation is subject to public law and the toll roads 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.

58. Consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system. [18] 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

16 — Case 235/85, cited above at footnote 12, 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.

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

18 — Case C-260/95 *DFDS* [1997] ECR I-1005, paragraph 23.

by the relevant bodies to generate revenue, in order to cover expenditure on materials and at the same time earn an income, it is clear that there is an economic activity in the case under consideration.

(c) Letting

59. Since, in the light of the foregoing, it must be considered that, as a rule, the body empowered to collect tolls is a taxable person, the question which now falls to be answered is whether the activity in question may be exempt from tax under Article 13B(b).

60. Under that Article the provision of infrastructure on payment of a toll would be exempt from tax if it constituted the letting of immovable property.

61. There is no definition of this term under Community law in the relevant legislation. To clarify its meaning we must, therefore, look at the context in which it is used, taking account of the general structure of the Sixth VAT Directive.

62. It is clear from the spirit and purpose of the Directive and the wording of Article 2 in particular that the fundamental principle of the Directive is that all supplies of goods and services made by a taxable person for consideration are subject to VAT if they are not expressly exempted. The provisions regarding exemption are therefore to be interpreted narrowly as they are an exception to the fundamental principle of the Directive.

63. This means that the term 'letting of immovable property' must be defined according to its usual meaning. Not every contract which has some characteristics of a letting is automatically covered by the term. This would constitute a wide interpretation of the exemptions from tax which is precisely what is not intended. The requirement is, therefore, that the characteristics of a letting should predominate in the contract.

64. The provision of roads infrastructure on payment of a toll does not, however, fulfil that condition. It is true that an identified area of space (the road travelled along) is made available to the user for an agreed period of time (the length of the journey) in exchange for payment. However, the characteristics of a letting do not predominate here, as the user's priority is to travel along a given stretch of road as

quickly and as safely as possible. The use of the property, on the other hand, is of secondary importance.

65. In the present case — according to the argument of the Irish Government — a bridge or a tunnel is let not only to one person but to several people at the same time. Such people have *a priori* no exclusive right of possession over the bridge. This is not a situation in which it is possible for several people to be tenants of the same property. Car drivers do not want to let the bridge jointly and be jointly and severally liable for the rent as in the case of shared accommodation.

66. There is, further, no letting here since the user has no protection from unauthorised use by third parties, nor can he make general use of the property; his right to use the property is limited to the possibility of travelling along the road.

67. The chief purpose of the 'contract' between the parties is not so much the use of the property as the one-time provision of a service using that property. For car drivers the brief use of the property is in fact of secondary importance, as their priority is to reach their destination quickly and safely.

68. The Irish Government's argument that the activities listed in Article 13B(b) show that 'letting' can be construed widely cannot be accepted. The examples given are not tenancies 'widely construed'. They may be special forms of tenancy; however they do not depart radically from the criteria for the general definition of tenancies. Even if this were the case, the conclusions drawn by the Irish Government regarding tax exemption would not follow. The four 'specific tenancies' are not mentioned in order to show that 'letting' can be construed widely, but because — as 'an exception to the exception' constituted by the tax exemption for letting — they are subject to VAT. Precisely because letting — as an exception to the rule — is not subject to VAT, it is to be interpreted narrowly, as explained in points 61 and 62.

69. In the present case there is, therefore, no VAT-exempt letting of property.

(d) (In the alternative) Distortion of competition

70. 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 distortions of competition. In the light of the observations made above, this sub-case 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.

71. A 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.

72. The examples of distortions 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, distortions of competition would most of all prejudice those countries where no road tolls are levied at all.

73. There are thus no distortions of competition within the meaning of Article 4(5)(2) which would justify treatment as a taxable person. However, as I explained in points 37 to 68, 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.

(e) Interim conclusion

74. Ireland has therefore failed to fulfil its obligations under the EC Treaty in not subjecting tolls for the use of bridges and tunnels to VAT, contrary to Articles 2 and 4 of the Sixth VAT Directive.

2. *Own resources*

75. 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 Directive. Contributions to own resources are then calculated by applying a fixed uniform rate to this base.

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

77. This 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 financial imbalance in the Community. Under the relevant Community 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.

78. 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. [19]

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

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

80. 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

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

cannot order the defendant State to remedy the breach or cancel or alter the contested measures.

81. Consequently the Court is not empowered to make a formal order that Ireland 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 Ireland to remedy the breach of the Treaty.

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

83. 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. [20] It is, therefore, for the Commission to judge, on expiry of the time-limit set, when to bring an action in the wake of the reasoned opinion. [21] 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. [22] Nevertheless, the case-law of the Court tends to reject the idea that the Commission's right of action can be forfeited. [23]

84. 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, which 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

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

21 — 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.

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

23 — Footnotes 21 and 22.

direct claim can be made for payment of resources in the course of an action for failure to fulfil Treaty obligations.

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

86. 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. [24] 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. [25]

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

88. 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.

89. 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

24 — 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 calendar year.

25 — Case 57/69 *ACNA* v *Commission* [1972] ECR 933, paragraphs 29 and 31 to 32.

of rules liable to entail financial consequences' constitutes an argument against temporal limitation.[26] 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.

90. According to the case-law of the Court, a dispute between the Commission and a Member State over the collection of own resources may not cause the financial equilibrium of the Community to be disrupted.[27] In the present case, a temporal imitation 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.

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

92. 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 this is not possible, the Member States in question may request reimbursement of the back payments.

93. It is clear from the time-limit in Article 9(2) of Regulation No 1553/89 that Member States are not intended to 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

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

27 — Case C-96/89, cited above at footnote 22, paragraph 37.

objection it is able to assess in principle the obligations which arise from the VAT Directive and proceed accordingly.

94. 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 have, as a matter of principle, a right 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.

95. 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.

96. 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.

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

98. It is clear from the Commission's letter of formal notice of 20 April 1988 amongst the documents on the Court file that the Commission's claims relate to the period from 1984 until cessation of the alleged infringement. It must therefore be assumed that this is the period at issue in the Court action too. Although the Commission took no further action in respect of subsequent years between the end of the pre-litigation procedure and the bringing of the action, it must be assumed that its intention was to put an end to the infringement with all that this implied for the subsequent years. The extent to which the financial years since 1984 are now closed so that the annual statements cannot now be corrected must therefore be examined.

99. 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 1984 financial year could accordingly no longer be corrected after 31 July 1988. The equivalent calculation is to be made for subsequent years. It would, therefore, no longer be possible for the Commission to collect own resources for those years.

100. 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 may be made: 'unless they concern points previously notified either by the Commission or by the Member State concerned.' For the 1984 to 1990 financial years, the underlying issues and various legal points which also underlie this application were discussed with Ireland.

101. There is a strong case for interpreting the second part of Article 9(2) to mean that exceptions to the 43-month time-limit are only to be allowed if those concerned have continued in the intervening period to make an effort to solve the problems raised. However, if the proceedings come to a lengthy and unwarranted standstill, it would be contrary to the spirit and purpose of the provision to continue to apply it. In the present case there was not sufficient further dialogue in the years between 1990 and 1997 to enable a solution to the problems to be found. In response to questioning in the oral procedure the Commission stated that it regularly raised the problem of own resources with the Member States concerned and that there was an ongoing dialogue on the question of levying VAT.[28] 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.

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

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

103. 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.

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

105. 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 interruption cannot continue beyond the 43-month time-limit. As there were more than four years — seven to be exact — 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.

106. 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 21 October 1997, that means that the financial years since 1994 are not yet closed and that corrections are still possible. [29]

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

VI — Costs

108. 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 Ireland

29 — See point 98 for the calculations.

to be ordered to pay the costs. Although the claim for payment of contributions to own resources has partially exceeded 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 realised through this action. The subject at issue in the present case is only the declaration of conduct contrary to the Treaty. As Ireland has essentially been unsuccessful, it should be ordered to pay the costs.

G — Conclusion

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

(1) In not subjecting tolls for the use of existing toll roads and toll bridges in Ireland 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, Ireland has failed to fulfil its obligations under the EC Treaty; however, the Commission is entitled to collect the own resources retrospectively and claim interest for late payment only as from 1994 (the financial year).

(2) Ireland shall bear the costs of the proceedings.