

JUDGMENT OF THE COURT (Third Chamber)

16 July 2009 (\*)

(Failure of a Member State to fulfil obligations – Value added tax – Directive 2006/112/EC – Articles 2, 9 and 13 – Economic activity in which the State, local authorities and other bodies governed by public law engage – Exemption)

In Case C-554/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 December 2007,

**Commission of the European Communities**, represented by R. Lyal and M. Afonso, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland**, represented by D. O'Hagan, acting as Agent, and E. Fitzsimons SC and N.J. Travers BL, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Klučka, U. Løhmus, P. Lindh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 19 March 2009,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its application, the Commission of the European Communities seeks a declaration that, by failing to transpose correctly into national law Article 13 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), including Annex I thereto, and by excluding from the scope of value added tax ('VAT') all economic activities in which the State, local authorities and other bodies governed by public law engage, with certain limited exceptions, Ireland has failed to fulfil its obligations under Articles 2, 9 and 13 of that directive.

**Legal framework**

## *Community legislation*

2 Article 2(1) of Directive 2006/112 (formerly Article 2 of 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 (OJ 1977 L 145, p. 1; ‘the Sixth Directive’)) provides:

‘The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

...’

3 Article 9 of Directive 2006/112 (formerly Article 4(1) and (2) of the Sixth Directive) states:

‘1. “Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

...’

4 Article 13 of Directive 2006/112 (formerly Article 4(5) of the Sixth Directive) provides:

‘1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as 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 those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.

2. Member States may regard activities, exempt under Articles 132, 135, 136, 371, 374 to 377, and Article 378(2), Article 379(2), or Articles 380 to 390, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.’

5 Annex I to Directive 2006/112 (formerly Annex D to the Sixth Directive) contains a list of 13 activities in respect of which bodies governed by public law are, in any event, to be regarded as taxable persons.

## *National legislation*

6 Section 8(2A) of the Value-Added Tax Acts 1972-2004 (that is to say the Value-Added Tax Act 1972 as amended by subsequent legislation up to and including the Finance Act 2004; ‘the Irish legislation’) provides:

‘(a) The Minister may, following such consultations as he may deem appropriate, by order provide that the State and every local authority shall be taxable persons with respect to specified categories of supplies made by them of goods or services and, accordingly, during the continuance in force of any such order but not otherwise, the State and every local authority shall be accountable for and liable to pay tax in respect of any such supplies made by them as if the supplies had been made in the course of business.

Provided that, where supplies of the kind referred to in, subject to subsection (3E), paragraph (xxiii) of the First Schedule or in paragraph (viic) of the Sixth Schedule are provided by the State or by a local authority, an order under this subsection shall be deemed to have been made in respect of such supplies by the State or by the local authority.

(b) The Minister may by order amend or revoke an order under this subsection, including an order under this paragraph.

(c) An order under this subsection shall be laid before Dáil Éireann [the Irish Parliament] as soon as may be after it is made and, if a resolution annulling the order is passed by Dáil Éireann within the next twenty-one days on which Dáil Éireann has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.’

7 Section 8(3E) of the Irish legislation provides:

‘(a) Notwithstanding [certain] provisions ...

an authorised officer of the Revenue Commissioners shall –

(I) where such officer is satisfied that such supply of such services has created or is likely to create a distortion of competition such as to place at a disadvantage a commercial enterprise which is a taxable person supplying similar-type services, or

(II) where such officer is satisfied that such supply of such services is managed or administered by or on behalf of another person who has a direct or indirect beneficial interest, either directly or through an intermediary, in the supply of such services,

make a determination in relation to some or all of such supplies as specified in that determination deeming –

(A) such person, the State or such local authority to be supplying such supplies as specified in that determination in the course or furtherance of business,

(B) such person, the State or such local authority to be a taxable person in relation to the provision of such supplies as specified in that determination, and

(C) such supplies as specified in that determination to be taxable supplies to which the rate specified in section 11(l)(d) refers.

(b) Where a determination is made under paragraph (a), the Revenue Commissioners shall, as soon as may be after the making thereof, issue a notice in writing of that determination to the party concerned, and such determination shall have effect from such date as may be specified in the notice of that determination:

Provided that such determination shall have effect no sooner than the start of the next taxable period following that in which the notice issued.

(c) Where an authorised officer is satisfied that the conditions that gave rise to the making of a determination under paragraph (a) no longer apply, that officer shall cancel that determination by notice in writing to the party concerned and that cancellation shall have effect from the start of the next taxable period following that in which the notice issued.

(d) In this subsection “authorised officer” means an officer of the Revenue Commissioners authorised by them in writing for the purposes of this subsection.’

### **Pre-litigation procedure**

8 Following a complaint made to it, the Commission sent a letter of formal notice to Ireland on 22 December 2004 notifying it that, by not subjecting to VAT local authorities operating off-street parking facilities whereas commercial operators engaged in that activity must charge tax at the standard rate of 21%, Ireland had failed to fulfil its obligations under the Sixth Directive.

9 In its letter of formal notice, the Commission noted that, pursuant to Article 4(5) of the Sixth Directive, public bodies were not to be considered taxable persons in respect of activities or transactions in which they engaged as public authorities. They were, however, to be treated as taxable persons in respect of economic activities (the supply of goods or services) in which they engaged otherwise than in that capacity.

10 Moreover, they had also to be considered taxable persons where their treatment as non-taxable persons would lead to significant distortions of competition. Lastly, such bodies were taxable in respect of the activities listed in Annex D to the Sixth Directive unless they were carried out on such a small scale as to be negligible. The Commission observed that Irish legislation and practice did not ensure that public bodies were taxed in accordance with the provisions of Article 4(5) of the Sixth Directive.

11 Ireland replied by letter of 21 April 2005. In its reply, it maintained that its legislation complied with that provision. Ireland argued that under its Constitution local authorities had limited powers. They may not, for example, engage in commerce in competition with private traders. Their powers in respect of parking are conferred on them in the interest of traffic management. More generally, local authorities act only pursuant to powers conferred on them by statute and therefore necessarily act in their capacity as public bodies.

12 Compliance with the second subparagraph of Article 4(5) was ensured by the power of the Minister for Finance to make an order pursuant to section 8(2A) of the Irish legislation. Since the exercise of that power is subject to judicial review, interested parties are able to secure the adoption of an order where necessary.

13 With particular regard to the provision by local authorities of off-street parking facilities, Ireland argued that there was no evidence of significant distortion of competition arising from the non-taxation of those facilities.

14 On 4 July 2006, the Commission sent a reasoned opinion to Ireland, repeating the

arguments put forward in the letter of formal notice.

15 In its reply, Ireland maintained that Article 4(5) of the Sixth Directive had been fully and correctly implemented in the Irish legislation. It also claimed that the Commission had, in its reasoned opinion, extended the scope of the alleged infringement.

16 Since it considered that the response to the reasoned opinion was not satisfactory, the Commission decided to bring the present action.

## **The action**

### *Admissibility*

17 Ireland contends that the action is in part inadmissible because of the alleged extension in its scope compared with that of the complaints in the letter of formal notice and in the reasoned opinion.

18 First, although the Commission's arguments initially focussed on the Irish system for making the provision of off-street parking facilities subject to VAT, they were extended, in the application, to calling into question the entire system of VAT in Ireland as applied to bodies governed by public law.

19 Secondly, the subject-matter of the action was also extended in that initially it concerned only local authorities, whereas the application also relates to the treatment as a non-taxable person of the State itself.

20 Thirdly, the Commission impermissibly changed its claim by alleging that the Irish legislation contains no general provision for making public bodies subject to tax on economic activities they carry out in their capacity as public authorities, where their non-taxation would lead to significant distortions of competition.

21 In that regard, the Court has consistently held that the letter of formal notice sent by the Commission to a Member State, and the reasoned opinion issued by the Commission, delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the EC Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations (see, in particular, Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 23, and Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paragraph 59).

22 Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure. The reasoned opinion and the application must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion, which for its part must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (*Commission v Germany*, paragraph 60 and the case-law cited).

23 However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered (judgment of 22 January 2009 in Case

C-150/07 *Commission v Portugal*, not yet published in the ECR, paragraph 21 and the case-law cited).

24 In this case, first of all, it is clear from the letter of formal notice and the reasoned opinion that the Commission was referring, in general, in its application, to activities carried on by bodies governed by public law, without confining such activities to off-street car-parking facilities.

25 Indeed, the letter of formal notice reveals that the latter activity, which was the subject-matter of the complaint made to the Commission, was mentioned as an example in the course of the preliminary examination of Irish legislation. On the basis of that examination, the Commission decided, generally, that the treatment for VAT purposes applied in Ireland to the supply of goods and services by bodies governed by public law was incompatible with the provisions of Article 4(5) of the Sixth Directive.

26 It is to be noted, next, that the Commission referred expressly, in the letter of formal notice, to bodies governed by public law. Moreover, in paragraphs 51 and 52 of the reasoned opinion, the Commission drew Ireland's attention to the fact that its reply to the letter of formal notice was silent as regards the activities of bodies governed by public law other than local authorities, in particular the State, whilst emphasising that the letter of formal notice and the reasoned opinion concerned all Irish public bodies, including the State.

27 Finally, paragraph 18 of the letter of formal notice refers, explicitly, to the lack of any general provision governing the treatment of bodies governed by public law as taxable persons when they carry on their activities as public authorities, where treating them as non-taxable persons would significantly distort competition.

28 In those circumstances, it must be held that the Irish authorities had available all the information necessary to enable them to put their case properly.

29 The plea of inadmissibility must therefore be rejected.

### *Substance*

30 In support of its action, the Commission pleads, in essence, three complaints alleging respectively:

- the lack of any general provision requiring the taxation of economic activities in which bodies governed by public law engage otherwise than in their capacity as a public authority,
- the lack of any general provision requiring bodies governed by public law acting in their capacity as a public authority to be treated as taxable persons where their treatment as non-taxable persons could give rise to significant distortions of competition, and
- the lack of any general provision requiring bodies governed by public law engaged in activities listed in Annex I to Directive 2006/112 to be treated as taxable persons.

31 It is appropriate to examine successively the validity of each of those complaints.

The first complaint, alleging the lack of any general provision requiring the taxation of economic activities in which bodies governed by public law engage otherwise than in their capacity as a public authority

- Arguments of the parties

32 The Commission notes that, under the first subparagraph of Article 13(1) of Directive 2006/112, public bodies must be considered taxable persons in respect of economic activities in which they engage otherwise than in their capacity as a public authority. However, there is no provision of Irish legislation requiring such taxation. On the contrary, the State and local authorities are not generally treated as taxable persons unless a ministerial order is made in respect of a specified category of goods or services.

33 In that regard, the Commission notes that bodies governed by public law are not automatically exempted in respect of all the activities in which they engage but only in respect of those which form part of their specific duties as public authorities (Case 235/85 *Commission v Netherlands* [1987] ECR 1471, paragraph 21).

34 The determining criterion is whether the public body acts under a special legal regime applicable to bodies governed by public law. Where the public body carries on an economic activity under the same legal conditions as those that apply to private traders, it becomes taxable like any other person (see, to that effect, Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 16).

35 The Commission further submits that a public body acts in its capacity as a public authority, in particular where the pursuit of the activity involves the use of public powers (see, to that effect, Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 24).

36 Ireland replies that the regime established by Article 13 of Directive 2006/112 constitutes a regime under which the notion of economic activity plays no express and certainly no predominant role. The focus is placed, rather, on the 'activities or transactions' of public authorities. Thus, Article 13 is not a mere exclusion to be interpreted narrowly. As a limitation on the application of the special legal regime, the second subparagraph of Article 13(1) of Directive 2006/112 does not fall to be construed widely, as the Commission's argument presupposes.

37 In addition, Ireland points out that Article 249 EC imposes an obligation on Member States to achieve a result when transposing directives into domestic law but each Member State may choose the appropriate form and method to attain that result. Ireland was therefore under no obligation to implement Directive 2006/112 in a particular form provided the appropriate result is achieved.

38 In that regard, Ireland contends that it is clear from Article 28A(2) of the Bunreacht na hÉireann (Constitution of Ireland) and, more specifically, the provisions of the Local Government Act 2001 that, in so far as they engage in activities, local authorities in Ireland do so uniquely pursuant to powers conferred upon them under the specific legal regime applicable to them by statute including the exercise of public powers, in accordance with the Court's case-law.

#### – Findings of the Court

39 It is clear from the scheme and purpose of Directive 2006/112, as well as from the place of Article 13 thereof in the common system of VAT established by the Sixth Directive, that any activity of an economic nature is, in principle, to be taxable. As a general rule and in accordance with Article 2(1) of Directive 2006/112, the supply of services for consideration, including those supplied by bodies governed by public law, is to be subject to VAT. Articles 9 and 13 of Directive 2006/112 thus give a very wide scope to VAT (see, to that effect, the judgment of 16 September 2008 in Case C-288/07 *Isle of Wight Council and Others*, not yet published in the ECR, paragraphs 25 to 28 and 38).

40 Since only activities of an economic nature are covered by Article 13 of Directive 2006/112 (*Isle of Wight Council and Others*, paragraph 29 and the case-law cited), it cannot be considered, as Ireland claims, that that article lays down a regime under which the notion of economic activity plays no express and certainly no predominant role.

41 Thus, it is only by way of derogation from the general rule referred to in paragraph 39 of the present judgment that certain activities of an economic nature are not to be subjected to VAT. Such derogation is laid down by the first subparagraph of Article 13(1) of Directive 2006/112, under which activities engaged in by a body governed by public law acting as a public authority are not to be subject to VAT (see, to that effect, *Isle of Wight Council and Others*, paragraph 30). As the Court has held on numerous occasions, two conditions must be cumulatively fulfilled in order for that provision to apply: 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 (*Isle of Wight Council and Others*, paragraph 19 and the case-law cited).

42 In those circumstances, Ireland's argument that, on the one hand, the first subparagraph of Article 13(1) of Directive 2006/112 is to be interpreted broadly and, on the other, its second subparagraph is to be interpreted restrictively, rests on the false premiss that bodies governed by public law are not, as a rule, to be treated as taxable persons for the purposes of VAT. As an exception to the principle of taxing any activity of an economic nature, the first subparagraph of Article 13(1) of Directive 2006/112 must be strictly interpreted.

43 As follows from paragraphs 39 to 41 of the present judgment, the correct application of Articles 2, 9 and 13 of Directive 2006/112, which are intended to ensure its effective implementation, requires that bodies governed by public law be, as a rule, subject to VAT in respect of economic activities in which they engage otherwise than as public authorities.

44 It should, in that regard, be recalled that the transposition of Community legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it does ensure the full application of the directive in a sufficiently clear and precise manner (Case C-360/87 *Commission v Italy* [1991] ECR I-791, paragraph 7 and the case-law cited).

45 Further, Member States must, in order to secure the full implementation of directives in law and not only in fact, establish a specific legal framework in the area in question (Case C-429/01 *Commission v France* [2003] ECR I-14355, paragraph 40 and the case-law cited).

46 Irish law in respect of VAT does not satisfy those requirements.

47 It is not in dispute between the parties that no provision of Irish law in respect of VAT requires bodies governed by public law to be regarded as taxable persons in respect of economic activities in which they engage otherwise than as public authorities. It follows that activities in which Irish public authorities engage are not, as a rule, regarded as being taxable.

48 An interpretation of Article 13 of Directive 2006/112 such as that suggested by Ireland leads therefore, in the absence of an express provision requiring bodies governed by public law to be treated as taxable persons in respect of economic activities in which they engage otherwise than as public authorities, to a result contrary to the general rule under Articles 2, 9 and 13 of that directive, that the supply of services for consideration, including those supplied by bodies governed by public law, be, as a rule, subject to VAT.

49 That conclusion is not affected by Ireland's argument that, in so far as they engage in



economic activities, local authorities in Ireland do so uniquely pursuant to powers conferred upon them under the specific legal regime applicable to them by statute. Apart from the fact that such argument concerns only activities engaged in by local authorities and not those engaged in by the State, it is to be noted that bodies governed by public law act as public authorities when they engage in activities which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority (*Isle of Wight Council and Others*, paragraph 31). Moreover, the mere fact that a body governed by public law acts within the framework of a special legal regime and in accordance with powers conferred upon it by statute does not mean that engaging in its activities necessarily involves the exercise of rights and powers of public authority.

50 It follows from the foregoing that, by failing to lay down, in its national legislation, a general requirement that economic activities in which bodies governed by public law engage otherwise than in their capacity as a public authority are to be subject to VAT, Ireland cannot effectively secure the correct application of Articles 2, 9 and 13 of Directive 2006/112 as regards those activities.

51 In those circumstances, the first complaint must be upheld.

The second complaint, alleging the lack of any general provision requiring bodies governed by public law acting in their capacity as a public authority to be treated as taxable persons where their treatment as non-taxable persons could give rise to significant distortions of competition

– Arguments of the parties

52 The Commission submits that, under the second subparagraph of Article 13(1) of Directive 2006/112, public bodies are to be treated as taxable persons in respect of economic activities in which they engage as public authorities where their treatment as non-taxable persons would lead to significant distortions of competition. However, no general provision of Irish law in respect of VAT requires such tax treatment.

53 In the Commission's submission, except for the unique existing general taxation mechanism, which applies to the provision of sporting facilities, if an official of the Ministry of Finance establishes that there is distortion of competition, the State and local authorities are treated as taxable persons only in so far as an express ministerial order is made in respect of a specified category of goods or services.

54 Thus, section 8(2A) of the Irish legislation simply confers a power on the Minister for Finance, without however containing any indication of the criteria on the basis of which that power is to be exercised. Therefore, the Irish legislation does not adopt the criteria set out in Directive 2006/112, thereby leaving the Minister with full discretion.

55 In reply, Ireland submits that section 8(2A) of the Irish legislation does set out the criteria that the Minister for Finance is required to apply. First, it provides that the Minister may make an order under the section following such consultations as he may deem appropriate. That consultation process permits other private undertakings, which feel that competition on the markets on which they operate is being distorted by the non-taxation of certain activities of public authorities, to complain to the Minister and seek the adoption of an order under the section. Second, in considering whether to make such an order the Minister is bound by the requirements of Directive 2006/112, and he is subject to judicial review, in particular in the light of Case C?430/04 *Feuerbestattungsverein Halle* [2006] ECR I?4999, which confirmed that Article 13 of that directive has direct effect.

– Findings of the Court

56 By providing, with regard to bodies governed by public law, for an exception to the non-application of VAT in respect of the activities and transactions in which they engage as public authorities, the second subparagraph of Article 13(1) of Directive 2006/112 is intended to restore the general rule stated in Articles 2(1) and 9 of that directive, under which any activity of an economic nature is, in principle, to be subject to VAT (see, to that effect, *Isle of Wight Council and Others*, paragraph 38, and the judgment of 4 June 2009 in Case C-102/08 *SALIX Grundstücks-Vermietungsgesellschaft*, not yet published in the ECR, paragraph 67).

57 Consequently, the second subparagraph of Article 13(1) of Directive 2006/112 cannot be construed narrowly (see, to that effect, *Isle of Wight Council and Others*, paragraph 60, and *SALIX Grundstücks-Vermietungsgesellschaft*, paragraph 68).

58 A body governed by public law acting in its capacity as a public authority must be regarded as a taxable person where its treatment as a non-taxable person gives rise to significant distortions of competition. The situation is thus envisaged in which bodies governed by public law engage in activities which may also be engaged in, competitively, by private traders. The objective is to ensure that the latter are not put at a disadvantage because they are taxed while the former are not (see, to that effect, *Comune di Carpaneto Piacentino and Others*, paragraph 22).

59 In that regard, Member States are free to choose, from the various methods of achieving the results defined by the second and third subparagraphs of Article 13(1) of Directive 2006/112, that of entrusting an administrative body, such as the Minister for Finance, with the task of specifying the situations in which an activity carried on by a body governed by public law may be regarded as bringing about significant distortions of competition or as being negligible and of applying those criteria to individual cases, provided that its decisions on application may be reviewed by the national courts (see, to that effect, *Fazenda Pública*, paragraph 32).

60 It is particularly important, so as to conform with the requirement of legal certainty, that, where that directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and rely on them, if necessary, before the national courts (see Case C-49/00 *Commission v Italy* [2001] ECR I-8575, paragraph 49, and *SALIX Grundstücks-Vermietungsgesellschaft*, paragraph 41).

61 Each Member State is bound to implement the provisions of directives in a manner that fully meets the requirements of clarity and certainty in legal situations imposed by the Community legislature, in the interests of the persons concerned established in the Member States. To that end, the provisions of a directive must be implemented with unquestionable legal certainty and with the requisite specificity, precision and clarity (Case C-354/99 *Commission v Ireland* [2001] ECR I-7657, paragraph 27 and the case-law cited, and *SALIX Grundstücks-Vermietungsgesellschaft*, paragraph 42).

62 Here, Irish law in respect of VAT contains no general provision requiring bodies governed by public law to be treated as taxable persons in respect of economic activities in which they engage as public authorities, in situations where their treatment as non-taxable persons would lead to significant distortions of competition.

63 Moreover, under section 8(2A) of the Irish legislation, the Minister for Finance has a broad discretion to determine, by order, the supplies of goods or services in respect of which bodies governed by public law must be treated as taxable persons.

64 Ireland leaves to the Minister for Finance the discretion to apply the provisions of section 8(2A) of the Irish legislation. Irish VAT law does not specify, contrary to the requirements noted in paragraphs 60 and 61 of the present judgment, in what situations an activity in which a body governed by public law engages can be regarded as giving rise to significant distortions of competition or as being negligible and does not set forth, in a binding provision with unquestionable legal certainty, the criteria for the Minister for Finance to apply such provision to actual situations.

65 The Court cannot, therefore, accept Ireland's argument that, since the Minister for Finance will have detailed knowledge of what it is appropriate to regard as an economic activity and will, in any event, not exercise that discretionary power otherwise than in accordance with Community law, the Minister should not be made subject to such a provision.

66 Such an interpretation cannot ensure compliance with the principle of legal certainty by virtue of which Community legislation must be certain and its application foreseeable by those subject to it (see, in particular, *Isle of Wight Council and Others*, paragraphs 47 and 48).

67 In the absence of any binding provision laying down criteria on the basis of which the powers of the Minister for Finance must be exercised, neither bodies governed by public law nor private operators are in a position to provide, with the required certainty, for the conduct of their affairs if the provision by bodies governed by public law of an economic activity will or will not be subject to VAT. That situation is therefore likely to jeopardise the principle of legal certainty (see, to that effect, *Isle of Wight Council and Others*, paragraphs 51 and 52).

68 It follows from the foregoing that, by failing to lay down, in its national legislation, either a general requirement that bodies governed by public law acting in their capacity as a public authority are to be subject to VAT where their treatment as non-taxable persons gives rise to significant distortions of competition or any criterion providing a framework for the exercise, in that connection, of the Minister for Finance's discretion, Ireland cannot effectively secure the correct application of Articles 2, 9 and 13 of Directive 2006/112 as regards those bodies.

69 Consequently, the second complaint must be upheld.

The third complaint, alleging the lack of any general provision requiring bodies governed by public law engaged in activities listed in Annex I to Directive 2006/112 to be treated as taxable persons

– Arguments of the parties

70 The Commission notes that Annex I to Directive 2006/112 contains a list of activities in respect of which public bodies must, in any event, be treated as taxable persons, whereas no provision of Irish VAT law provides for such taxation. Only the transactions of the Irish agricultural intervention agency are taxed pursuant to an order made in 2001 under section 8(2A) of the Irish legislation.

71 Ireland submits that most of the activities listed in Annex I to Directive 2006/112 are in general exempt or can be exempted under other provisions of that directive, in particular Annex X thereto. It is therefore unlikely, given the very limited extent to which local authorities in Ireland engage in such activities, that the absence of an express provision making such activities taxable, save where they are carried out on such a small scale as to be negligible, has any practical effects.

– Findings of the Court

72 The third subparagraph of Article 13(1) of Directive 2006/112 provides that bodies governed by public law are, in any event, to be regarded as taxable persons in respect of the activities listed in Annex I thereto, unless those activities are carried out on such a small scale as to be negligible. There is, in effect, a presumption that, since those activities may be carried on, under national laws, by either public or private operators, omitting to tax those activities would entail distortion of competition (see, to that effect, *Isle of Wight Council and Others*, paragraph 35).

73 As the Court has already stated in paragraph 34 of the judgment in *Isle of Wight Council and Others*, it is that undesirable result, namely distortion of competition, that the Community legislature sought to avoid by providing, in the third subparagraph of Article 13(1) of Directive 2006/112, that the activities specifically listed in Annex I thereto (such as telecommunications, the supply of water, gas, electricity and thermal energy, the transport of goods, port and airport services and passenger transport) are, ‘in any event’, unless they are negligible, to be subject to VAT, even when they are carried on by bodies governed by public law acting as public authorities.

74 Since it is clear from the wording of that provision that the treatment of those bodies as taxable persons for VAT purposes results from the performance, as such, of the activities listed in Annex I to Directive 2006/112 (see, to that effect, *Isle of Wight Council and Others*, paragraph 35), the correct transposition of that provision requires that Irish VAT law contain a requirement that bodies governed by public law engaged in activities listed in Annex I to that directive are to be treated as taxable persons, provided that those activities are not carried out on such a small scale as to be negligible.

75 It is apparent from the documents in the Court file that such law contains no such provision. As regards, moreover, Ireland’s argument that the activities listed in Annex I to Directive 2006/112 are in general exempt or can be exempted, Ireland itself accepted in the course of the hearing that, of those activities, many are not so exempted. In those circumstances, it cannot be ruled out that a body governed by public law could, in certain circumstances, engage in an activity listed in Annex I to that directive as a non-taxable person.

76 It must, accordingly, be held that, by failing to lay down, in its national legislation, a general requirement that bodies governed by public law engaged in activities listed in Annex I to Directive 2006/112 are to be subject to VAT, provided that those activities are not carried out on such a small scale as to be negligible, Ireland has not correctly transposed Article 13 of that directive.

77 It follows that the third complaint must be upheld.

78 In the light of all the foregoing considerations, it must be declared that:

- by failing to lay down, in its national legislation, a general requirement that economic activities in which bodies governed by public law engage otherwise than in their capacity as a public authority are to be subject to VAT;
- by failing to lay down, in its national legislation, either a general requirement that bodies governed by public law acting in their capacity as a public authority are to be subject to VAT where their treatment as non-taxable persons gives rise to significant distortions of competition or any criterion providing a framework for the exercise, in that connection, of the Minister for Finance’s discretion, and
- by failing to lay down, in its national legislation, a general requirement that bodies governed

by public law engaged in activities listed in Annex I to Directive 2006/112 are to be subject to VAT, provided that those activities are not carried out on such a small scale as to be negligible,

Ireland has failed to fulfil its obligations under Articles 2, 9 and 13 of the directive.

## **Costs**

79 Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

**1. Declares that, by failing to lay down, in its national legislation, a general requirement that economic activities in which bodies governed by public law engage otherwise than in their capacity as a public authority are to be subject to value added tax;**

**by failing to lay down, in its national legislation, either a general requirement that bodies governed by public law acting in their capacity as a public authority are to be subject to value added tax where their treatment as non-taxable persons gives rise to significant distortions of competition or any criterion providing a framework for the exercise, in that connection, of the Minister for Finance's discretion, and**

**by failing to lay down, in its national legislation, a general requirement that bodies governed by public law engaged in activities listed in Annex I to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax are to be subject to such tax, provided that those activities are not carried out on such a small scale as to be negligible,**

**Ireland has failed to fulfil its obligations under Articles 2, 9 and 13 of the Directive.**

**2. Orders Ireland to pay the costs.**

[Signatures]

\* Language of the case: English.