62010CJ0524
JUDGMENT OF THE COURT (Fourth Chamber)

8 March 2012 ( * )

?Failure of a Member State to fulfil obligations — Common system of value added tax — Directive 2006/112/EC — Articles 296 to 298 — Common flat-rate scheme for farmers — Flat-rate compensation percentage set at nil rate'

In Case C-524/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 11 November 2010,

European Commission, represented by M. Afonso, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes and R. Laires, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 September 2011,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2011,

gives the following

Judgment

1

By its action, the European Commission asks the Court to declare that, in applying to farmers a special scheme which does not comply with the scheme established by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive'), because it exempts them from the payment of value added tax ('VAT'), and in applying a flat-rate compensation percentage at a nil rate, while at the same time making a substantial negative compensation in own resources payable to the European Union in relation to the collection of VAT, the Portuguese Republic has failed to fulfil its obligations under Articles 296 to 298 of that directive.

Legal context

European Union law

2

The VAT Directive establishes, in Articles 295 to 305, the rules relating to the common flat-rate scheme for farmers (‘the flat-rate scheme for farmers’). That scheme was, until 1 January 2007, governed by Article 25 of the 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’).

3

Under Article 295(1)(1) to (5) of the VAT Directive, that scheme concerns, in essence, the supplies of goods (agricultural products) produced by agricultural, forestry or fisheries undertakings and of agricultural services, listed respectively in Annexes VII and VIII to that directive, which are made by a farmer, the expression ‘flat-rate farmer’ meaning a farmer covered by the flat-rate scheme for farmers.

4

Article 295(1)(7) of the VAT Directive provides that ‘flat-rate compensation percentages’ are the ‘percentages fixed by Member States in accordance with Articles 297, 298 and 299 and applied by them in the cases specified in Article 300 in order to enable flat-rate farmers to offset at a fixed rate the input VAT charged’. The input VAT charged is, according to Article 295(1)(6), ‘the amount of the total VAT attaching to the goods and services purchased by all agricultural, forestry and fisheries undertakings of each Member State subject to the flat-rate scheme where such tax would be deductible in accordance with Articles 167, 168 and 169 and Articles 173 to 177 by a farmer subject to the normal VAT arrangements’.

5

Articles 296 to 298 of the VAT Directive state:

‘Article 296

1. Where the application to farmers of the normal VAT arrangements, or the special scheme [for small enterprises] provided for in Chapter 1, is likely to give rise to difficulties, Member States may apply to farmers, in accordance with this Chapter, a flat-rate scheme designed to offset the VAT charged on purchases of goods and services made by the flat-rate farmers.

2. Each Member State may exclude from the flat-rate scheme certain categories of farmers, as well as farmers for whom application of the normal VAT arrangements, or of the simplified procedures provided for in Article 281, is not likely to give rise to administrative difficulties.

3. Every flat-rate farmer may opt, subject to the rules and conditions to be laid down by each Member State, for application of the normal VAT arrangements or, as the case may be, the simplified procedures provided for in Article 281.

Article 297

Member States shall, where necessary, fix the flat-rate compensation percentages. They may fix

varying percentages for forestry, for the different sub-divisions of agriculture and for fisheries.

Member States shall notify the Commission of the flat-rate compensation percentages fixed in accordance with the first paragraph before applying them.

Article 298

The flat-rate compensation percentages shall be calculated on the basis of macro-economic statistics for flat-rate farmers alone for the preceding three years.

The percentages may be rounded up or down to the nearest half-point. Member States may also reduce such percentages to a nil rate.’

6

Article 299 of the VAT Directive provides that the flat-rate compensation percentages may not have the effect of obtaining for flat-rate farmers refunds greater than the input VAT charged.

7

Under Article 300 of the VAT Directive, the flat-rate compensation percentages are, in essence, to be applied to the prices, exclusive of VAT, of agricultural products and services which the flat-rate farmers supply to taxable persons other than those covered by the flat-rate scheme.

8

Article 301 of the VAT Directive provides:

‘1. In the case of the supply of agricultural products or agricultural services specified in Article 300, Member States shall provide that the flat-rate compensation is to be paid either by the customer or by the public authorities.

2. In respect of any supply of agricultural products or agricultural services other than those specified in Article 300, the flat-rate compensation shall be deemed to be paid by the customer.’

9

Article 302 of the VAT Directive states that, if a flat-rate farmer is entitled to flat-rate compensation, he is not to be entitled to deduction of VAT in respect of activities covered by this flat-rate scheme.

10

Article 303(1) of the VAT Directive states in essence that, where the taxable customer pays flat-rate compensation pursuant to Article 301(1), he is to be entitled to deduct the compensation amount from the VAT for which he is liable in the Member State in which his taxed transactions are carried out. Under Article 303(2) the customer may also, in certain situations, obtain a refund of that amount from the tax authority.

11

The Sixth Directive also provided, in Article 25(12), that, if Member States decide to apply the flat-rate scheme for farmers in their territory, they are to fix the uniform basis of assessment of VAT in order to apply the scheme of own resources using the common method of calculation in Annex C to that directive. That provision and that annex are not reproduced in the VAT Directive, but they are covered by Article 5(2) of 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 (OJ 1989 L 155, p. 9).

12

Under Article 272(1)(e) of the VAT Directive, Member States may release taxable persons covered by the flat-rate scheme for farmers from certain or all obligations referred to in Title XI, Chapters 2 to 6, of that directive, including, inter alia, the obligation to inform the tax authorities of any activity as a taxable person for the purposes of identification, to issue invoices with VAT, to keep accounts and to submit VAT returns.

13

In accordance with Article 395 of the Act concerning the conditions of accession of the Kingdom of Spain and of the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23), read together with Annex XXXVI of that Act, the Portuguese Republic was able to defer until 1 January 1989 full application of the rules constituting the common system of VAT.

National law

14

Decree-law No 195/89 of 12 June 1989 (Diário da República, First Series, No 133, of 12 June 1989), introduced into the Portuguese value added tax code (Código do Imposto sobre o Valor Acrescentado, ‘the CIVA’), approved by Decree-law No 394-B/84 of 26 December 1984 (Diário da República, First Series, No 297, of 26 December 1984), amended and replaced by Decree-law No 102/2008 of 20 June 2008 (Diário da República, First Series, No 118, of 20 June 2008), corrigendum No 44-A/2008 of 13 August 2008 (Diário da República, First Series, No 156, of 13 August 2008), several provisions intended to bring the Portuguese VAT legislation into line with the Sixth Directive. The amendments made to that legislation include provisions establishing the particular scheme applicable to farmers (‘the Portuguese scheme at issue’).

15

Under Article 9(33) of the CIVA, ‘supplies of goods made in the course of activities listed in Annex A of this code, and of agricultural services defined in Annex B, provided that they are carried out as incidental activities by a farmer using his labour force or the equipment normally employed in his agricultural or forestry undertaking are exempt from VAT’. Annexes A and B of the CIVA correspond, in essence, to Annexes VII and VIII to the VAT Directive.

16

It is apparent from reading Article 9(33) and Article 20(1) of the CIVA together that, in exchange for the abovementioned exemption, farmers cannot make a deduction or obtain any refund of sums paid by them as VAT on the acquisition of goods and services intended to be used for the making of the above supplies.

17

Under Article 29(3) of the CIVA, farmers who engage solely in VAT-exempt transactions are released from obligations imposed on taxable persons subject to the normal VAT arrangements, in respect of settlement of that tax and passing it on to their customers, issuing invoices, making returns and keeping accounts.

The pre-litigation procedure

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By a letter of formal notice of 6 June 2008 the Commission stated to the Portuguese Republic that it considered that the Portuguese scheme at issue was incompatible with the provisions of the flat-rate scheme for farmers provided for by the VAT Directive, in particular Articles 296 to 298 thereof, since the Portuguese legislation does not provide that farmers covered by that national scheme are to receive compensation in respect of paid input VAT and does no more than establish an exemption in respect of farming, with the proviso that it is impossible to deduct the amount of paid input tax.

19

In its reply of 20 August 2008 to that letter, the Portuguese Republic denied that it had failed to fulfil its obligations, contending that the second sentence of the second subparagraph of Article 298 of the VAT Directive (‘the provision at issue’) expressly permits Member States to fix flat-rate compensation percentages at a nil rate, and that possibility is not linked to the amount of the tax paid by the farmers covered by the Portuguese scheme at issue. The Portuguese Republic claimed that the Portuguese legislation has an effect which is compatible with the objectives pursued by the flat-rate scheme for farmers, in particular that of simplification, and that the tax treatment provided for by such a scheme, when accompanied by zero-rate compensation, is equivalent to that applying to VAT-exempt activities where input VAT is not deductible. The Portuguese Republic concluded that, since it is for each Member State to choose the form and means which it intends to use in order to transpose into its legal system the directives addressed to it, the Portuguese scheme at issue can fall under the list of exempted activities appearing in Article 9 of the CIVA.

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Since the Commission found that reply unpersuasive, on 26 June 2009 it sent to the Portuguese Republic a reasoned opinion in which it restated its position that the Portuguese scheme at issue does not comply with Articles 296 to 298 of the VAT Directive.

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By letter of 31 August 2009 the Portuguese Republic informed the Commission that it declined to adopt the measures required to comply with that reasoned opinion, and expanded in more detail on the argument submitted in its reply to the letter of formal notice.

22

The Commission maintained its position that the Portuguese legislation is not compatible with Articles 296 to 298 of the VAT Directive and decided to bring this action.

The action

Arguments of the parties

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In the first place, the Commission states that one objective pursued by the flat-rate compensation scheme is simplification, enabling flat-rate farmers to be released from compliance with a certain

number of obligations characteristic of the normal or simplified VAT schemes, and another is the provision of compensation for paid input tax, the aim being to ensure that that input tax is not a factor, as ‘hidden VAT’, in the formation of the prices of agricultural products.

24

When a Member State decides to apply that scheme in its territory, it is obliged, pursuant to the first sentence of the first subparagraph of Article 297 of the VAT Directive, to fix, where necessary, flat-rate compensation percentages. The Portuguese scheme at issue does not comply with the obligation to provide compensation for farmers covered by that scheme in respect of the input VAT paid by them.

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The arguments of the Portuguese Republic to justify the Portuguese scheme at issue cannot be accepted. First, the provision at issue does not have the scope which the Portuguese Republic attributes to it. The drafting history of the Sixth directive does not allow the interpretation advocated by the Portuguese Republic.

26

Second, the characteristics of Portuguese agriculture do not justify the view that zero-rate compensation, because it remains advantageous for Portuguese farmers covered by the Portuguese scheme at issue, is in any event compatible with the provisions of the VAT Directive.

27

Third, the obligation to fix flat-rate compensation in respect of input VAT charged is not subject to the condition that flat-rate farmers are, as a group, so placed as to be in tax credit vis-à-vis the Member State concerned.

28

Fourth, it is of no relevance that the Commission was slow to challenge the Portuguese scheme at issue, since that scheme has been established, in all essential respects, since 1992. In that regard, one of the points made by the Commission is that only after an inspection of own resources carried out in Portugal in November 2007 did it become apparent that the amount of VAT not deducted by farmers subject to that scheme reached almost 5.3% of their sales in 2004 and 7.9% in 2005. Since the Portuguese authorities considered that the amount of VAT levied in the agricultural sector was excessive, they therefore applied in 2004 a negative compensation of almost EUR 70 million in their calculation of the basis of assessment of own resources.

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Fifth, the alleged recovery of input VAT by means of subsidies and other government support for agricultural activities cannot take the place of a correct application of the flat-rate scheme for farmers as provided for by the VAT Directive.

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Sixth, neither the VAT Directive, nor the recitals in the preamble to the Sixth Directive, nor the Court’s case-law provide any basis for the view that the flat-rate compensation at issue can be described as non-fiscal.

31

In the second place, the Commission claims that the Portuguese legislation is confined to exempting from payment of VAT and, consequently, excluding from the common system of VAT, all farmers who are not subject to the normal arrangements, who represent a significant part of the Portuguese agricultural sector, 27% in 2004 and 29% in 2005. The Portuguese scheme at issue therefore seriously undermines the principle of the generality of VAT.

32

The Portuguese Republic denies, initially, that the arguments submitted by the Commission are well founded. When the Sixth Directive was adopted, the zero rate was applied only residually and transitionally. Consequently, it cannot be held that the application of a compensation percentage at a nil rate was connected to the application of zero-rate tax on input acquisitions, unless it is to be conceded that the option given to Member States by Article 25(3) of the Sixth Directive, a provision which is now the second subparagraph of Article 298 of the VAT Directive, was, from the outset, practically inapplicable.

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Next, first, the Council of the European Union decided to amend the draft Sixth Directive produced by the Commission by adding that option to it. However, given that that draft directive already provided for the possibility of rounding the percentages up or down, and therefore the option of rounding the percentages to nil when they were close to that figure, the amendment made by the Council necessarily went further than that draft directive. In the recitals attached to that draft, the Commission also stated that the Member States should have the power freely to fix the flat-rate compensation percentages and that the percentages resulting from the relevant macro-economic calculations were only maximum limits. The addition of the word ‘also’ in the provision at issue, which did not appear in the corresponding provision of the Sixth Directive and is a purely formal alteration, confirms that Member States have the power to fix a flat-rate compensation percentage at a nil rate whatever the circumstances.

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According to the Court’s case-law, a Member State whose national law complies with the clear and precise wording of a provision of the VAT Directive cannot be accused of having failed to fulfil the obligations specifically arising from that provision. The action should therefore be dismissed.

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Second, to accept the interpretation maintained by the Commission would run counter to the principle of legal certainty and the objective of simple and uniform application of the rules of the common system of VAT.

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Third, in relation to the flat-rate scheme for farmers, the Commission’s sole role is to check that the level of compensation fixed by a Member State does not result in compensation which is too high. The Commission does not have the power to request a Member State to apply a compensation percentage higher than that which the Member State has decided to establish.

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Those various factors support the literal interpretation of the provision at issue. The interpretation advocated by the Portuguese Republic is not, moreover, contrary either to the requirement of the uniform application of European Union law or to the principle of equal treatment and tax neutrality. In that regard, the Portuguese Republic contends that the flat-rate scheme for farmers is in itself likely to jeopardise that neutrality, to the extent that it allows the application of flat-rate compensation percentages determined on the basis of a mere estimate.

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For the sake of completeness, the Portuguese Republic contends that its choice not to provide for compensation for input VAT borne by farmers covered by the Portuguese scheme at issue is fiscally coherent.

39

First, the circumstances which prevailed in Portugal on the date the Sixth Directive came into force in that Member State have not since that date significantly changed, the current position in relation to VAT having the same features as existed on 1 January 1989. Further, even if there had been the change in circumstances relied on by the Commission, that change occurred almost 17 years ago, the zero rate being abolished in the Portuguese legislation in March 1992.

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The fact that flat-rate compensation percentages are to be fixed ‘where necessary’ implies that there are situations where the fixation of such percentages is not justified. That is the case, in particular, where farmers as a group are not so placed as to be in tax credit vis-à-vis the State. Further, it is apparent in particular from the Court’s case-law that the calculation of the maximum limit of compensation must take account of the output VAT which is collected in accordance with the normal arrangements and that, if it is not to constitute State aid, the flat-rate scheme for farmers cannot allow Member States to refund to flat-rate farmers sums greater than the refund of VAT to which they would have been entitled if they were covered by the normal arrangements.

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In Portugal, both on 1 January 1989 and currently, the amounts of VAT linked to the acquisitions of goods and services intended for agricultural activities and which are deductible under the normal arrangements are lower than the amounts of VAT payable to the State which result from the collection and passing-on of VAT to the acquirers of agricultural goods and services. Farmers are therefore not, as a group, so placed as to be in tax credit vis-à-vis the State. Accordingly, the decision to fix the compensation percentage in respect of input VAT at a nil rate is, in the case of the Portuguese Republic, the only appropriate and coherent fiscal solution.

42

In that regard, the Portuguese Republic maintains that the Commission has not demonstrated either in the pre-litigation procedure or in the application how it arrived at the rates of 5.3% and 7.9% and that, moreover, the Portuguese Republic does not know where those rates come from. The Portuguese Republic is therefore not in a position to rebut those rates, which consequently cannot be used by the Commission in order to require it to grant to farmers covered by the Portuguese scheme at issue compensation at a rate equal or close to those rates. In any event, those rates represent only a maximum ceiling.

43

Second, the Portuguese Republic claims that the Portuguese scheme at issue is consistent with the scope of the scheme as provided for by the VAT Directive and with the objective of simplification of rules and procedures, since national law releases the farmers covered by that scheme from any obligation in respect of issuing invoices, collection, making returns, keeping accounts, passing on and paying VAT. Moreover, only by fixing a compensation percentage at a nil rate is it possible to achieve complete, and therefore real, simplification. The scheme at issue thus also satisfies the requirements governing the obligation to transpose secondary legislation into national law.

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Further, the recovery of amounts of VAT borne in respect of the acquisitions of goods and services intended for agricultural activities is almost always ensured by means of aid or other subsidies allocated by the State and other public bodies.

45

Third, the Portuguese Republic contends that the objective of compensation, for flat-rate farmers, in respect of input VAT borne by them on such acquisitions was not relied on in either the letter of formal notice or in the reasoned opinion. That said, even if that objective of compensation were established, any compensation would be non-fiscal in nature. The Sixth Directive and the VAT Directive were therefore incapable of imposing the obligation to pay that compensation.

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Lastly, the Portuguese Republic states that the Commission itself, in its application, dismisses the matter of the claimed Portuguese debt in respect of European Union own resources linked to the flat-rate scheme for farmers. The Portuguese Republic claims however, inter alia, that, even if the Court were to accept the Commission’s position, that could not entail an increase in the Portuguese share of European Union own resources accruing from VAT.

Findings of the Court

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In support of its action, the Commission relies on two separate grounds of complaint, one relating to the application to farmers covered by the Portuguese scheme at issue of a special scheme which exempts them from payment of VAT and involves the application of a flat-rate compensation percentage at a nil rate, the other relating to the negative compensation of own resources payable by the Portuguese Republic in connection with the collection of VAT.

The first ground of complaint, relating to exemption and the application of a flat-rate compensation percentage at a nil rate

48

As is clear from Article 272(1)(e) and Article 296(1) of the VAT Directive, the objective of the flat-rate scheme for farmers is to enable Member States to release farmers, on whom the application of the normal VAT arrangements or the special scheme for small enterprises would be likely to give rise to difficulties, from certain or all of the obligations usually imposed on taxable persons covered by the normal VAT arrangements, by granting to them flat-rate compensation for the

amount of input VAT paid by those farmers. That scheme therefore pursues both the objective of simplification (Case C-43/04 Stadt Sundern [2005] ECR I-4491, paragraph 28) and the objective of offsetting the amount of input VAT (Case C-321/02 Harbs [2004] ECR I-7101, paragraph 29). Since the Commission has, as is clear from the documents submitted to the Court, referred to that latter objective both in the letter of formal notice and in the reasoned opinion, there is no basis, in any event, for the Portuguese Republic's claim that that objective was not relied on as a ground for complaint in the present action.

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It must also be recalled that the flat-rate scheme for farmers is a scheme which derogates from and is an exception to the general scheme of the VAT Directive and must therefore be applied only to the extent necessary to achieve its objective. Further, in accordance with settled case-law of the Court, any derogation or exception to a general rule is to be interpreted strictly (Harbs, paragraph 27, and Stadt Sundern, paragraph 27). Next, no provision is made in the VAT Directive for an exemption from VAT in respect of farming. On the contrary, as the Advocate General stated in points 46 to 48 of her Opinion, although no VAT is charged on the sales of flat-rate farmers, the flat-rate scheme for farmers was specifically not designed to be an exemption scheme, because such a scheme would not have made it possible to eliminate the burden of input VAT and therefore to safeguard the neutrality of the common system of VAT. It is clear moreover from Article 296(1) of that directive that farmers are as a general rule subject either to the normal arrangements, the special scheme for small enterprises, or the said flat-rate scheme.

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Moreover, while the simplification of administrative obligations burdening flat-rate farmers is indeed one of the objectives pursued by the flat-rate scheme for farmers, the goal of simplification cannot justify the introduction of an exemption which is not provided for by the VAT Directive (see, to that effect and by analogy, Case C-128/05 Commission v Austria [2006] ECR I-9265, paragraph 25). That is reinforced by the fact that the objective of simplification must, in the present case, be reconciled with the objective of offsetting the input VAT borne by the farmers concerned, which necessarily implies that a minimum of administrative obligations are imposed on flat-rate farmers, inter alia, in order to collect the data required for the determination of the applicable flat-rate compensation percentages.

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However, where flat-rate farmers in fact bear a burden of input VAT which is not negligible, it would be contrary to the latter objective not to grant them compensation for such a burden.

52

Further, in the wording of recital 7 of the preamble to the VAT Directive, the common system of VAT should result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain. Accordingly, as stated by the Advocate General in points 45 to 48 of her Opinion, the aim of the flat-rate scheme for farmers is also to preserve so far as possible the neutrality of VAT, the purpose of compensation being to ensure that the burden of input VAT is not passed on in output transactions and does not then entail an addition to the price which would in turn be subject to VAT and would increase step by step down the entire length of the production and distribution chain of goods and services supplied by flat-rate farmers. Consequently, to interpret the provision at issue as giving Member States the freedom to reduce flat-rate compensation percentages to a nil rate even where flat-rate farmers bear a burden of input VAT

which is not negligible, would be to jeopardise that neutrality.

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It is true that the result of paying simple compensation which is entirely flat-rate does not, by definition, ensure the complete neutrality of VAT. It does however achieve the highest neutrality possible taking into account the need to reconcile that payment and the objective of compensation with the objective of simplification of the rules to which flat-rate farmers are subject, which is also one of the objectives of the flat-rate scheme for farmers, as stated in paragraph 48 of this judgment.

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In that context, the rules governing the determination of the flat-rate compensation percentage as laid down in Article 298 of the VAT Directive cannot, without more, be regarded as calling those objectives into question. It cannot therefore be accepted that a mere exemption of agricultural activities, because it would, from an operational viewpoint, be equivalent to the application of a flat-rate compensation percentage at a nil rate, can be regarded as a correct transposition of the rules of the VAT Directive relating to the flat-rate scheme for farmers and, in particular, of Articles 296 to 298 of that directive.

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In that regard, it is also clear that the option of reducing flat-rate compensation percentages to a nil rate constitutes an option which is in addition to the option, provided for in the first sentence of the second subparagraph of Article 298 of the VAT Directive, of rounding those percentages up or down to the nearest half-point. However, in the light of the foregoing, that option of reduction to a nil rate is made available to Member States only where the percentages resulting from the calculations made in accordance with the first subparagraph of Article 298, even when they are greater than 0.5%, are not less insignificant than that figure and, consequently, where the overall burden of input VAT borne by flat-rate farmers can itself be regarded as insignificant.

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As stated by the Advocate General in points 20 to 33 and 56 to 58 of her Opinion, first, neither the wording of the provision at issue nor the drafting history of the Sixth Directive preclude that interpretation of Articles 296 to 298 of the VAT Directive and, secondly, the Portuguese Republic cannot validly rely on the judgment of 15 July 2010 in Case C-582/08 Commission v United Kingdom [2010] ECR I-7195 in support of the view that that interpretation cannot be pleaded against it.

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It must also be made clear that, contrary to what is maintained by the Portuguese Republic, it is an interpretation of the provision at issue as leaving Member States free to fix flat-rate percentages at a nil rate whatever the circumstances which would be contrary to the principle of legal certainty and the uniform application of the rules of the common system of VAT in the European Union.

58

In the present case, there is no need to adjudicate on the admissibility or relevance of the Commission’s arguments based on the rates it refers to of 5.3% and 7.9%, since it is sufficient to state that the Portuguese Republic accepts that the zero rate of VAT was repealed in its legislation in 1992 and that goods and services generally acquired by farmers in order to pursue their

activities have since been subject, as appropriate, to a VAT rate of 6% or 13%. Portuguese flat-rate farmers therefore necessarily bear a burden of input VAT which is not negligible and which, accordingly, must be compensated. Consequently, there is no basis for that Member State's application to farmers covered by the Portuguese scheme at issue of a flat-rate compensation percentage at a nil rate.

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Further, it must be observed, first, that the Portuguese Republic's argument that it is appropriate to fix a flat-rate compensation percentage higher than zero only where the farmers are so placed as to be in tax credit in respect of VAT vis-à-vis the State has no basis in the text of the VAT Directive. On the contrary, the Court has previously stated that, while the macro-economic data relating to flat-rate farmers alone, to which Article 298 of the VAT Directive refers, do comprise, as stated by the Portuguese Republic, inputs (intermediate consumption and gross fixed-asset formation) and outputs (final production, including own consumption), together with the total amount of taxes relating to inputs, the Court has also stated that the flat-rate compensation percentages are obtained by dividing the total amount of taxes relating to inputs by the outputs (Case 3/86 Commission v Italy [1988] ECR 3369, paragraph 8). The VAT which may be payable on output transactions and, consequently, the possibility of the farmers, in particular those covered by the flat-rate scheme, being in tax credit, is therefore not taken into account in determining the applicable flat-rate compensation percentage.

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Next, it is clear from settled case-law of the Court that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-110/00 Commission v Austria [2001] ECR I-7545, paragraph 13, and Case C-487/08 Commission v Spain [2010] ECR I-4843, paragraph 34). Further, the rules laid down in Article 258 TFEU are to be applied without the Commission being required to comply with fixed time-limits. The Commission is thus entitled to decide, in its discretion, on what date it may be appropriate to bring an action and it is not for the Court, as a general rule to review the exercise of that discretion (Case C-297/08 Commission v Italy [2010] ECR I-1749, paragraph 87 and case-law cited).

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It follows that, since the Portuguese Republic does not dispute that, on the expiry of the period laid down in the reasoned opinion, the overall VAT burden on agricultural inputs borne by farmers covered by the Portuguese scheme at issue was not negligible, as stated in paragraph 58 of this judgment, the fact, were it to be established, that the circumstances prevailing in Portugal in that regard are substantially unchanged since 1992, and even since 1989, is of no relevance to the analysis of whether the Commission's action is well-founded.

62

Lastly, first, the VAT Directive expressly states, in Article 296(1), that the flat-rate scheme for farmers is designed to offset the input VAT borne by flat-rate farmers. It cannot therefore be accepted that that compensation is concerned in a general way with the incidental costs of farming and therefore is non-fiscal in nature, and that its payment cannot be imposed as an obligation by the VAT Directive. Next, the VAT Directive lays down, in Articles 300 and 301, the main rules governing how the actual compensation to which a given flat-rate farmer is entitled must be determined and paid to that farmer. Accordingly, it can further not be accepted that the burden of input VAT borne by farmers covered by the Portuguese scheme at issue can be offset to their

advantage by means of measures other than the payment of flat-rate compensation as provided for by that directive.

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In those circumstances, the first ground of complaint relied on by the Commission in support of its action must be considered to be well founded.

The second ground of complaint, on the negative compensation of own resources payable in respect of the collection of VAT

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In accordance with settled case-law, the Court may of its own motion examine whether the conditions laid down in Article 258 TFEU for bringing an action for failure to fulfil obligations are satisfied (Case C-362/90 Commission v Italy [1992] ECR I-2353, paragraph 8, and Commission v Spain, cited above, paragraph 70).

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It is clear in particular from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that an application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself (Case C-178/00 Italy v Commission [2003] ECR I-303, paragraph 6, and Case C-211/08 Commission v Spain [2010] ECR I-5267, paragraph 32).

66

In the present case, the Commission’s second ground of complaint does not satisfy those requirements. That is because the Commission complains that the Portuguese Republic applied a substantial negative compensation of own resources payable in relation to the collection of VAT. However, in setting out its pleas in law, the Commission does no more than state that, if an infringement of the VAT Directive is established, with the result that European Union own resources are reduced, the Commission is entitled to receive the total amount of own resources concerned, with the addition of interest for late payment. The Commission fails thereby to explain precisely which obligation that Member State was bound by and failed to fulfil by applying such negative compensation. Moreover, the Commission states, in its application, that ‘it is not the purpose of these infringement proceedings to examine to what extent the Portuguese Republic complied with the legislation on the collection of own resources’, thereby contradicting the second ground of complaint stated in its claims submitted to the Court.

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It follows that the second ground of complaint must be rejected as being inadmissible.

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In the light of all the foregoing, the Court must declare that, by applying to farmers a special scheme which does not comply with the scheme established by the VAT Directive, because it exempts farmers from payment of VAT and involves the application of a flat-rate compensation percentage at a nil rate, the Portuguese Republic failed to fulfil its obligations under Articles 296 to

298 of that directive.

Costs

69

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. Under the first subparagraph of Article 69(3) of those Rules, the Court may order that the costs be shared or that the parties bear their own costs, in particular where each party succeeds on some and fails on other heads. Since the Commission’s application has been upheld only in part, each party must be ordered to bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby

1.

Declares that by applying to farmers a special scheme which does not comply with the scheme established by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, because it exempts farmers from payment of value added tax and involves the application of a flat-rate compensation percentage at a nil rate, the Portuguese Republic failed to fulfil its obligations under Articles 296 to 298 of that directive;

2.

Dismisses the action as to the remainder;

3.

Orders the European Commission and the Portuguese Republic to bear their own costs.

[Signatures]

( * ) Language of the case: Portuguese.