OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 27 April 2006 (1)

Case C-128/05

Commission of the European Communities

v

Republic of Austria

1. In this action, the Commission submits that certain special arrangements applied in Austria to international passenger transport providers who are not established in that Member State, who provide only occasional services there and whose turnover there is less than EUR 22 000 per annum, are contrary to the Sixth VAT Directive. (2)

2. Under those arrangements, such carriers do not issue invoices showing Austrian VAT or submit VAT returns in Austria. Rather, their input tax in that Member State is deemed to be equal to their output tax there, and they are not entitled to claim back any excess by way of either deduction or refund.

3. Austria contends that those arrangements are covered by Article 24 of the Sixth Directive, which authorises the application of simplified procedures to small undertakings, provided that those procedures do not lead to a reduction of tax.

4. Whether that defence is made out turns on three principal issues: whether the size of a ‘small undertaking’ is to be assessed in absolute terms or in relation to its turnover in the Member State in question, whether an exemption from VAT formalities may properly qualify as a ‘simplified procedure’, and whether it leads to a reduction of tax and is therefore impermissible.

Relevant Community VAT provisions

5. Under Article 2 of the Sixth Directive, any supply of services effected for consideration within the territory of a Member State is subject to VAT. Under Article 6, a supply of services is any transaction which is not a supply of goods.

6. Article 9(2)(b) provides: ‘the place where transport services are supplied shall be the place where transport takes place, having regard to the distances covered.’ (3)

7. Articles 17 and 18 (4) lay down rules governing the origin, scope and exercise of the right to deduct, which is the cornerstone of the VAT system. Their relevant provisions may be summarised as follows.

8. Under Article 17(1) and (2) taxable persons are entitled to deduct from the tax which they are liable to pay (their output tax) the tax which is charged on supplies made to them (their input tax), provided that the latter supplies are used for the purposes of their taxable output transactions.

9. Subject to the same proviso, taxable persons not established in the territory of the Member State in which the input tax was incurred are entitled to a refund of that tax in accordance with the provisions of Article 17(3) and (4) and of the Eighth VAT Directive. (5) Under Article 1 of the Eighth Directive, however, the refund arrangements apply to such persons only if, in addition, they have not made any taxable supplies in the Member State in question during the tax period in which the input tax was incurred.

10. To exercise their right of deduction, taxable persons must in particular hold an invoice drawn up in accordance with Article 22(3). Deduction is effected by subtracting the total amount of deductible input tax for a given tax period from the total amount of output tax due for the same period (Article 18(2)).

11. Article 22 (6) concerns the obligations of taxable persons. Article 22(3) sets out requirements concerning the issuance of invoices, Article 22(4) sets out requirements concerning the submission of regular returns and Article 22(5) requires taxable persons to pay the net amount of VAT due (in other words, output tax minus input tax) when submitting each return.

12. Article 24 of the Sixth Directive is headed ‘Special scheme for small undertakings’. Article 24(1) provides:

‘Member States which might encounter difficulties in applying the normal tax scheme to small undertakings by reason of their activities or structure shall have the option, under such conditions and within such limits as they may set but subject to the consultation provided for in Article 29, of applying simplified procedures such as flat-rate schemes for charging and collecting the tax provided they do not lead to a reduction thereof.’

13. Article 24(2) to (7) in addition allow Member States to retain or introduce exemptions or graduated tax relief for taxable persons whose annual turnover is less than EUR 5 000. (7)

14. Article 29 provides:

‘(1) An Advisory Committee on value added tax, hereinafter called “the Committee”, is hereby set up.

(2) The Committee shall consist of representatives of the Member States and of the Commission. The chairman of the Committee shall be a representative of the Commission. Secretarial services for the Committee shall be provided by the Commission.

(3) The Committee shall adopt its own rules of procedure.

(4) In addition to points subject to the consultation provided for under this Directive, the Committee shall examine questions raised by its chairman, on his own initiative or at the request

of the representative of a Member State, which concern the application of the Community provisions on value added tax.'

Disputed national provisions

15. The Commission takes issue with the provisions of a regulation of the Federal Finance Minister on the establishment of average rates for calculating amounts deductible by foreign undertakings providing international passenger transport, applicable to transactions and events taking place after 31 March 2002. (8)

16. Paragraph 1 of that regulation allows such carriers, if they do not have a domicile, registered office, place of business or usual residence in Austria and if their turnover [in Austria] is less than EUR 22 000 in a given tax period, (9) to calculate their deductible VAT in respect of their turnover from occasional international passenger transport by motor vehicles or trailers not registered in Austria by applying an average rate of 10% of that turnover, (10) if they do not issue invoices for the services provided.

17. Under paragraph 2, that average rate is in lieu of all amounts deductible in respect of the provision of the transport in question and, under paragraph 3, use of the average rate exonerates the carrier from the obligation to keep VAT accounts.

18. It appears from the documents exchanged during the administrative proceedings and annexed to the Commission's application that (belatedly, in the first half of 2004) Austria consulted the Advisory Committee on VAT set up under Article 29 of the Sixth Directive, in order to comply with the formal consultation requirement laid down by Article 24(1). In the committee the Commission expressed a negative view and the other Member States expressed no view. However, as an advisory body, the committee could not in any event issue any binding decision.

Forms of order sought

19. Following a regular administrative procedure in accordance with Article 226 EC, the Commission now asks the Court to:

– declare that, by allowing taxable persons not established in Austria who transport passengers there not to submit tax returns and not to pay the net amount of VAT when their annual turnover in Austria is below EUR 22 000, in that case deeming the amount of VAT due to be equal to the amount of deductible VAT and making the application of the simplified rules contingent on Austrian VAT not appearing on invoices or in other documents serving as invoices, the Republic of Austria has failed to fulfil its obligations under Articles 2, 6, 9(2)(b), 17, 18 and 22(3) to (5) of the Sixth Directive; and

– order the defendant to pay the costs of the proceedings.

20. Austria contends that the application should be dismissed and the Commission should be ordered to pay costs.

21. No hearing has been asked for, and none has been held.

Assessment

Scope of the alleged infringement

22. Austria does not make any submission concerning the compatibility of the disputed regulation with Articles 2, 6, 9(2)(b), 17, 18 and 22(3) to (5) of the Sixth Directive as such. Its defence is based entirely on Article 24(1).

23. In those circumstances, a formalistic approach might lead to the conclusion that the infringement may be considered to be established (being implicitly acknowledged by Austria) in respect of all those provisions unless the defence on the basis of Article 24 is upheld.

24. However, I do not think that such a conclusion would be warranted. The provisions listed differ in their import. Articles 2, 6, 9(2)(b), and 17 (among others) establish the context in which the procedural requirements laid down in Articles 18 and 22 are to be applied. What is at issue is whether the way in which Austria has derogated from the latter requirements is, or is not, permissible.

25. There is nothing in the Commission's allegations, or in the disputed Austrian provisions themselves, to suggest any conflict with the principles that (a) supplies of services are subject to VAT (Article 2); (b) passenger transport is a service (Article 6); (c) the place of supply of international passenger transport is segmented according to the distance covered in each Member State (Article 9(2)(b)); and (d) a taxable person has a right to deduct input tax from output tax or, as the case may be, to obtain a refund of input tax (Article 17).

26. On the contrary, the disputed regulation assumes that all those principles apply. What it does, in effect, is to provide that in certain specified circumstances input tax and output tax are deemed to cancel each other out and in that case the requirements in Articles 18 and 22 of the Sixth Directive concerning invoicing, accounting and submission of returns are not to be observed. Of Article 18, only paragraphs 1(a) and 2 are relevant, and of Article 22, the Commission refers only to paragraphs 3 to 5.

27. It is therefore only in respect of those latter provisions that I believe an infringement can be said to be established or acknowledged if Austria's defence is unsuccessful.

28. Moreover, the refund arrangements under Article 17(3) and (4) of the Sixth Directive and the provisions of the Eighth Directive are not relevant here. Those arrangements apply only to taxable persons who have not effected any output transactions in Austria, whereas the disputed rules apply only where carriers *have* provided passenger transport services in Austria, in accordance with Article 9(2)(b) of the Sixth Directive.

29. I shall therefore examine in turn the three contentious issues between the parties: the notion of 'small undertakings', the notion of 'simplified procedures' and the possibility of a reduction in tax.

Small undertakings

30. Austria claims that its rules are permissible under Article 24(1) of the Sixth Directive which allows the application of simplified procedures to 'small undertakings'.

31. The Commission argues that the definition in the Austrian regulation – turnover in Austria of

less than EUR 22 000 in a given calendar year – is not consistent with the notion of a ‘small undertaking’, because even very large undertakings not established in Austria might have turnover there of less than EUR 22 000 a year. The notion of what constitutes a ‘small undertaking’ is not defined in the Sixth Directive. It should thus be given a Community definition which takes account of the size of the undertaking as a whole, not merely its turnover in a particular Member State.

32. The Commission refers to its 1996 and 2003 recommendations on the definition of small and medium-sized enterprises, (11) according to which fairly strict criteria must be laid down if measures aimed at such enterprises are genuinely to benefit those for which size represents a handicap. In the definitions it there put forward, a ‘small or medium-sized enterprise’ has fewer than 250 employees and either an annual turnover not exceeding EUR 40 million (in 1996; EUR 50 million in 2003) or an annual balance-sheet total not exceeding EUR 27 million (in 1996; EUR 43 million in 2003). A ‘small enterprise ’ has fewer than 50 employees and either an annual turnover not exceeding EUR 7 million or an annual balance-sheet total not exceeding EUR 5 million (in 1996; EUR 10 million for both sums in 2003). In either case, according to the 1996 recommendation, the enterprise must be independent in the sense that not more than 25% of its capital may be owned by undertakings falling outside the relevant definition.

33. Austria submits that Article 24 gives Member States a broad power to assess whether and in what conditions to introduce simplified procedures for charging and collecting VAT in the case of small undertakings, (12) and contends that its definition falls within that power. It puts forward moreover certain calculations which it submits demonstrate the extreme unlikelihood that in practice any passenger transport undertaking with a total turnover of more than EUR 40 million will have a turnover in Austria of less than EUR 22 000.

34. Austria relies in addition on Article 24(2) et seq. of the Sixth Directive, concerning exemptions and graduated tax relief. The turnover threshold expressed in those provisions can refer only to turnover within the Member State, for the simple reason that where a tax exemption is concerned only turnover within the tax jurisdiction can be exempted. Therefore, it is also only turnover within the Member State that is pertinent for the purposes of Article 24(1).

35. In my view, the Commission is substantially correct in its submissions and Austria has failed to make out the contrary case.

36. Although I do not accept that a formal definition of small enterprises should necessarily be applied in the VAT sphere when it was not drawn up with that sphere specifically in mind, such a definition nevertheless provides a helpful indication of what the Community legislator regards as a ‘small or medium-sized enterprise’ and a ‘small enterprise’.

37. Austria claims that the disputed rules are justified under Article 24(1) of the Sixth Directive and not under any other provision. That statement is made explicitly in its defence, and it appears that when Austria consulted the Advisory Committee on VAT, it did so on the ground that the possibilities available under Article 24(2) et seq. applied only in the case of taxable persons established in the Member State, whereas the disputed regulation concerns only those not established in Austria.

38. Consequently, it is against the yardstick of Article 24(1) that the Austrian provisions must be measured.

39. Article 24(1) is based on the premiss that Member States may ‘encounter difficulties in applying the normal tax scheme to small undertakings by reason of their activities or structure’. On any normal reading, that reference to ‘small undertakings’ must mean undertakings which are objectively small, not undertakings whose activities in a particular Member State are limited. Nor is

there anything else in that provision to suggest the latter interpretation. There is no reason to suppose that a Member State might encounter difficulties in applying the normal tax scheme to a large undertaking whose economic activities within its territory are limited or occasional. Such an undertaking will have a structure which will enable it to comply with the requirements of registration and declaration in the Member State, or will be able to appoint a tax representative there in accordance with Article 21(2) of the Sixth Directive. (13)

40. With regard to the broad power of assessment which Austria claims under Article 24(1), I am not convinced by the case-law it cites, which reads, in full: 'As for Article 24, it confers on the Member States a broad power to assess whether, and in what conditions, it is necessary to introduce flat-rate schemes, or other simplified procedures for charging and collecting the tax, in the case of small undertakings. Accordingly, the fact that a Member State has not, for reasons of its own, exercised that option cannot be regarded as an obstacle which precludes recourse to the possibility of applying for authorisation to introduce measures derogating from the Sixth Directive in accordance with Article 27 thereof.' (14)

41. A power to assess whether and in what conditions to apply a simplified procedure to small undertakings does not in my view imply a power to determine what constitutes a small undertaking. The Court in *Direct Cosmetics* was concerned with the interpretation of Article 27(1) of the Sixth Directive. As the above quotation makes clear, it dealt with Article 24 only to the extent necessary to establish that a Member State's decision not to introduce a simplified procedure in exercise of powers under Article 24 did not prevent it from seeking authorisation for a derogating measure under Article 27. That paragraph cannot be taken to contain a full and conclusive analysis of the power conferred on Member States when they do make use of Article 24.

42. Moreover, the Court has more recently stated that Articles 24 to 26 of the Sixth Directive 'must be applied only to the extent necessary to achieve their objective' (15) – suggesting that the power in question is not as broad as Austria alleges.

43. The figures and calculations which Austria puts forward are in my view not relevant. Even if they can establish that few of the transport providers concerned will be objectively large undertakings, they cannot establish that none of them will be large.

44. The issue underlying the Commission's complaint is not whether the definition in the disputed regulation applies (perhaps even principally) to small undertakings, but whether it excludes large undertakings. And clearly it does not – it is quite possible for a (perhaps extremely) large undertaking established outside Austria to operate a limited number of occasional passenger journeys into or through Austria and thus fall below the EUR 22 000 threshold.

45. Nor do I think that Austria can derive any argument from Article 24(2) et seq. of the Sixth Directive. Even if the threshold in those provisions concerns only turnover within each Member State – an assertion for which, as the Commission points out, there appears to be no basis in the directive – they provide, as Austria has itself stressed, for a completely distinct set of arrangements. (16)

46. Two minor points raised by Austria may be dealt with briefly.

47. First, it cites a declaration of the Council and the Commission recorded in the minutes relating to Article 24 of the Sixth Directive. However, it is settled case-law that declarations recorded in Council minutes in the course of preparatory work leading to the adoption of a directive cannot be used for the purpose of interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question, and, moreover, such declarations have no legal significance. (17)

48. Second, Austria refers to the Opinion of the Economic and Social Committee on a Commission proposal to amend the Sixth Directive. (18) Since that proposal has never been adopted, it seems to me that the Committee's opinion on it cannot be legally relevant.

Simplified procedures

49. Article 24(1) of the Sixth Directive allows Member States to adopt 'simplified procedures such as flat-rate schemes'. The Commission argues essentially that the disputed regulation introduces not a simplified procedure but a complete exemption from the requirements of registration, declaration, invoicing and accounting. Austria relies again on the broad power of assessment noted in *Direct Cosmetics* (19) and stresses that Article 24(1) sets no limit to the kind of simplification allowed and that Article 24(2) provides for exemptions.

50. I agree with the Commission. However broad the concept of 'simplified procedures' may be, it cannot include a complete absence of procedure. For reasons analogous to those I have already given, (20) I do not think that the discretion referred to in *Direct Cosmetics* includes a discretion to opt for complete exoneration from the VAT system in place of application of a simplified procedure. And the fact that exemptions are allowed in the framework of Article 24(2) to (7) would if anything tend to confirm, since that is a distinct framework and expressly authorises the use of exemptions, that exemptions are not contemplated in Article 24(1). Finally, the illustrative reference 'such as flat-rate schemes' lends weight to the conclusion that the simplified procedure selected should nevertheless be one that still leads to some appropriate accounting for, and assessment and collection of, tax.

51. It is also worth mentioning that, by way of authorised derogation from Article 11 of the Sixth Directive, Austria was permitted during the period from 1 January 2001 to 31 December 2005 to tax its portion of international passenger transport, carried out by persons not established in Austria and by means of vehicles not registered in Austria, on the basis of an average taxable amount per person and per kilometre. (21) Consequently, a simplified procedure was already in operation when the disputed regulation was adopted, a fact which renders even less justifiable Austria's claim to be able to exempt operators entirely from all VAT accounting responsibility on the basis that it may introduce simplified procedures.

Possible reduction in tax

52. The issue between the parties is whether equating the amounts of deductible input tax and of chargeable output tax leads to a reduction in tax. Article 24(1) of the Sixth Directive provides in terms that the 'simplified procedures such as flat-rate schemes for charging and collecting the tax' may be introduced only 'provided they do not lead to a reduction thereof'. Economic activities are normally pursued only if they are profitable, which implies that the value of their outputs normally exceeds that of their inputs. By the same token, the amount of output tax will normally exceed that

of deductible input tax. If that were not so, VAT would be not a tax but a benefit. It seems logical therefore to say that a provision deeming input tax to be equal to output tax will normally lead to a reduction in the amount of tax collected.

53. However, that will not in fact hold true for every case. Even though no tax at all will be collected when input tax and output tax are deemed to cancel each other out, the amount which would otherwise have accrued to the tax authorities may in some circumstances be nil, or even negative. A particular economic activity may operate, cyclically or even structurally, without making a profit or even at a loss; or outputs may be taxed at a lower rate than inputs, so that a profit can still be made without generating any extra VAT.

54. The standard rate of VAT in Austria is 20%, whereas the reduced rate of 10% applies to passenger transport. (22) Consequently, if the value of inputs acquired by a transport provider at the standard rate is half that of the services it sells at the reduced rate, input tax will be equal to output tax. If it is more than half, input tax will exceed output tax and the transport provider can normally claim back the difference. This he cannot, of course, do under the contested arrangements.

55. The Austrian Government's position is thus essentially that carriers covered by the scheme will normally acquire inputs at the standard rate of VAT in Austria to a value approximately half that of their transport services taxable there, so that there is no reduction in tax.

56. Such an assumption might seem arbitrary, and indeed the Commission considers the figures used by Austria in its calculations to be so. However, although one might normally have supposed that a transport provider not based in Austria and providing only occasional services into or through that country would acquire input supplies mainly elsewhere, the Austrian Government points out that the price of diesel fuel in Austria is sufficiently cheaper than in neighbouring countries to encourage carriers to make disproportionately large purchases compared with the distance travelled there. (23) In addition, Austria argues, there will be costs for motorway toll stickers, other tolls, parking and possible repairs. It is therefore plausible to suppose that the contested scheme, which in effect 'caps' the deductible input VAT at 10% of the value of outputs, rather than allowing it to be deducted at its actual level, will not tend to lead to a reduction in tax.

57. I do not think it necessary or even possible for the Court to embark on any detailed analysis of the figures put forward by Austria. The choice of those figures – distances travelled, number of passengers carried, fuel consumption and so on – is bound to be to some extent arbitrary. (24) However, the assumptions underlying the calculations – the difference between the standard and the reduced rates of VAT in Austria, the differential between fuel prices in Austria and in neighbouring States – seem valid and such as to render plausible the conclusion that a reduction in tax cannot be asserted with certainty.

58. Austria puts forward moreover another argument which the Commission also rejects: namely, where the amount of tax potentially lost is small, it is relevant to take into account the administrative costs involved when assessing whether there is any reduction in tax. The Commission retorts that what Article 24(1) rules out is a reduction in tax, not a reduction in net revenue, and that there is no evidence that in the cases covered by the disputed regulation the administrative cost would in fact outweigh the revenue.

59. I agree with the Commission that the wording of Article 24(1) is clear. Simplified procedures must not lead to a reduction in the tax charged and collected, that is to say, gross tax revenue. Whether they may lead to a reduction in net tax revenue is another question not alluded to. However, it would seem to me absurd to interpret a provision allowing the introduction of simplified procedures in such a way that it required Member States to forgo such procedures in

circumstances where the normal procedures would produce more gross but less net revenue. Consequently, I do not think that administrative costs can be ruled out of the calculation when assessing whether a measure meets the proviso in Article 24(1) of the Sixth Directive.

60. That having been said, it is quite true that Austria has put forward no evidence other than plausible affirmations as to the relative importance of administrative costs in administering VAT in relation to occasional passenger transport services of the kind concerned.

61. In conclusion on this aspect, it seems to me that the Commission has failed to establish non-compliance with the proviso that there may be no reduction in tax. Austria's submission, although far from conclusive, is plausible and has not been rebutted by the Commission. (25)

Conclusion on the infringement

62. In the light of all those considerations, it seems to me clear that the disputed Austrian rules derogate from the provisions of Article 18(1)(a) and (2) and of Article 22(3) to (5) of the Sixth Directive.

63. Austria claims that the derogations are justified under Article 24(1) and it is common ground that the consultation procedure required by that provision was completed, albeit belatedly.

64. However, the disputed rules do not fall within the limits set down by Article 24(1), in that they are not restricted to small undertakings and cannot be described as a simplified procedure.

65. In those circumstances, it is not relevant that there may in fact be no reduction in tax, since in the scheme of Article 24(1) that is a proviso which applies when procedures already fall within the limits set down.

Costs

66. 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 Article 69(3), where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs.

67. In the present case, the Commission has asked for costs. Although I consider that its claim went too far in alleging failure to fulfil obligations under Articles 2, 6, 9(2)(b) and 17 of the Sixth Directive and that a part of Austria's defence has not been fully rebutted, I am none the less of the view that the infringement is established and that there is no reason to depart from the basic rule in Article 69(2) of the Rules of Procedure.

Conclusion

68. I am consequently of the opinion that the Court should

– dismiss the application in so far as it refers to Articles 2, 6, 9(2)(b) and 17 of Sixth Council Directive 77/388/EEC;

– declare that, by allowing taxable persons not established in Austria who transport passengers there not to submit tax returns and not to pay the net amount of VAT when their

annual turnover in Austria is below EUR 22 000, in that case deeming the amount of VAT due to be equal to the amount of deductible VAT and making the application of the simplified rules contingent on Austrian VAT not appearing on invoices or in other documents serving as invoices, the Republic of Austria has failed to fulfil its obligations under Articles 18(1)(a) and (2) and 22(3) to (5) of the same directive; and

– order the Republic of Austria to pay the costs.

1 – Original language: English.

2 – 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, amended on numerous occasions; hereinafter 'the Sixth Directive').

3 – Thus, for example, a bus journey from Munich to Verona would take place partly in Germany, partly in Austria and partly in Italy. The value of the service would be divided according to the proportion of the journey travelled in each Member State, and VAT would be chargeable on each portion at the rate applicable in the Member State in question. The VAT so calculated is then accounted for to the VAT authorities of each of the three Member States.

4 – Both amended, rather confusingly, by Article 28f of the same directive, introduced by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and itself subsequently amended on several occasions.

5 – Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 19).

6 – The current text of which is to be found in Article 28h, also introduced by Directive 91/680/EEC and also subsequently amended on several occasions.

7 – In principle, although the figure may in fact be higher in some Member States in circumstances not relevant here.

8 – BGBl. II No 166/2002.

9 – For this purpose, a calendar year.

10 – In Austria, output VAT is charged at 10% on passenger transport services, with the result that this provision makes the amount of deductible input tax the same as the amount of output tax, irrespective of what rate of VAT was actually charged on any inputs, such as diesel fuel, purchased by the service provider.

11 – Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises (OJ 1996 L 107, p. 4) – see the 22nd recital in the preamble, and Article 1(1) to (3) of the annex; Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36) – see Article 2(1) and (2) of the annex. The former recommendation was issued in the context of the Integrated Programme in Favour of Small and Medium-Sized Enterprises and the Craft Sector, and the latter with a view to limiting the proliferation of definitions of small and medium-sized enterprises in use at Community and national level, in particular in connection with Structural Funds or research.

12 – Joined Cases 138/86 and 139/86 *Direct Cosmetics* [1988] ECR 3937, paragraph 41.

13 – The text of which is currently to be found in Article 28g.

14 – *Direct Cosmetics*, paragraph 41, cited in footnote 12.

15 – Case C-321/02 *Harbs* [2004] ECR I-7101, paragraph 27; Case C-280/04 *Jyske Finans* [2005] ECR I-0000, paragraph 35.

16 – It may be noted also that the provisions of Article 24(1) were not in the original proposal for a Sixth Directive (OJ 1973 C 80, p. 1, Article 25), and that in the currently proposed recast directive (COM(2004) 246 final), the two sets of provisions appear in different sections (Articles 274 and 275 to 285 respectively).

17 – See, for example, Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 26, and the case-law cited there.

18 – Opinion of the Economic and Social Committee on the proposal for a Council Directive amending Directive No 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes in respect of the common value added tax scheme applicable to small and medium-sized businesses (OJ 1987 C 83, p. 9), the proposal being COM(86) 444 final (OJ 1986 C 272, p. 12).

19 – Cited in footnote 12; quoted in point 40 above.

20 – In points 40 to 42 above.

21 – Council Decision 2001/242/EC of 19 March 2001 (OJ 2001 L 88, p.14).

22 – See the Commission's document *VAT rates applied in the Member States of the European Community* DOC/1636/2005.

23 – The assertion as to relative prices is generally borne out by figures published by motoring organisations – see for example the website of the International Road Transport Union: http://www.iru.org/Services/fuel/Welcome.E.html.

24 – The existence of the derogation whereby Austria may calculate VAT on international passenger transport by foreign operators on an average basis (see point 51 above) may also be relevant here.

25 – See, for example, Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-0000, paragraph 75, and the case-law cited there.