

OPINION OF ADVOCATE GENERAL

RUIZ-JARABO COLOMER

delivered on 7 July 2009 1(1)

**Case C-246/08**

**Commission of the European Communities**

**v**

**Republic of Finland**

(Action for failure to fulfil obligations – VAT – Definition of economic activity – Public and private legal aid services – Payment according to income – Public authority – Distortion of competition)

**I – Introduction**

1. In the year 2002, the Republic of Finland decided to extend free legal aid, which had traditionally been afforded to citizens with lower incomes, to another segment of the population whose income was higher but who would find it difficult to pay the full cost of the service. In these cases, however, the law provides that the recipient shall pay, with a variable quota depending on his financial means, for part of the work of the legal adviser, who may be a public employee or a private practitioner.

2. The Finnish legislation exempts legal aid from VAT if it is provided by one of the public offices set up for the purpose and if the client makes part payment. By this action, the Commission alleges that that legislation of the Republic of Finland infringes several provisions of Directive 77/388/EEC. (2)

3. The study of the tax scheme applicable to this kind of activity permits examination of the diversion to the private sector of the supply of certain public sector services, a device used ever more frequently in public spheres which are particularly overburdened, such as health and education.

**II – Legal framework**

**A – Community law**

4. The Commission's action is based on the Sixth Directive, despite the fact that Directive 2006/112/EC has been in force since 1 January 2007. (3)

5. Article 2(1) of the Sixth Directive provides that ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’ is subject to VAT.

6. Under Article 4(1), “[t]axable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity’. Those ‘economic activities’ comprise, according to the aforementioned paragraph 2, ‘all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions’ and in particular ‘the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis’.

7. Article 4(5) regulates the subjection to VAT of bodies governed by public law, which ‘shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions’. However, the second subparagraph of Article 4(5) states that ‘they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition’.

#### B – *Finnish law*

8. The Finnish legal aid scheme is formed of four pieces of legislation adopted in 2002: the Law on legal aid of 5 April 2002; (4) the Law on State legal aid offices; (5) the Government Decree on legal aid of 23 May 2002; (6) and the Government Decree concerning the criteria governing remuneration for legal aid services, also of 23 May 2002. (7)

9. In accordance with that legislation, where a person requires professional legal assistance, either in legal proceedings or other legal matters, but his financial situation does not permit him to pay for the service in full, the State coffers ensure that he has access to legal advice.

10. Legal aid is given on application and may be free or provided in return for part payment, which is determined according to the applicant’s monthly income and assets. (8) This ‘semi-gratuitous’ legal aid was introduced in 2002, and the benefit was thus extended to private persons with slightly higher incomes. In this case, the quota payable by the person concerned has two components: the ‘basic contribution’ and the ‘additional contribution’.

11. The ‘basic contribution’ (*perusomavastuu*) varies, depending on the recipient’s earnings, between 0% and 75% of the normal fees and costs of the service. (9) In any event, neither single persons earning more than EUR 1 400 a month nor married persons earning (individually) more than EUR 1 200 are entitled to aid. (10)

12. The ‘additional contribution’ (*lisäomavastuu*) is paid only by a recipient of legal aid who has liquid assets or easily liquidated assets to the value of over EUR 5 000, and amounts to one half of the value of those assets in excess of EUR 5 000. (11)

13. As a general rule, the service is supplied by public legal advisers employed by any of the 65 legal aid offices established in Finland. However, for the purpose of entering an appearance in legal proceedings it is possible to appoint a private lawyer who has given his consent; and, if the recipient of the aid himself nominates a professional lawyer who meets the requirements to represent him, that lawyer is selected for the task, unless there are specific reasons for not doing so. (12)

14. The public legal aid agencies are financed for the most part from public funds. The sums

paid by clients as a 'basic contribution' or an 'additional contribution', when appropriate, are entered as income in the budget of each office. (13) The legal advisers who work in these offices are public employees with a State salary.

15. Private advisers are guaranteed reasonable remuneration depending on the level of participation required and the time spent, and also reimbursement of any costs they incur. Where a litigant is entitled to gratuitous legal aid, the State pays for the service in full; where aid is semi-gratuitous, the party concerned pays his share as determined by the Law and the State pays the rest.

16. The fees of a private lawyer and those of a public office are calculated according to the same criteria. (14) Consequently, the quota payable by the client is the same, irrespective of who is providing the service.

17. The only difference lies in the VAT scheme, since, under the Law on legal aid, a private lawyer is always subject to VAT, whereas the legal assistance provided by the public employees, whether free or in exchange for part payment, is not taxed. (15)

### **III – Pre-litigation procedure**

18. On 13 October 2004 the Commission sent the Finnish authorities an initial letter drawing their attention to the different treatment afforded by its VAT legislation to legal assistance of the same kind, depending on whether it was provided by private lawyers or lawyers working in a public office. The Commission added that, according to the information available to it, that legislation generated a significant distortion of competition to the detriment of the private lawyers.

19. By letter of 17 December 2004, the Finnish authorities described the VAT scheme complained of and maintained that, although it distorted competition, it did so to a very slight extent, since the recipient's choice of a public or private adviser is determined not only by whether the person chosen is subject to VAT but also by other factors such as his professional experience and qualifications or the heavy workload of the public offices.

20. On 19 December 2005, the Commission, considering that the foregoing explanations were inadequate, sent the Republic of Finland a letter of formal notice requiring it to levy VAT on the legal aid services offered by public lawyers in legal proceedings (which may also, therefore, be provided by private lawyers), whenever a percentage of their remuneration was paid by the recipient. The Commission considered that, in those circumstances, the public employees are not acting as public authorities, which are entitled to exemption from VAT under the first subparagraph of Article 4(5) of the Sixth Directive, and that their exemption would lead to significant distortions of competition within the meaning of the second subparagraph of Article 4(5).

21. In its reply, dated 16 February 2006, the Republic of Finland repeated the arguments already stated in its letter of 2004, also describing as spurious the Commission's premiss that the public legal aid offices act as public authorities when they provide legal advice other than in legal proceedings but not when they do so in such proceedings and that they act as public authorities when they receive nothing for giving the advice but not when they work in exchange for part payment.

22. Those arguments did not satisfy the Commission, which sent a reasoned opinion to the Finnish Government on 15 December 2006. On 15 February 2007, the Finnish authorities disagreed with the aforementioned opinion and therefore the Commission decided to bring this action for failure to fulfil obligations before the Court of Justice.

#### **IV – The procedure before the Court of Justice and the forms of order sought by the parties**

23. The Commission's application was lodged at the Registry on 3 June 2008 and the defence of the Finnish Government on 17 July 2008.

24. The reply was lodged on 3 October 2008 and the rejoinder on 13 November 2008.

25. Since neither of the parties was concerned that a hearing should be held, the case was ready for the preparation of this Opinion on 28 April 2009.

26. The Commission asks the Court of Justice to declare that, by failing to levy VAT on legal advice services provided in return for part payment by public legal aid offices, while like services provided by private advisers are subject to VAT, the Republic of Finland has failed to fulfil its obligations under Article 2(1) and Article 4(1), (2) and (5) of the Sixth VAT Directive. It also asks for an order for costs against the Republic of Finland.

27. The Republic of Finland contends that the action for failure to fulfil obligations be dismissed and the Commission ordered to pay the costs.

#### **V – Analysis of the failure to fulfil obligations**

28. The Finnish scheme for providing legal aid to private persons in legal proceedings has, as has been explained, variations in two respects. On the one hand, the recipient may receive the service completely free or in exchange for part payment, according to the level of his income; and, on the other hand, legal assistance may be provided by the employees of one of the public offices set up for the purpose or by a lawyer. The Finnish VAT legislation taxes the activity carried out in this particular situation by practitioners in the sector, but not the activity of the public legal aid offices, irrespective, in both cases, of whether the individual concerned pays a contribution.

29. This difference in tax treatment has attracted the attention of the Commission, which directs its complaints against a very specific aspect of the Finnish legislation. It believes that it is correct for assistance supplied in private offices always to be subject to VAT, and for the participation in legal proceedings by public employees to remain outside the scope of the tax when that assistance is completely free; on the other hand, it disagrees that the activity should not be taxed when it is carried out by a public office and the person concerned makes a payment.

30. The Commission's action for failure to fulfil obligations is based on three pleas in law, the relevance of which will be examined in this Opinion.

31. First, the Commission maintains that, when the public advisers provide the aforementioned service in return for part payment, they are carrying out an 'economic activity' within the meaning of Article 4(1) and (2) of the Sixth Directive, which involves a 'supply of goods effected for consideration', on which VAT is therefore payable under Article 2(1) of the Directive.

32. Secondly, the Commission repeats that, in this case, the public advisers are not acting as public authorities, and therefore the exemption from tax under the first subparagraph of Article 4(5) of the Sixth Directive is not applicable.

33. Thirdly, the Commission maintains, furthermore, that the competition of the public offices creates significant distortions of competition, so that, even if it were accepted that they are engaging in activities in their capacity as public authorities, they would have to be described as taxable persons pursuant to the second subparagraph of Article 4(5) of the Sixth Directive.

A – *The meaning of ‘economic activity’ for VAT purposes (Articles 2(1) and 4(1) of the Sixth Directive)*

34. As has been pointed out, the Commission bases its action on the premiss that the legal assistance offered by the Finnish public offices is of an economic nature, provided that the recipient of the assistance pays an amount, however small, by way of consideration. This is the most important aspect of the application but, surprisingly, the one which the Commission develops in least detail.

35. Under Article 2(1) of the Sixth Directive, VAT is levied on ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’. Article 4(1) of the Directive completes this definition, adding that taxable person shall mean any person who carries out any ‘economic activity’ specified in Article 4(2), which refers inter alia to ‘activities of the professions’ and ‘[t]he exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis’.

36. Accordingly, if there is no ‘economic activity’, there is no liability to the tax. (16) The case-law has already laid down some criteria for clarifying the concept, but this case requires more in-depth interpretive work, since I am unable to find any precedent with similar factual content.

1. The case-law

37. In the first place, the Court of Justice has observed that the term ‘economic activity’ is objective in character, and must be considered per se whatever its purpose or results. (17) It is therefore immaterial that the task being discussed here is carried out in the public interest and by imposition of law or with the aim of providing assistance (helping citizens in order to facilitate and improve their access to justice) and not with a purely business spirit or with the aim of achieving certain targets. Such circumstances, on their own, do not support the conclusion that the activity at issue lacks economic significance.

38. An ‘economic activity’, in relation to its subjection to VAT, does not necessarily have to be a business activity designed to make a profit; this is shown by the fact that the Directive describes non-profit-making organisations as taxable persons, even though subsequently, one of the exemptions in Article 13A(1) may apply to them. The wording of Article 4 of the Second Directive was also very significant; (18) it described a taxable person as ‘any person who independently and habitually engages in transactions pertaining to the activities of producers, traders or persons providing services, *whether or not for gain*’.

39. This idea is refuted, in principle, by the wording of the judgment in *Floridienne and Berginvest*, in which it was held that, where a holding company makes capital available to its subsidiaries, that activity may of itself be considered an economic activity, consisting in exploiting that capital with a view to obtaining income by way of interest therefrom on a continuing basis, provided that it is not carried out merely on an occasional basis and is not confined to managing an investment portfolio in the same way as a private investor ... and provided that ‘it is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment’. (19) In my view, this passage seeks to specify the circumstances in which there is an economic activity of ‘exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis’, but it cannot be extended to all the other situations covered in Article 4(2) of the Directive. (20) Any other interpretation would undermine the objective nature of the concept. The receipt of income is also essential in the other cases, not as a requirement of productivity, but of ‘reciprocity of services’, as is explained below.

40. Secondly, the case-law has also stipulated that the activity at issue must be carried out in return for remuneration. (21) Article 2 of the Directive attributes to the taxable transaction the element of consideration, which seems to form an integral part of VAT, since, in order to apply, it requires, as its name suggests, the existence of an added value in the goods and services subject to it. (22)

41. This was the approach taken by the Court of Justice in its judgment in *Hong-Kong Trade Development Council*, which exempted from VAT services provided free of charge, on the ground that where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment. The requirement that taxable transactions must be effected against payment is confirmed by the fact that the economic activities of taxable persons are necessarily activities which are carried on with the object of obtaining payment of consideration or which are likely to be rewarded by the payment of consideration, because if they were free of charge in all cases they would not fall within the system of value added tax, since they could not, according to Article 8, constitute a basis of assessment. (23)

42. However, it is not appropriate to reject *ad limine* the application of VAT to work which is remunerated in part, (24) although it is also not appropriate to infer that the mere presence of a payment, however small, means that a given activity is economic in nature. The case-law has devised a more qualified solution for this kind of situation, maintaining that a service is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied. (25) Also, there must be a direct link between the service provided and the consideration received. (26)

43. The Court of Justice therefore held that activities such as those of the Apple and Pear Development Council were not subject to VAT, (27) since the work of this public organisation benefited the whole industry, not only the individual apple and pear growers required to pay an annual charge to the Council. According to the judgment, there was no direct relationship between the benefit which those individual growers obtained and the amount of the mandatory charge. Using the same criterion, the judgment in *Tolsma* decided that playing music on the public highway, for which no remuneration is stipulated, even if the musician solicits money and receives sums, in the form of donations, does not constitute a supply of services effected for consideration, since those receipts cannot be regarded as the consideration for the service supplied and there is no link between the two. On the other hand, the case-law has regarded as an economic activity the provision of a roads infrastructure in return for payment of a toll, the amount of which depended largely on the category of vehicle used and the distance covered. (28)

## 2. Application to the present case

44. In line with the judgment in *Hong-Kong Trade*, the Commission acknowledges that there is no economic activity when public offices provide legal assistance to a citizen for no charge. However, its reasoning in this respect contradicts its final position, since it argues that the aforementioned services are provided without consideration, because, 'as the employee of a public legal aid office, the adviser's only remuneration is his normal salary'. This argument is counterproductive for the Commission's claims, since the public adviser's salary does not vary when the party concerned has to pay a sum to the Authority; therefore, in these cases of part payment too, the essential consideration is lacking.

45. In my view, however, the salary of the employee who participates in one of these procedures is irrelevant for deciding whether the activity of the public office is subject to VAT. The

reason that services which are wholly free of charge are not taxed is, as the case-law points out, that there is no 'economic activity' if there is no exchange of services and that there is therefore no basis for that taxation.

46. If legal aid is provided in return for part payment, it is necessary to focus attention on the nature of the payment and its composition, in order to determine whether it involves 'actual consideration' for the service provided and if there is a 'direct and necessary link' between the two.

47. If subsidised legal aid is provided by a private lawyer, it is easy to find that direct relationship, since, irrespective of whether the client pays nothing or pays only a fraction of the fee, the full amount is paid by the State. The professional always obtains true consideration, the amount of the legally appropriate remuneration, which is therefore subject to VAT. Whether it comes in whole or in part from public funds, the price depends solely and exclusively on the nature of the work carried out.

48. In the public offices, however, it is unlikely that the link between the contribution payable by the recipient and the assistance provided meets the criterion of 'direct and necessary' required by the case-law. The payment received by the Administration does not correspond to the actual value of the service, not even with that provided for by law (which the private lawyer receives), but is a percentage of that value. The office charges a maximum of 75% of the fees established in the Finnish legislation (29) and receives 20%, 30%, 40% or 55% of that amount, depending on the income of the person concerned.

49. The consideration given by the private person does not depend solely and exclusively on the cost of the work, but also, to a large extent, on the client's financial position. There is therefore a certain connection between the service and the amounts he pays (since this contribution is calculated on the basis of the legal value of the legal aid provided), but that link is neither direct nor does it have the intensity which the case-law requires in order to identify a service effected for consideration, because it is 'contaminated' by the taking account of the client's income and assets. The more modest the person's income, the less direct the aforementioned link will be.

50. The information which the Finnish Government has supplied concerning the financing of its public legal aid offices is very revealing. According to that evidence, in 2007 only 34% of the legal aid work of those offices involved part payment and the contributions of private persons in that respect amounted to EUR 1.9 million, as opposed to the EUR 24.5 million represented by the gross operating costs of those authorities.

51. Although I agree with Advocate General Verloren van Themaat that 'the decisive point in Article 4 [of the Directive] is the economic nature of the activities carried out and not the legal form of such activities or the method of financing them', (30) in the present case the details given confirm that the payments from private persons cover a minimal proportion of the cost of the legal aid paid for by the Finnish State. If it is added that the contribution made by recipients bears a certain resemblance to a tax instrument owing to its progressive nature and that, in accordance with the judgment in *Götz*, the receipt of a payment does not, per se, mean that a given activity is economic in nature, (31) it is clear that the legal aid provided by the Finnish Authority on a semi-gratuitous basis does not fulfil the conditions for being an economic activity subject to VAT.

52. The case-law concerning the treatment as taxable persons of notaries, tax collectors and other public agents does not, in my view, suffice to contradict this idea. The judgments in *Commission v Netherlands*, *Ayuntamiento de Sevilla* and *Mihal* (32) show that the duties of those professionals represent a genuine economic activity, since, although they are conferred by law for reasons of public interest, they involve a supply of services, which is constant and effected in return for remuneration, to private persons, and the Directive contains no reservation in favour of

the professions regulated. The difference between those situations and the present dispute lies in the type of consideration, because in the cases referred to there is nothing to indicate that the fees depend on factors other than the particular nature of the service.

53. In the light of the above, it may be inferred that the Commission has not sufficiently established that the work of the Finnish public legal aid offices constitutes an ‘economic activity’ as regards its subjection to VAT. This reason is sufficient basis for dismissing the Commission’s action, without examining the exception provided for in Article 4(5) of the Sixth Directive.

54. However in case the Court of Justice should disagree with this assessment and should consider that the Commission has produced the aforementioned evidence, I shall analyse below the meanings of ‘public authority’ and ‘significant distortion of competition’ in the context of these proceedings.

*B – The meaning of ‘public authority’ in VAT (the first subparagraph of Article 4(5) of the Sixth Directive)*

55. According to the information provided, the public legal aid offices form part of the Finnish Administration. In those circumstances (provided that we accept the premiss that such agencies exercise an ‘economic activity’), it is necessary to ascertain whether that activity may be exempted from VAT under the exception in Article 4(5) of the Sixth Directive.

56. The first subparagraph of that provision states that public bodies ‘shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions’.

57. Therefore, for this exemption from VAT to apply, two conditions must be satisfied cumulatively: 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. (33)

58. The Court of Justice offered a precise definition of this second requirement, stating that ‘the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities “as public authorities” within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders’, they do not engage in such activities. (34)

59. That explanation does not mean that the mere fact that businessmen or private practitioners are present in the same sphere of activity precludes an operation being regarded as carried out by an organisation acting ‘as a public authority’. The term must be given a broad interpretation, encompassing both tasks which are essentially public, which private persons are prohibited from carrying out, and those in which a competitive situation arises with the private sector. (35) Otherwise, it would be difficult to apply the ‘exception to the exception’ in the second subparagraph of Article 4(5), which makes ‘such activities or transactions’ (36) subject to VAT if there is a risk of significant distortions of competition.

60. The exclusion in the first subparagraph of Article 4(5) is therefore objective since, although it takes the form of an elimination of the status of ‘taxable person’ of public bodies, it is only the way in which the activities at issue are carried out that determines the scope of the treatment of such bodies as non-taxable persons. Accordingly, the case-law has stated that the Directive considers the activities of public bodies to be subject to tax when the bodies carry them out ‘not as bodies governed by public law but as bodies subject to private law’, and that the only criterion



making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law. (37)

61. In the present case, the Commission maintains that the Finnish public legal aid offices, when they provide their services in the context of legal proceedings, act under the same legal conditions as the private practitioners authorised to provide such services, since the work at issue is governed by the same legislation, irrespective of who conducts the legal defence. More specifically, the Commission adds that its position 'is based solely on the question of whether the public legal aid offices provide their services pursuant to specific provisions which do not apply to private offices'; since that is not the situation in the case of legal proceedings, the Commission argues that the aforementioned offices are not acting as public authorities, and are therefore subject to VAT. (38)

62. In my view, this reasoning is based on incorrect premisses, since the case-law requires only that they act 'as public authorities' in accordance with the legal system appropriate to public bodies, not that that legislation is applied to them. In the case now pending, the private operators work, by special authority of the law, within a legal framework applicable to public bodies and not the reverse, as the Commission appears to suggest.

63. Procedural assistance, whether provided by a public adviser or a private lawyer, constitutes a public task and is governed in both cases by the parameters of the 2002 legislation. The private lawyer who may participate in these situations is not guided only by the rules governing the exercise of his profession, as when he acts for any other client, since the aforementioned legislation imposes different requirements: first, the Administration (through the public offices) decides whether it is appropriate for him to accept that legal representation, checking in that regard that he satisfies the legal conditions and that there are no specific reasons advising against appointing him; (39) secondly, he is remunerated in accordance with the official tariffs which are different from the general tariffs for fixing fees; (40) and, finally, he is paid by the State, not by the person concerned. Apart from the rules of professional conduct and strictly procedural rules, there are not many similarities between the legal system governing the legal profession and that which regulates the lawyer's relationship with these special clients.

64. It is not a question, therefore, of an activity subject to the general rules of the market, but of transactions of a public authority which, when they are exercised directly by the Administration, are exempt from VAT.

65. The Finnish legislature created this specific public task in order to make high-quality legal assistance available to citizens and, in order to facilitate this task, it entrusted it not only to public employees, but also to private lawyers who thus act 'as public authorities'. The exemption from VAT does not apply, however, because the first subparagraph of Article 4(5) of the Sixth Directive reserves this to public bodies.

66. This result is not surprising. The case-law has declared that, even if it were accepted that certain professionals exercised the powers of a public authority by virtue of a public appointment, they would not enjoy the exemption provided for in Article 4(5) of the Sixth Directive if they pursued those activities independently in the exercise of a profession and without forming part of the Public Administration. (41)

67. Consequently, the offices in question act as bodies governed by public law when they undertake, in connection with legal proceedings, the legal aid tasks entrusted to them by the Law. They therefore act as public authorities even though they receive some remuneration in return and private offices also exercise the same activities. Therefore, this ground for failure to fulfil obligations cannot succeed.

C – *The meaning of ‘significant distortions of competition’ for the purposes of VAT (the second subparagraph of Article 4(5) of the Sixth Directive)*

68. The third and last argument put forward by the Commission in its application is based on the fact that, if it is accepted that the aforementioned bodies act as public authorities when they take part in legal proceedings, their non-taxable status for VAT purposes is likely to create ‘significant distortions of competition’ within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive. Under that provision, such activities are to be taxed even though they are carried out by a public authority. By that measure, the Community legislature seeks to avoid infringements of the principles of the generality and neutrality of VAT. (42)

69. The Commission claims in its application that the fact that the public offices are not subject to VAT makes it 22% (43) more expensive to consult a private lawyer and points out that the recipients of legal aid are ultimate consumers, without the right to deduct VAT, which is a crucial point for evaluating the disruption to competition. (44)

70. In its defence, the Finnish Government adds that the choice between a private firm and a public office does not depend only on price, since it is also influenced by other factors, such as the professional relationship which the legal aid recipient may have maintained with a lawyer, his reputation or his specialisation in a certain field, the pressing workload of the public advisers at any time or the conflicts of interest which may arise. It also points out that the statistics for the years 2002 to 2006 show that only a minority of the legal aid recipients consulting a private lawyer make a part payment (approximately 20%; for the remaining 80% the service is wholly subsidised by the State); that the proportion of cases handled by the public offices and by private offices, on the semi-gratuitous basis described, remained stable between 2004 and 2006; and that, during that period, the number of clients making a part payment and consulting a private lawyer showed a greater increase (155%) than the number of clients who, in similar circumstances, were represented by public employees (a 30% increase).

71. The Commission does not consider those figures definitive, since the facts they reflect ‘may be attributable to many factors and do not, on their own, undermine the allegation that comparable situations have received different treatment, which is obvious’. (45)

72. The recent judgment in *Isle of Wight Council* (46) held that potential significant distortions of competition (within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive) must affect the activity in question, encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical; and that the distortions of competition must be ‘more than negligible’.

73. These interpretative guidelines greatly limit the circumstances in which the activity of a public authority is not subject to VAT. On the one hand, it is not essential to establish that in the past the different tax regimes have given the public body a competitive advantage; it is sufficient that there is a glimpse of a future distortion of competition. On the other hand, it seems to me that the minimum level of disturbance in the market which precludes the exemption of the public bodies is very low, because it is enough for it to be ‘more than negligible’.

74. The statistics provided by the Finnish Government show that private offices have benefited greatly from the Law on legal aid during its first years of application, because a person who chooses to consult a private lawyer, when the State subsidises part of the services provided, is influenced by factors other than price. However, none of these reasons is, on its own, essential.

75. However, there is an aspect which, although it has not been raised in the case, would mitigate the potential anti-competitive nature of the different tax treatment under consideration here, since the choice between a public adviser or a private adviser does not always depend on the client's wishes. Under the Finnish Law on legal aid, where a citizen nominates a private lawyer, the necessary steps will be taken with a view to his appointment, although the Administration reserves the right to take that initiative, (47) which would occur, for example, if it distributed a workload which was too heavy for the public advisers (a situation which would inevitably occur if all private persons showed a preference for assistance from the public offices).

76. Therefore, without minimising the effect of an economic difference of 22% when it comes to a choice between one means of legal representation and the other, the Commission has not established that that factor carries more weight in the decision-making process than the other factors mentioned or that it gives rise to a significant distortion of competition of which, at the moment, there is no indication whatsoever.

#### **D – Corollary**

77. In my view, it is obvious that the nature of the contribution made by the interested party, which is not strictly economic, precludes describing the service provided by public legal advisers in Finland as an 'economic activity'. I therefore suggest that the Court of Justice dismiss the action for failure to fulfil obligations brought by the Commission.

78. However, should the Court of Justice not agree with that view, in parts B and C of this Opinion I have analysed, as a secondary point, the wording of Article 4(5) of the Sixth Directive, and concluded that the public offices act as public authorities and that the fact that they are not considered taxable persons for VAT does not adversely affect competition. Consequently, there would in any event be no failure to fulfil obligations.

#### **VI – Costs**

79. Under Article 69(2) of the Rules of Procedure of the Court of Justice, 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 been unsuccessful and the Republic of Finland has requested that it be ordered to pay the costs, the Commission must be ordered to pay the costs of these proceedings.

#### **VII – Conclusion**

80. In the light of the foregoing considerations, I suggest that the Court of Justice:

- (1) dismiss the action for failure to fulfil obligations brought by the Commission against the Republic of Finland;
- (2) order the Commission to pay the costs of these proceedings.

1 – Original language: Spanish.

2 – Sixth Council Directive 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 – Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

4 – Oikeusapulaki (257/2002). An (unofficial) English version of the text of this Law, published by the Finnish Ministry of Justice may be consulted on:

<http://www.finlex.fi/fi/laki/kaannokset/2002/en20020257.pdf>. There is also a guide to the application of this legislation on the Internet:

<http://www.om.fi/en/Etusivu/Julkaisut/Esitteet/Oikeusapu/pagename/esite/Tulosta> (for the English version).

5 – Laki valtion oikeusaputoimistoista (258/2002).

6 – Valtioneuvoston asetus oikeusavusta (388/2002).

7 – Valtioneuvoston asetus oikeusavun palkkioperusteista (389/2002).

8 – Section 3(1) of the Law on legal aid.

9 – For single persons, the tariff is as follows: with a maximum monthly wage of EUR 650, there is no deductible, aid is provided free: EUR 850 or less, he must pay 20% of the service; EUR 1 000 or less, 30%; EUR 1 200 or less, 40%; EUR 1 300 or less, 55%; and EUR 1 400 or less, 75%.

If the person seeking aid is married, the amounts are different: if the individual earnings of the spouse concerned are EUR 550 or less, it is free; EUR 650 or less, 20%; EUR 800 or less, 30%; EUR 1 000 or less, 40%; EUR 1 100 or less, 55%; and EUR 1 200 or less, 75%.

10 – Article 6 of the Government Decree on legal aid.

11 – Article 7 of the Government Decree on legal aid.

12 – Section 8 of the Law on legal aid.

13 – According to the Finnish Government, in 2007 the gross operating costs of those public offices amounted to EUR 24.5 million, as opposed to EUR 1.9 million in operating income, which includes the part payments made by recipients of semi-gratuitous legal aid and the costs of the losing other party in proceedings (point 35 of the defence).

14 – Article 11 of the Government Decree concerning the criteria governing remuneration for legal aid services.

15 – Law on Value Added Tax of 30 December 1993 (*arvonlisäverolaki* (1501/1993)).

16 – Although Article 4 of the Sixth Directive gives a very wide scope to VAT, it covers only activities of an economic nature (Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 15; Case C-77/01 *EDM* [2004] ECR I-4295, paragraph 47; and Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 18). For a person to be considered a taxable person for VAT, the Directive includes, as well as the requirement that he carry out an economic activity, three other objective or subjective conditions: independence, professionalism and continuity.

17 – Case 235/85 *Commission v Netherlands* [1987] ECR 1471, paragraphs 6 to 10; Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case C-479/01 *Zita Modes* [2003] ECR I-14393, paragraph 38; Case C-369/04 *Hutchinson 3G* [2007] ECR I-5247, paragraph 28; Case C-284/04 *T-Mobile Austria*

[2007] ECR I-5189, paragraph 35; and Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47.

18 – Second Council Directive 67/228/EC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967(I), p. 16).

19 – Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567, paragraph 28. See also the Opinion delivered in that case by Advocate General Fennelly, points 34 and 35.

20 – As regards holding companies, the Court of Justice has acknowledged that the mere acquisition and holding of shares in a company does not constitute an ‘economic activity’ within the meaning of the Sixth Directive, unless the holding company is involved in the management of the companies (Case C-60/90 *Polysar* [1991] ECR I-3111). Thus, the criterion of business is introduced again, in order to clarify the meaning of the expression, used in Article 4(2), of ‘exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis’. In relation to this concept of ‘exploitation’, see Case C-186/89 *Van Tiem* [1990] ECR I-4363; Case C-230/94 *Renate Enkler* [1996] ECR I-4517; and *Hutchinson 3G*, and also Terra, B. and Kajus, J., *A guide to the European VAT Directives. Introduction to European VAT 2009*, vol. 1, IBFD, 2009, p. 360.

21 – *Commission v Netherlands*, paragraphs 9 and 15; Case C-276/97 *Commission v France* [2000] ECR I-6251, paragraph 32; and Case C-408/06 *Götz* [2007] ECR I-11295, paragraph 18.

22 – Herrero de la Escosura, P., *El IVA en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas*, University of Oviedo – Ed. Marcial Pons, Madrid, 1996, p. 120.

23 – Case 89/81 *Hong-Kong Trade Development Council* [1982] ECR 1277, paragraphs 10 and 11.

24 – That approach would culminate, for example, in considering the exemption of sales which, below cost price, are made in discount and clearance sales.

25 – Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14; Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 45; and Case C-305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, paragraph 47.

26 – Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11 and 12; Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 12; and *Commission v France*, paragraphs 34 and 35.

27 – *Apple and Pear Development Council*, paragraphs 11 to 16.

28 – *Commission v France*, paragraph 35.

29 – Possibly rather more, if the private person has easily liquidated assets of more than EUR 5 000. It is not clear from the documents in the file whether the amount may reach 100% of the fees, but it seems highly unlikely, since Article 6 of the Decree on legal aid fixes a maximum monthly salary for entitlement to this benefit.

30 – Opinion delivered in *Hong-Kong Trade Development Council*, point 3.4 *in fine*.

31 – *Götz*, paragraph 21. See to the same effect the judgments in Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1547, paragraph 24; *Hutchinson*, paragraph 39; and *T-Mobile Austria*,

paragraph 45.

32 – *Commission v Netherlands*; the judgment in Case C-202/90 *Ayuntamiento de Sevilla* [1991] ECR I-4247; and the order in Case C-456/07 *Mihal* [2007] ECR I-79.

33 – *Ayuntamiento de Sevilla*, inter alia paragraph 18.

34 – Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 16. Also the judgments in Case C-4/89 *Comune di Carpaneto Piacentino and Others* [1990] ECR I-1869, paragraph 8; Case C-247/95 *Marktgemeinde Welden* [1997] ECR I-779, paragraph 17; Case C-276/97 *Commission v France* [2000] ECR I-6251, paragraph 40; Case C-358/97 *Commission v Ireland* [2000] ECR I-6301, paragraph 38; Case C-359/97 *Commission v United Kingdom* [2000] ECR I-6355, paragraph 50; Case C-408/97 *Commission v Netherlands* [2000] ECR I-6417, paragraph 35; Case C-260/98 *Commission v Greece* [2000] ECR I-6537, paragraph 35; Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 17; and Case C-430/04 *Feuerbestattungsverein Halle* [2006] ECR I-4999, paragraph 32.

35 – In accordance with the judgment in *Commission v France*, ‘the ... argument ... that a body acts as a public authority only in respect of activities falling within the definition of public authority in the strict sense of that term ... must be rejected’ (paragraph 41).

36 – The case-law has emphasised that this expression refers to activities or transactions engaged in by bodies governed by public law as public authorities (Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, paragraph 21).

37 – Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, paragraph 15; and *Fazenda Pública*, paragraph 16.

38 – The Commission’s application, paragraph 61.

39 – Section 8 of the Law on legal aid.

40 – Established in the Government Decree concerning the criteria governing remuneration for legal aid services (Valtioneuvoston asetus oikeusavun palkkioperusteista).

41 – *Commission v Netherlands*, paragraphs 21 and 22; *Ayuntamiento de Sevilla*, paragraphs 18 to 21; and the order in *Mihal*.

42 – According to Casado Ollero, ‘the aim of the Community legislation is to prevent the exemption from VAT undermining the generality and neutrality of the tax, except that, instead of mentioning these two principles, the legislature refers to the result that may be the consequence of their infringement: the creation of distortions of competition’ (Casado Ollero, G., ‘El IVA y las operaciones de los entes públicos’, *El IVA en el sistema tributario español*, vol. II, Ed. Ministerio de Economía y Hacienda, Madrid, 1986, p. 194).

43 – The VAT rate in Finland.

44 – It is based on the Opinion delivered by Advocate General Kokott in *T-Mobile and Hutchinson* 3G.

45 – The Commission’s application, paragraph 56.

46 – Case C-288/07 *Isle of Wight Council* [2008] ECR I-7203.

47 – Section 8 of the Law on legal aid.