OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 6 June 2013 (1)

**Case C?189/11**

**European Commission**

**v**

**Kingdom of Spain**

**Case C?193/11**

**European Commission**

**v**

**Republic of Poland**

**Case C?236/11**

**European Commission**

**v**

**Italian Republic**

**Case C?269/11**

**European Commission**

**v**

**Czech Republic**

**Case C?293/11**

**European Commission**

**v**

**Hellenic Republic**

**Case C?296/11**

**European Commission**

**v**

**French Republic**

**Case C?309/11**

**European Commission**

**v**

**Republic of Finland**

**Case C?450/11**

**European Commission**

**v**

**Portuguese Republic**

(VAT – Special scheme for travel agents)

1. In this series of infringement actions, the Commission takes issue with an interpretation of Directive 2006/112 (2) under which eight Member States consider that the special VAT margin scheme for travel agents (‘the margin scheme’) set out in Articles 306 to 310 of that directive (Annex I to this Opinion) applies regardless of whether the customer is actually the traveller or not. On the basis of the terminology used in some language versions of the provisions in question, that is referred to as ‘the customer approach’. The Commission asserts that, under the legislation as it stands (and in accordance with the practice in the remaining Member States), the margin scheme applies only where the customer is the traveller. Its interpretation is referred to, on the basis of the terminology in other language versions, as ‘the traveller approach’. That is the essence of the principal issue in all these cases, and of the sole issue in seven of them. I shall address only that issue in the present Opinion.

2. With regard to the Kingdom of Spain alone, the Commission objects also to three further aspects of the national rules relating to the margin scheme, concerning, respectively, the exclusion from the margin scheme of situations in which retail travel agents sell travel packages organised by wholesale agents, the statement of the amount of VAT included in the price and the determination of the taxable amount over a tax period. I address those issues in a separate Opinion, also delivered today.

## The Package Travel Directive

3. The definitions included in Article 2 of the Package Travel Directive (3) are not directly relevant here. However, they may provide useful background for understanding the margin scheme. For the purposes of the Package Travel Directive:

‘1. “package” means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than 24 hours or includes overnight accommodation:

(a) transport;

(b) accommodation;

(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

…;

2. “organiser” means the person who … organises packages and sells or offers them for sale, whether directly or through a retailer;

3. “retailer” means the person who sells or offers for sale the package put together by the organiser;

4. “consumer” means the person who takes or agrees to take the package …, or any person on whose behalf the principal contractor agrees to purchase the package … or any person to whom the principal contractor or any of the other beneficiaries transfers the package …;

5. “contract” means the agreement linking the consumer to the organiser and/or the retailer.’

**The margin scheme**

4. The margin scheme has its genesis in Article 26 of the Sixth VAT Directive (Annex II to this Opinion). (4) Its essence is simple. Where a travel agent, acting in his own name, uses the supplies and services of other taxable persons in the provision of travel facilities, all the transactions are to be treated as a single supply, subject to VAT in the travel agent’s Member State. The taxable amount is deemed to be the travel agent’s margin – the difference between the VAT-inclusive cost to him of the supplies and services which he includes in the package which he sells and the price, exclusive of VAT, which he charges for that package.

5. The margin scheme was not included in the Commission’s initial or revised proposals for the legislation, so there is no written legislative history from which any indication as to its purpose may be directly gleaned. However, it is common ground in the present proceedings that the aim was twofold: to simplify matters for travel agents who would otherwise have to deduct or reclaim input VAT in different Member States and to ensure that each service is taxed where it is provided.

6. Without an arrangement such as the margin scheme, a travel agent or tour operator putting together a holiday or travel package within the European Union would be liable for output VAT on the whole price of the package in his own Member State. He would have to recover the VAT charged to him, often in other Member States, for supplies such as transport, accommodation, meals, guided tours, cruises or organised leisure activities to be provided in those Member States. Not only would that involve significant administrative complexity but, as a result, such services would be subject to VAT not in the Member State in which they were in fact provided and consumed but in the Member State in which the package was purchased. Significant VAT revenue might thus be diverted from Member States providing tourist destinations to those providing the tourists.

7. Apart from those effects, however, the margin scheme is in principle neutral as regards the

VAT system. Over the chain of supplies as a whole, no more or less is charged than would otherwise be the case, and, in principle, no residual amount becomes irrecoverably embedded at an intermediary stage, so as to burden one or other of the economic operators involved. A comparative example may be helpful in that regard.

8. If the cost of (say, transport, hotel and restaurant) services bought by the travel agent and included in the package is 100, exclusive of VAT, if the travel agent's net margin on those services is 20 and if VAT is levied at 20% (in all Member States concerned, if there are more than one), then:

– under the normal scheme, the travel agent buys at 100, plus VAT of 20, making a VAT-inclusive price of 120; adding his margin of 20 to the VAT-exclusive price, he sells at 120, plus VAT of 24, making a VAT-inclusive price of 144; he deducts input VAT of 20 and accounts to the tax authority for the difference of 4 between output and input VAT;

– under the margin scheme, the travel agent buys at 100, plus VAT of 20, making a VAT-inclusive price of 120; adding his margin of 20 to the VAT-inclusive price, he sells at 140, plus VAT of 4, making a VAT-inclusive price of 144; he deducts no input VAT but accounts to the tax authority only for the output VAT of 4 on his margin of 20.

In both cases, the VAT-inclusive selling price is 144 and the tax authorities collect VAT of 24, the entire burden of which is borne by the purchaser of the package.

9. Where the services in question are provided in one or more Member States other than that in which the package is sold, under the normal scheme the travel agent cannot simply deduct the input VAT of 20 from his output VAT of 24. Unless he is registered for VAT in those other Member States, he must go through the rather more complicated process of claiming a refund there, (5) for which he might have to wait for some not inconsiderable time, by contrast with the system of immediate deduction when transactions are confined within a single Member State. Moreover, the Member States in question collect no VAT on services supplied in their territory. Under the margin scheme, however, neither difficulty arises.

10. There is no dispute between the parties as to the principles I have set out above. The difference of interpretation concerns only whether, for the margin scheme to apply, the person who buys the package must be the traveller (the person who actually consumes the services or other supplies (6)) or may also be another travel agent. That issue arises in particular, it appears, because it has become increasingly common for travel agents or tour operators ('organisers' in the terminology of the Package Travel Directive) to put together holiday or travel packages which they sell to another agent or operator (a 'retailer' in the terminology of the Package Travel Directive) before the final sale is made. However, there would be less scope for differing views if the language of the EU legislation were more consistent.

11. In the six languages in which the Sixth Directive was originally drafted (Danish, Dutch, English, French, German and Italian), the word 'traveller' or its equivalent was used throughout Article 26, except in the English version, which used 'customer' just once, in defining the scope of the scheme in Article 26(1): 'where the travel agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities'. (7)

12. With successive enlargements, that anomaly has spread into various other language versions, and has extended, in some cases, to instances where the English uses 'traveller'.

13. In the Sixth Directive, the Estonian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovene and Swedish versions followed the English pattern, using 'customer' just once,

while the Finnish, Greek, Hungarian and Spanish followed the other original languages in using ‘traveller’ throughout. In Czech, ‘customer’ was used throughout, even where the English used ‘traveller’.

14. In Directive 2006/112, the pattern changed somewhat. The five original (1977) languages other than English (Danish, Dutch, French, German and Italian), together with Czech, Estonian, Greek, Hungarian, Latvian, Lithuanian, Slovene and Spanish, use ‘traveller’ throughout. The English pattern is found in Bulgarian, Maltese, Polish and Swedish. ‘Customer’ is used throughout in Portuguese, Romanian and Slovak. Finnish uses ‘customer’ in three instances and ‘traveller’ in two. (8)

15. In 2002, the Commission proposed amendments to Article 26 of the Sixth Directive, (9) which included replacing the word ‘traveller’ by ‘customer’ throughout. (10)

16. In its explanatory memorandum, (11) the Commission gave the following reasons for proposing that change:

‘… one of the major problems raised by Member States and travel agents alike is the fact that the scheme could strictly only be applied when the travel service was sold to a traveller. Such a rule was tailored to the market situation in 1977, when travel packages were mainly sold by a travel agent directly to the traveller. Nowadays the situation has changed considerably. More persons are operating in the sector and the supply of travel packages is more fractionated than in 1977. Therefore more and more travel services are supplied either to other travel agents or to other taxable persons who use travel services as an incentive for their personnel or in the framework of their business, e.g. seminars.

The current situation, whereby the special scheme is not applicable when the travel service is sold to a person other than the traveller, no longer ensures that VAT revenue is allocated to the Member State where the consumption actually takes place. When a travel agent sells a travel package to another travel agent, the normal rules of taxation should be applied. This means that he should be able to deduct the input VAT he paid to his suppliers and to charge VAT in the Member State where he is established on the whole value of his onward supply of a travel package to the second travel agent. In that case the VAT revenue on the initial supplies (e.g. hotel accommodation) is no longer allocated to the Member States where the different services are consumed, but is redirected to the Member State where the travel agent is established.

To avoid this, several Member States with large tourism industries apply a different interpretation of this Article, and extend the scope of the special scheme to supplies of travel services by travel agents to clients other than travellers. The result is that the original purposes of this scheme, simplification and taxation in the Member State of consumption are better met.

Nevertheless, this leads to differing applications of the special scheme within the Community, a situation which is not compatible with the proper functioning of the internal market and which distorts competition between traders established in different Member States. This is a situation that is unacceptable and therefore the Commission proposes that the first sentence of Article 26(2) be modified by deleting the words “to the traveller”.

The consequence thereof is that the scope of the special scheme is substantially broadened. In its amended version, the special scheme must be applied for all supplies by travel agents under the conditions mentioned in Article 26(1), irrespective of the nature of the customer (private person, taxable person, business, other travel agents, etc.).’

17. The proposal has not yet been adopted. It remains before the Council, within which, it

appears, no agreement has been reached.

**Procedure**

18. Those, essentially, are the circumstances in which, in 2006, the Commission analysed the application of the margin scheme across the European Union and took the view that 13 Member States were implementing it incorrectly (specifically, they took the customer approach rather than the traveller approach). Some of those Member States (12) then amended their legislation, but others did not. Although the Commission still wished to see its proposed amendment implemented, it considered that uniformity was essential in the internal market and that the unfair competitive advantage enjoyed by some travel operators should be eliminated. (13)

19. In accordance with the procedure laid down in Article 226 EC (now Article 258 TFEU), the Commission therefore sent letters of formal notice to all eight of the Member States concerned by the present cases, on 23 March 2007. In the light of their replies, it sent reasoned opinions to seven of those Member States on 29 February 2008 and to the eighth, the Kingdom of Spain, on 9 October 2009. Since the Member States did not comply with the reasoned opinions, the Commission brought the present actions on dates between 20 April and 1 September 2011. It seeks declarations to the effect that, by permitting travel agents to apply the margin scheme when providing travel services to persons other than travellers, the Member States have failed to fulfil their obligations under Articles 306 to 310 of Directive 2006/112.

20. There has been a full written procedure in all cases, with the exception of Case C-293/11 *Commission* v *Greece*, in which the Commission waived its right to submit a reply. Several Member States submitted statements in intervention in each other's cases. A joint hearing was held on 6 March 2013 at which the Commission and all the Member States concerned presented oral argument.

21. It is undisputed in any of the cases that the relevant national legislation takes the customer approach. I therefore consider it unnecessary to set out any of that legislation here. The issue (the sole issue in seven of the cases and the first issue in Case C?189/11 *Commission* v *Spain*) is simply whether that is the correct approach or whether, as the Commission submits, a correct interpretation of Articles 306 to 310 of Directive 2006/112 requires all Member States to apply the traveller approach.

**Brief summary of the main arguments**

22. The Commission and the defendant Member States all agree that: (i) the aims of the margin scheme are to simplify procedures and ensure equitable collection of VAT revenue without otherwise derogating from the VAT system; (ii) while it is now common for travel or holiday packages to be put together by one travel agent or tour operator and sold to another before final sale to the traveller or holidaymaker, that was not the case when the Sixth Directive was adopted in 1977; (iii) a uniform interpretation is necessary to ensure a harmonised application of the VAT rules in all Member States which does not differentiate between travel agents; (iv) the customer approach embodies the interpretation best suited to achieve the aims of the margin scheme; and (v) that approach is in fact followed in the defendant Member States. Since these points are all undisputed, it does not seem useful to set out any detailed argument on them here; moreover, I can accept all these points, and I shall not devote any further consideration to them in my assessment below. Suffice it to say that, as regards (i) and (iv), I have set out the essentials in my presentation of the margin scheme, (14) that (ii) and (v) are agreed facts and that (iii) is uncontroversial.

23. While there is no dispute as to the need for a single, harmonised interpretation throughout

the Union, the Commission considers that the broader interpretation involved in the customer approach cannot be achieved without a change to the legislation (the *de lege ferenda* view), whereas the defendant Member States consider that the provisions as they stand can – and should – receive that broader interpretation (the *de lege lata* view).

24. The lynchpin of the Commission's argument is linguistic. In only one of five instances, only one of the six original language versions of Article 26 of the Sixth Directive used the term 'customer'; in all other instances and in all other language versions – in particular in that in which the final text was debated and approved – the term 'traveller' was used throughout. The legislature's intention was thus clearly that the margin scheme should be confined to cases in which the travel agent's sale was direct to the traveller. (15)

25. In addition, in the Commission's view, two phrases used in the provision would not otherwise make sense. If the meaning were 'customer', the words 'in its own name' in Article 26(1) of the Sixth Directive (Article 306(1) of Directive 2006/112) would be redundant, as travel agents always act in their own name vis-à-vis their customers (those who buy directly from them), though not always vis-à-vis travellers (who may not be the same persons). And in Article 26(2) of the Sixth Directive (Articles 307 and 308 of Directive 2006/112), the phrases 'supplied … to the traveller' and 'to be paid by the traveller' would be illogical if the purchaser of the service were another travel agent: where a package put together by one travel agent is sold to another travel agent before being sold to the traveller, how can the first travel agent's margin (the basis of assessment for VAT) be calculated if the package is to be 'treated as a single service supplied by [that] travel agent to the traveller' but the second travel agent applies his own margin?

26. The Commission also stresses that, according to settled case-law, provisions which are in the nature of exceptions to a principle must be interpreted strictly. (16) The margin scheme is an exception to the principle of taxation at each stage in the chain of transactions and deduction of input tax at each stage prior to the retail stage. (17)

27. Although it agrees that the customer approach would be better suited to achieving the aims of the margin scheme, the Commission emphasises that Member States are required to apply the VAT legislation of the Union even if they consider it to be less than perfect. (18)

28. None the less, the Commission specifies that, in its view (which it appears to derive from the purpose of the scheme rather than from any words in the legislation), the margin scheme should apply when a business, which (as a legal person) cannot itself be a 'traveller', purchases a travel package to be used by its staff. What matters is simply that the package should not be sold on to the actual traveller.

29. By contrast, the defendant Member States (19) accentuate the need to ensure achievement of the aims pursued by the margin scheme.

30. As regards the Commission's main linguistic point, they stress that the wording used in one language version of an EU provision cannot serve as the sole basis for its interpretation or be made to override the other language versions. Where there is divergence between language versions, the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (20) Such a teleological approach has been taken by the Court to hold that the margin scheme applies to a hotelier who offers his customers a package including accommodation, return transport and a coach excursion, the transport services being bought in from third parties, even though he is not, formally speaking, a travel agent or tour operator. (21) It should likewise be applied here to ensure that the aims of the scheme are correctly achieved.

31. The absurdities which the Commission sees in the use of certain phrases are, in the

Member States' view, inconclusive. The English version of the provisions (from which all the other 'customer' versions derive) does not speak of travel agents who deal with *their customers* in their own name but who deal with *customers* (not necessarily directly their own) in their own name. There is thus no obvious redundancy in such wording – which is, in any event, retained by the Commission in its proposed amendment. However, since it is specified that the margin scheme is not to apply to travel agents who act solely as intermediaries, the words 'in their own name' could be redundant on any interpretation. And, as the Court has held, the words 'to be paid by the traveller' cannot be interpreted literally but may include payments by third parties. (22)

32. The defendant Member States point out also that the Court has consistently held that the requirement for strict interpretation of exceptions to the principles of the VAT system does not mean that the terms used should be construed in such a way as to deprive exceptions of their intended effect, and that any interpretation must be consistent with the objectives pursued and comply with the principle of fiscal neutrality. (23)

33. The Commission's reference to Case C-304/05 *Commission* v *Spain*, (24) the Member States submit, is not relevant. That case concerned a provision of the Sixth Directive whose interpretation was clear from its wording. Here, it is quite evident that the wording is capable of giving rise to different interpretations, and has indeed done so.

**Assessment**

34. In these proceedings, the Court finds itself in an invidious position. No consistent pattern can be seen in the way in which the existing language versions of Articles 306 to 310 of Directive 2006/112 use the words 'customer' and 'traveller' (neither of which is defined). A Commission proposal to rectify the situation (not itself a model of linguistic consistency) has failed to meet with agreement in the Council, to which it was submitted more than a decade ago. There would appear to be, if not stalemate, at least insufficient shared willingness to determine a uniform approach. There are two, mutually incoherent, interpretations, in favour of each of which arguments can be advanced. Eight Member States interpret the provisions in one way (formerly at least 13 did so), while the remainder – none of which has sought to intervene in order to submit its own point of view – interpret them in the other, without either approach being necessarily related to whether, in the relevant languages, Directive 2006/112 uses the word 'traveller' or 'customer'.

35. It is hard to avoid the impression that the Court is being called upon to decide a matter of VAT policy (and of legislative drafting) which has proved beyond the capabilities or the willingness of the Member States and the legislature.

36. Be that as it may, the Court must provide a legal interpretation of the current text which will determine whether the Commission's actions are (as regards the issue with which this Opinion is concerned) well-founded or not.

37. In that context, the number of Member States which have adopted one approach or the other cannot in my view be a factor of any legal relevance to the Court's analysis (even if it might be a political consideration of some relevance for the legislature). Whatever the outcome of that analysis, a significant number of Member States will be called upon to amend their legislation. By the same token, it seems to me that little persuasive value can be attached to any practical difficulties which might arise for travel agents under either interpretation if it were applied uniformly – other, of course, than those which the margin scheme is specifically designed to avert. Neither approach is likely to be perfect in practice but, if at least eight (previously, at least 13) Member States have been able to implement the provisions in a particular way over a significant period, any difficulties entailed by that implementation (taken in isolation, rather than as part of an internally conflicting whole) appear unlikely to be decisive.

38. If the provisions governing the margin scheme were unequivocal, their clear meaning should in principle prevail, even if that were to weaken to some extent the achievement of the aims of the margin scheme. In my view, however, they leave room for interpretation, and the Court must have regard to the purpose and general framework of that scheme and to its own previous rulings in that context. (25)

39. It seems unprofitable to seek an answer though detailed analysis of the haphazard way in which the terms 'traveller' and 'customer' or their equivalents are now used in the different language versions of Articles 306 to 310 of Directive 2006/112. The Commission stresses that the word 'customer' was used only once in only one of the six original language versions of Article 26 of the Sixth Directive and has explained how that anomaly arose and was subsequently propagated. It is convinced – and I see no need to cast doubt on that conviction – that the Council's intention was to use the word 'traveller' throughout.

40. However, I do not think one can necessarily infer, from an intention to use the word 'traveller' consistently, a concomitant intention to confine application of the margin scheme to situations in which the travel agent deals directly with the physical person who is going to consume or enjoy the services provided.

41. It is true that, taking the word at its face value, it is difficult to interpret 'traveller' as including 'another travel agent'. However, a contextual reading which has regard to the purpose and general scheme of the provisions may lead to a broader interpretation.

42. On the one hand, the word ‘traveller’ cannot be given a rigorously literal interpretation in the context of the margin scheme. For Robert Louis Stevenson, to travel hopefully may have been a better thing than to arrive, (26) but he might have felt less hopeful had he been facing delayed flights, cramped seating in crowded aircraft or tasteless food on tiny plastic trays. For many if not most modern holidaymakers, the focus has shifted: it is the destination rather than the voyage which counts, (27) and one may book a resort holiday or other accommodation through a travel agent while arranging one’s own means of arrival. The latter was, specifically, the case with the ‘motoring holidays’ in *Van Ginkel*, (28) which the Court held to fall within the margin scheme. Moreover, it is clear that one person may buy a travel package to be used by another, but it would be surprising if the VAT treatment of the purchase were to depend on whether the purchaser was the actual traveller or a relative, holiday companion etc. Nor indeed is there any reason why a holiday booked through a travel agent should involve any significant travel at all: it might be more convenient (or perhaps cheaper, in the case of promotional offers) to book an inclusive stay at a spa resort in one’s own home town through a travel agent rather than directly.(29) For the purposes of the margin scheme, therefore, the ‘traveller’ is not necessarily one who ‘travels’, and actual ‘travel facilities’ or an actual ‘journey’ need not form part of the package in respect of which the travel agent is required to apply the scheme.

43. On the other hand, without there being any need to draw specific conclusions from the ways in which ‘customer’ or its equivalent has been used in different language versions, the mere fact that the term was allowed to insinuate itself into the legislation and there to multiply tends to belie the view that the legislature has ever attached decisive importance to the use of the word ‘traveller’. It may be noted, moreover, that the increasing use of the term ‘customer’ in the legislative provisions has accompanied the increasing frequency of sales of holiday or travel packages between travel agents.

44. It seems to me, therefore, that a legislative intention to use a single term to designate the person buying travel, accommodation or similar services from a travel agent – and ‘traveller’ was a convenient term to use – does not require the meaning of that term to be confined to a particularly narrow category of such persons.

45. Nor, in any event, does the Commission itself seek to interpret ‘traveller’ literally: it includes under the term, for example, a business entity which buys services for the use of its employees, the only condition being in its view that the package must not be sold on to whoever is the final consumer.

46. I thus cannot regard the text of the provisions governing the margin scheme as unequivocal, even on the assumption that the original intention was to use the term ‘traveller’ – which is itself not free from ambiguity – throughout.

47. That being so, the term may in my view be interpreted so as to extend to customers other than the physical persons who actually enjoy the travel or holiday services purchased from a travel agent (or, as the Commission suggests, than those who buy for the benefit of such persons), and indeed so as to include other travel agents who will then sell the services on. Given the uncertainty as between language versions, it should be so interpreted if that is required by the purpose and general framework of the margin scheme. The Court has already, in the light of such a requirement, interpreted 'travel agent' to include a hotelier offering an accommodation package which comprises transport and excursions and a trader organising language and study trips abroad. (30) A further parallel can be drawn with the Court's interpretation of the phrase 'persons taking part in sport' – which, as it acknowledged, refers in normal usage only to natural persons – as capable of including corporate persons and unincorporated associations for the purposes of Article 13A(1)(m) of the Sixth Directive (now Article 132(1)(m) of Directive 2006/112). (31)

48. Crucially, to exclude the sale of travel or holiday packages by a travel agent or tour operator to another travel agent who will sell it on from the application of the margin scheme would run directly counter to the two aims which – as is common ground in these proceedings – the scheme was intended to achieve.

49. The Court has recognised the aim of adapting the normal rules on place of taxation, taxable amount and deduction of input tax to take account of the multiplicity of services in a travel or holiday package and of places in which they are provided, which entail practical difficulties for travel agents and tour operators of such a nature as to obstruct their operations. (32) When travel agent A puts together a package comprising, say, a coach tour of several Member States, with accommodation, restaurant meals and visits to tourist attractions in each of them, and sells that package to travel agent B, who sells it on to the natural persons who will participate in the tour, the practical difficulties entailed are all encountered by A, not by B. Even if the place of supply of A's sale to B is not in the Member State in which B is established, B's difficulties are in principle no greater than those involved in a simple cross-border supply – namely, the need to obtain a refund or deduction of input tax paid on a transaction in another Member State. B's situation alone does not necessarily justify application of a special margin scheme. A, by contrast, has to deal with input tax on different services at different rates in different Member States – the very situation which the margin scheme is designed to alleviate. Yet under the traveller approach advocated by the Commission in the present proceedings it is B alone who will benefit from the scheme, while A will not.

50. Comparable considerations apply in relation to the second aim, that of ensuring that VAT revenue is correctly allocated to the Member State in which the relevant service is in fact provided and received. If, in the above example, the margin scheme is not applied to A's sale to B, A will recover the amounts of VAT charged on services provided to and enjoyed by the tourists in the Member States visited, a process which is likely to result in a net payment to him of much or all of those amounts (33) and a loss of VAT revenue in those Member States. Although harmonised at EU level, VAT is a national tax, levied in each Member State at its own rates and under its own detailed rules. It is classified in Article 1(2) of Directive 2006/112 as 'a general tax on consumption'. Although Title V (Articles 31 to 61) of Directive 2006/112 lays down particular rules as regards the place of supply where there is a cross-border element, it is inherent in the idea of a tax on consumption that it should crystallise at the time and place of actual consumption (that is to say, for a non-cumulative multistage tax like VAT, final consumption at the end of the chain of supply). In the situation in issue, the relevant services are physically both supplied and consumed in the same Member State. The cross-border element is, as regards those services, essentially artificial – the supply in A's Member State is of A's services, not of those of the service providers in the Member States visited. It would therefore run counter not only to the aims of the margin

scheme but also to a fundamental principle of the common VAT system which that scheme is designed to uphold if revenue derived from consumption in one Member State were to accrue to the benefit of another Member State in which none of the services directly giving rise to that consumption were provided.

51. It is true that derogations from the general regime should be interpreted strictly but, as the Member States have pointed out, that does not mean that the terms used should be construed in such a way as to deprive them of their intended effect. Here, the Commission's proposed interpretation would do just that. (34)

52. On that basis, I am compelled to conclude not only that the customer approach is better suited than the traveller approach to achieve the aims of the margin scheme, but also that the latter actually frustrates those aims in situations of the kind in which the Commission argues that it should be applied. Such a conclusion seems to me sufficient to justify dismissing the Commission's actions in all these cases (subject to the proviso that, in Case C-189/11 *Commission* v *Spain*, there are three further issues to determine).

53. That said, it may be helpful, briefly, to mention any other major points made by the defendant Member States which also support that view and to respond to certain arguments raised by the Commission.

54. First, the Member States stress the principle of fiscal neutrality inherent in the VAT system, in the sense that VAT should not be applied in a way which distorts competition between suppliers. (35) They point out that, because (as I have explained in points 49 and 50 above) the practical and administrative difficulties involved in putting a travel package together are not alleviated by the Commission's interpretation where the package is sold to another travel agent, that interpretation favours larger tour operators and travel agencies over smaller ones, which are less likely to have the necessary resources to cope with those difficulties. The latter are therefore less able to put packages together for sale to other travel agents. The Commission's interpretation unjustifiably involves, moreover, treating a taxable person's supplies differently for VAT purposes on the basis of the identity of his customer rather than on any criterion linked to the supply or the supplier.

55. I agree with that assessment. The criterion of size will give larger agencies an advantage over smaller agencies also in other ways, but application of the VAT rules should not add further discrimination. It is also true that the principle of neutrality, in this sense, is not a rule of primary law which can condition the validity of a provision, but a principle of interpretation, to be applied concurrently with other such principles. (36) Here, however, its application buttresses the view which I have reached on the basis of the principle which requires a provision whose meaning is not clear (particularly where there are conflicting language versions) to be interpreted in the light of the purpose and general scheme of the rules of which it forms part.

56. Second, the Commission has argued that the phrase 'in their own name' in Article 306 of Directive 2006/112 is redundant if the customer approach is adopted, since travel agents always deal with their customers in their own name (were that not so, the persons with whom they were dealing would not be their customers).

57. That argument seems weak. While it is true that a word or phrase used in legislation should in principle be presumed to serve its own intended purpose, I cannot accept that an interpretation which does no more than avoid redundancy should be made to prevail over one which much more clearly serves the intended purpose of the body of rules as a whole. Redundancy is not unknown in legislation. Here, the phrase 'in their own name' may easily be seen as simply an anticipation of the exclusion, in the following sentence, of travel agents acting solely as intermediaries. I note, moreover, that the Commission's 2002 proposal to amend Article 26 of the Sixth Directive, which

is supposed to implement the customer approach, continues to use the words ‘where the travel agents deal with customers in their own name’ – thus perpetuating the alleged redundancy.

58. Third, the Commission submits that the definition of ‘margin’ in Article 308 of Directive 2006/112 is unworkable if the customer approach is taken. If travel agent A puts together a package and sells it to travel agent B who sells it to a traveller, how can A’s margin be the difference between the VAT-exclusive price paid by the traveller and the actual cost to A of the goods and services provided by other taxable persons for the direct benefit of the traveller, when the price paid by the customer includes not only A’s margin but also B’s margin?

59. If, as the legislation stands, the word ‘traveller’ should, as I believe, be construed broadly to include customers of different kinds, in particular other travel agents, the problem disappears. (37) Moreover, as the Member States have pointed out, the words ‘to be paid by the traveller’ cannot be interpreted literally in that context. (38)

60. Fourth, the Commission refers to Case C?204/03 *Commission* v *Spain*, (39) to the effect that Member States may not disregard express provisions of the VAT directives in order to produce a result more closely in line with the overall aims of that legislation.

61. Here again, I agree with the Member States that the case-law does not preclude an interpretation which produces such a result unless it runs counter to a clear and unequivocal provision. The provisions in issue in the present proceedings are, as has been amply demonstrated, not unequivocal.

62. Finally, however, it must be acknowledged that the customer approach is not a panacea for all possible imperfections in the margin scheme. Its most salient drawback is set out by the Commission in the explanatory memorandum to its proposed amendments to the Sixth Directive:

‘Several Member States also raised the issue of business trips and the problem this causes to companies, who are, in effect, final consumers of travel packages, as they will be unable, under the proposed new provisions of Article 26, to deduct the residual input VAT. If they order a travel package from a travel agent, they will [be] charged a price VAT included, and therefore this company will not be able to deduct this amount of VAT although this travel package is used for business purposes. This will cause residual VAT in the intermediary consumption stage, which is contrary to the basic principle of neutrality of the Community VAT system.’ (40)

63. Although acknowledged, that issue is not addressed in the proposed amendment. In the present proceedings, the Commission puts forward an interpretation under which the term ‘traveller’ would include companies purchasing business trips – thus, in effect, applying the customer approach to that extent (and, in so doing, embedding residual VAT at an intermediary stage).

64. The problem could be averted only if the traveller approach were adopted in its strictest interpretation, so as to apply the margin scheme only where the travel agent’s customer was a natural person consuming the services sold. Where the customer was a taxable legal person, the normal regime would apply and, if the services acquired were used for strictly business purposes and constituted cost components of the business’s taxable outputs, all the VAT on those services, in addition to that on the travel agent’s margin, could be deducted from the tax on those outputs and the principle of VAT neutrality for taxable persons would be respected.

65. That is not, however, the interpretation which the Commission proposes for the traveller approach. Moreover, the aims of the margin scheme are, as is agreed, specifically to simplify procedures and to ensure correct allocation of VAT revenue. There is no suggestion that it was

intended also to guarantee full deductibility of input tax on travel services used for taxable business purposes, even if that would have been a desirable aim.

66. The existence of the issue which I have described does not, therefore, lead me to revise my conclusion that the customer approach should apply on a correct interpretation of the margin scheme, with the result that the Commission's actions should be dismissed in so far as they seek declarations to the effect that, by permitting travel agents to apply the margin scheme to the provision of travel services to persons other than travellers, the Member States have failed to fulfil their obligations under Articles 306 to 310 of Directive 2006/112.

## Costs

67. Under Article 138(1) of the Court's 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. All the defendant Member States have applied for costs. Under Article 140(1) of the Rules of Procedure, Member States which intervene in proceedings are to bear their own costs.

## Conclusion

68. In the light of all the above considerations, I am of the opinion that – subject to the analysis and conclusions which I set out in my separate Opinion in Case C-189/11 concerning the remaining complaints against the Kingdom of Spain – the Court should:

– dismiss the actions brought by the Commission,

– order the Commission to pay the costs incurred by the Member States as defendants, and

– order the Member States to bear the costs which they have incurred as interveners.

## Annex I

*Articles 306 to 310 of Directive 2006/112 (emphasis added)*

'Article 306

1. Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with *customers* in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.

This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 [(41)] applies for the purposes of calculating the taxable amount.

2. For the purposes of this Chapter, tour operators shall be regarded as travel agents.

Article 307

Transactions made, in accordance with the conditions laid down in Article 306, by the travel agent in respect of a journey shall be regarded as a single service supplied by the travel agent to the *traveller*.

The single service shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services.

Article 308

The taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent's margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the *traveller* and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the *traveller*.

Article 309

If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the supply of services carried out by the travel agent shall be treated as an intermediary activity exempted pursuant to Article 153.

If the transactions are performed both inside and outside the Community, only that part of the travel agent's service relating to transactions outside the Community may be exempted.

Article 310

VAT charged to the travel agent by other taxable persons in respect of transactions which are referred to in Article 307 and which are for the direct benefit of the *traveller* shall not be deductible or refundable in any Member State.'

**Annex II**

*Article 26 of the Sixth Directive (emphasis added)*

'Special scheme for travel agents

1. Member States shall apply value added tax to the operations of travel agents in accordance with the provisions of this Article, where the travel agents deal with *customers* in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. This Article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11A(3)(c). [(42)] In this Article travel agents include tour operators.

2. All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the *traveller*. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services. The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of this service shall be the travel agent's margin, that is to say, the difference between the total amount to be paid by the *traveller*, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the *traveller*.

3. If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the travel agent's service shall be treated as an exempted intermediary activity under Article 15(14). Where these transactions are performed both inside and outside the Community, only that part of the travel agent's service relating to transactions outside the Community may be exempted.

4. Tax charged to the travel agent by other taxable persons on the transactions described in paragraph 2 which are for the direct benefit of the *traveller*, shall not be eligible for deduction or refund in any Member State.’

**Annex III**

*Terminology used in the different language versions*

Sixth Directive

BG (43)

CS

DA

DE

Article 26(1)

????????? (recipient, beneficiary)

zákazník (customer)

rejsende (traveller)

Reisender (traveller)

Article 26(2), first sentence

???????? ???? (traveller)

Article 26(2), third sentence

???????? ????/??????

(traveller/ tourist)

Article 26(4)

??????

(tourist)

Directive 2006/112

BG

CS

DA

DE

Article 306

??????

(customer)

cestující

(traveller)

rejsende (traveller)

Reisender (traveller)

Article 307

???????? ???? (traveller)

Article 308

Article 310

Sixth Directive

EL

EN

ES

ET

Article 26(1)

??????????? (traveller)

customer

viagero (traveller)

klient (customer)

Article 26(2), first sentence

traveller

reisija (traveller)

Article 26(2), third sentence

Article 26(4)

Directive 2006/112

EL

EN

ES

ET

Article 306

?????????? (traveller)

customer

viagero (traveller)

reisija (traveller)

Article 307

traveller

Article 308

Article 310

Sixth Directive

FI

FR

HU

IT

Article 26(1)

matkustaja (traveller)

voyageur (traveller)

utas (traveller)

viaggiatore (traveller)

Article 26(2), first sentence

Article 26(2), third sentence

Article 26(4)

Directive 2006/112

FI

FR

HU

IT

Article 306

asiakas (customer)

voyageur (traveller)

utas (traveller)

viaggiatore (traveller)

Article 307

Article 308

asiakas (customer)

matkustaja (traveller)

utazó (traveller)

Article 310

matkustaja (traveller)

utas (traveller)

Sixth Directive

LT

LV

MT

NL

Article 26(1)

klientas (customer)

klients (customer)

klienti (customer)

reiziger (traveller)

Article 26(2), first sentence

keleivis (traveller)

ce?ot?js (traveller)

vja??atur (traveller)

Article 26(2), third sentence

Article 26(4)

Directive 2006/112

LT

LV

MT

NL

Article 306

keleivis (traveller)

ce?ot?js (traveller)

konsumaturi (consumer)

reiziger (traveller)

Article 307

vja??atur (traveller)

Article 308

Article 310

Sixth Directive

PL

PT

RO (44)

SK

Article 26(1)

klient (customer)

cliente (customer)

client

(customer)

zákazník (customer)

Article 26(2), first sentence

podró?ny (traveller)

viajante (traveller)

c?l?tor (traveller)

turista (tourist)

Article 26(2), third sentence

Article 26(4)

cestujúci (traveller)

Directive 2006/112

PL

PT

RO

SK

Article 306

nabywca (acquirer)

cliente (customer)

client (customer)

zákazník (customer)

Article 307

turysta (tourist)

Article 308

Article 310

Sixth Directive

SL

SV

Article 26(1)

naro?niki (customer)

kunder (customers)

Article 26(2), first sentence

potnik (traveller)

resande (traveller)

Article 26(2), third sentence

Article 26(4)

Directive 2006/112

SL

SV

Article 306

potnik (traveller)

kunder (customers)

Article 307

resande (traveller)

Article 308

Article 310

1 – Original language: English.

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

3 – Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59). Article 1 states its purpose as being ‘to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community’.

4 – 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’). Articles 306 to 310 of Directive 2006/112 merely recast the structure and wording of Article 26 of the Sixth Directive, without, in principle, bringing about any material change (see recital 3 in the preamble to Directive 2006/112).

5 – Under the provisions of, now, Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State

(OJ 2008 L 44, p. 23), which repealed and replaced 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. 11).

6 – Although the Commission's definition of 'traveller' is in fact somewhat looser than that – see point 28 below.

7 – The Commission explained at the hearing that the text of the Sixth Directive was debated and agreed within the Council in its French version, which was intended to serve as the basis for all other languages; however, contrary to that intention, the final English text was in fact based on a parallel version in English, which had not been the basis of discussions. It cannot, however, be denied that the text was adopted in all six languages, each version being equally authentic.

8 – I reproduce the monolingual text of Articles 306 to 310 of Directive 2006/112 in Annex I to this Opinion, and of Article 26 of the Sixth Directive in Annex II. In both cases, I italicise the word 'traveller' or 'customer', as the case may be, or its equivalent, on each occurrence. In Annex III, I set out a table which indicates the word used in each provision, in each of the different language versions. At the hearing, the Commission stated that the Council had determined the final text in each language version of Directive 2006/112, without the Commission being in a position to react to any changes.

9 – Proposal for a Council Directive amending Directive 77/388/EEC as regards the special scheme for travel agents (COM(2002) 64 final).

10 – That was, in any event, the intention. In fact, at least the French, Greek, Italian and Swedish versions of the proposed new provisions all seem to have retained the word 'traveller' in at least one instance.

11 – At point 4.1.2.1.

12 – Cyprus, Hungary, Latvia and the United Kingdom. The Netherlands amended its legislation at a later stage (from 1 April 2012) and parallel proceedings which had been brought against that Member State (Case C-473/11) were withdrawn.

13 – See Commission press releases IP/08/333 and IP/11/76.

14 – The aim of simplifying procedure for travel agents has, moreover, been repeatedly stressed by the Court (see, for example, Case C-31/10 *Minerva Kulturreisen* [2010] ECR I?12889, paragraphs 17 and 18 and case-law cited). The aim of correct allocation of tax yield was stressed by Advocate General Tizzano in his Opinion in *First Choice Holidays* (Case C-149/01 [2003] ECR I?6289, point 25, footnote 13).

15 – See, however, point 28 below.

16 – See, for a recent example, Case C-360/11 *Commission* v *Spain* [2013] ECR I-0000, paragraph 18 and case-law cited.

17 – See Article 1(2) of Directive 2006/112.

18 – Case C-204/03 *Commission* v *Spain* [2005] ECR I?8359, paragraph 28 and case-law cited.

19 – I do not think it useful here to attribute individual arguments – of which what follows is, in any event, only a summary – to individual Member States.

20 – See, for example, Case C-41/09 *Commission* v *Netherlands* [2011] ECR I?831, paragraph 44 and case-law cited. See also Case C?296/95 *EMU Tabac and Others* [1998] ECR I?1605, paragraph 36.

21 – Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I?6229, paragraphs 18 to 27. See also Case C-200/04 *iSt* [2005] ECR I?8691, paragraph 22 et seq.

22 – *First Choice Holidays*, cited in footnote 14, paragraph 28 of the judgment.

23 – See, for a very recent example with regard to exemptions, Case C-91/12 *PCF Clinic AB* [2013] ECR I?0000, paragraph 23.

24 – Cited in footnote 18; see, in particular, paragraph 25.

25 – See the case-law cited in footnote 20 above.

26 – *Virginibus puerisque*, iv, El Dorado (1881).

27 – There are cases of course in which the voyage or journey itself, or part of it, is the aim (certain cruises, for example, or legendary train journeys such as the Orient Express), and others in which the transport itself is the only service purchased from the travel agent (notably, perhaps, in the case of business travel). However, a significant part of travel agency business involves packages of which the services available at the destination are the central component, transport to and from that destination being simply an inevitable adjunct.

28 – Case C?163/91 [1992] ECR I?5723.

29 – In *Minerva Kulturreisen*, cited in footnote 14, the Court did rule that the margin scheme was not to apply to the sale by a travel agent of opera tickets in isolation ‘without provision of a travel service’, but it made clear that travel services included accommodation (see paragraphs 21 to 28 of the judgment).

30 – See, respectively, *Madgett and Baldwin* and *iSt*, both cited in footnote 21.

31 – Case C-253/07 *Canterbury Hockey Club and Canterbury Ladies Hockey Club* [2008] ECR I?7821, paragraph 26 et seq. I note that, in that case, the Commission had submitted that the provision was to be interpreted ‘not literally, but so as to ensure the effective application of the exemption for which it provides, on the basis of the supply of services in question and that, therefore, regard must be had not only to the formal, legal recipient of that supply, but also to its material recipient or effective beneficiary’ (see paragraph 25 of the judgment).

32 – See the case-law cited in footnote 14 above.

33 – That would not be the case only if A were both registered for VAT in each of those Member States and made supplies there on which the output VAT exceeded all his input VAT there. Even then, however, there would be a flow of VAT revenue from the Member States in which the services were in fact provided and enjoyed to the Member State in which A was established, which would collect the output tax on his sale to B.

34 – See point 32 above.

35 – For the other sense of fiscal neutrality in the context of VAT, see footnote 40 below.

36 – See Case C?44/11 *Deutsche Bank* [2012] ECR I?0000, paragraph 45.

37 – The difficulty is addressed in the Commission's proposed amendments to Article 26 of the Sixth Directive, essentially by replacing the word 'traveller' by 'customer' throughout Article 26(3) (corresponding to the last sentence of Article 26(2) in the unamended version; there are also other changes, but they have no particular bearing on the point under discussion). That, it seems to me, demonstrates the largely contrived nature of the objection.

38 – See point 31 above.

39 – Cited in footnote 18 above. The Commission cites also Case C?269/00 *Seeling* [2003] ECR I?4101, paragraph 54.

40 – Document cited in footnote 9, point 2, penultimate paragraph. The principle of neutrality referred to here is that VAT should be neutral in its effect on taxable persons, who should not themselves bear the burden of the tax.

41 – Point (c) of the first paragraph of Article 79 concerns the use of a suspense account for repayment of expenditure in the name and for the account of a purchaser or customer.

42 – Article 11A(3)(c) was the predecessor to point (c) of the first paragraph of Article 79.

43 – The Sixth Directive having been repealed before Bulgaria's accession to the EU, the Bulgarian version is not an official translation.

44 – The Sixth Directive having been repealed before Romania's accession to the EU, the Romanian version is not an official translation.