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Opinion of Mr Advocate General Cosmas delivered on 20 May 1999. - Staatssecretaris van Financiën v J. Heerma. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Sixth VAT Directive - Transactions between a partner and a partnership. - Case C-23/98.

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Opinion of the Advocate-General

I - Introduction

1 By this reference for a preliminary ruling made under Article 177 of the EC Treaty (now Article 234 EC), the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has referred to the Court a question on the interpretation of Article 4(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (`the Sixth Directive'). (1) Specifically, the Court is requested to interpret that provision in order to decide whether the letting of immovable property by a partner to the partnership of which he is a member constitutes an economic activity which is carried out `independently', so that the partner in question, whose sole economic activity is that letting, may be classified as a taxable person with respect to value added tax (`VAT') as defined by the Sixth Directive.

II - Legal framework

2 The scope of the common system of VAT introduced by the Sixth Directive is defined by Article 2 of the directive as follows:

`The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

3 Article 4 of the Sixth Directive, in Title IV headed `Taxable Persons', provides as follows:

`1. "Taxable 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. (2)

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

3. ...

4. The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.

5. ...'

4 Article 13B(b) of the Sixth Directive provides that the leasing or letting of immovable property is in principle exempt from VAT. However, under Article 13C(a) Member States may allow taxpayers a right of option for taxation in such cases.

As the Commission (3) and the Netherlands Government (4) point out, Netherlands law, in accordance with the abovementioned provisions of the Sixth Directive, provides for the possibility of opting for taxation where immovable property is let, as is the case in the main proceedings.

III - Facts

5 Mr J. Heerma, who lived in Welsrijp, had a farming business. As from 1 January 1994 he and his wife formed the partnership J. Heerma/K. Heerma-Graanstra (`the partnership'), established in Welsrijp, into which he brought the movable assets of his farming business together with the financial value of the other assets of that business.

6 Around June 1994 Mr Heerma began the construction of a cattle shed. On 18 November 1994 Mr Heerma and the partnership entered into a lease of the cattle shed for a term of six years, commencing on 1 November 1994, at an annual rent of NLG 12 000. As the Netherlands Government states, that lease was approved on 23 December 1994 by the competent Chamber of Agriculture (Grondkamer voor Friesland).

7 According to the referring court, on 15 August 1994 Mr Heerma and the partnership lodged a joint request with the tax inspector, in connection with the abovementioned lease, to be excluded, under Article 11(1)(b)(5) of the 1968 Law on Turnover Tax (1994 version), from the exemption from turnover tax.

That request was refused by the tax inspector on 14 October 1994. The administrative objection entered against that decision was likewise rejected by the inspector.

Mr Heerma brought an appeal against the latter decision before the Gerechtshof te Leeuwarden (Regional Court of Appeal, Leeuwarden), Netherlands which set aside both that decision and the original decision refusing the request and held that the lease of the cattle shed granted by Mr Heerma from 1 November 1994 was not exempt from turnover tax.

8 In particular, the Gerechtshof found in its judgment of 4 October 1996 that, having regard to the circumstances, the case of Mr Heerma and the cattle shed was one where an entrepreneur was exploiting certain of his assets in order to obtain income from them on a continuing basis, as

provided for in Article 7 of the 1968 Law on Turnover Tax. It was to be noted that the lease was not affected by the fact that the lessor was a partner in the partnership which constituted the lessee; there was nothing in Mr Heerma's connection with the partnership to prevent him from participating in economic life by means of the letting at issue.

9 An appeal on a point of law against the decision of the Gerechtshof was brought by the Staatssecretaris van Financiën (State Secretary for Finance). He submitted that the letting of the immovable asset in fact represented the renting of a person's own business assets, that Mr Heerma restricted his activities to the letting of the immovable asset to the partnership, making it a case of transacting within a closed circuit, and that all those factors together meant that there was no participation in economic life and thus no business relationship.

10 The Hoge Raad der Nederlanden found, first, that the partnership, a combination of natural persons, which lacked legal personality but possessed de facto collective autonomy, carried on economic activities independently and on that ground was to be deemed a taxable person within the meaning of Article 4 of the Sixth Directive.

11 The Hoge Raad then stated that, having regard to the judgment of the Court of Justice in Enkler, (5) the letting of an immovable asset as described above was to be regarded as an economic activity within the meaning of Article 4(2) of the Sixth Directive, since the Gerechtshof had held - and this was not being challenged on appeal - that the purpose of the letting was to obtain income on a continuing basis.

12 However, the Hoge Raad noted that the plea on appeal raised the question whether Article 4(1) must be interpreted as meaning that, in a case such as that at issue here, having regard to the connection between lessor and lessee, the letting of immovable property is to be regarded as an independent economic activity, or that there is no such independence. In the latter case, that could mean that the partner who is the lessor must be identified with the partnership so that there would be only one taxable person within the meaning of that provision of the Sixth Directive.

IV - The question referred for a preliminary ruling

13 On the basis of the foregoing considerations in its judgment, the Hoge Raad referred the following question to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EC Treaty:

`Is Article 4(1) of the Sixth Directive to be interpreted as meaning that, where a person's sole economic activity consists in the letting of tangible property to the partnership of which he is a member, that letting, whilst being an economic activity, cannot be regarded as an independent activity, for the reason that the partner and the partnership must together be deemed to constitute a single taxable person within the meaning of Article 4(1)?'

V - Reply to the question referred for a preliminary ruling

14 By its question the referring court is asking the Court of Justice to decide whether, in the case where a partner in a partnership lets a tangible asset to the partnership, the letting constitutes an economic activity which is carried out `independently' within the meaning of Article 4 of the Sixth Directive, allowing both the partnership and the partner who is the lessor to be regarded as taxable persons, or whether, in the abovementioned case, the partner and the partnership are equated with each other, with the result that the activity is not carried out independently and, consequently, that there must be considered to be essentially only one taxable person.

15 It should first be noted that, as the referring court and the Commission point out, under Netherlands law a partnership, such as that at issue in the main proceedings, which, although without legal personality, possesses, as an association of natural persons, de facto collective

autonomy, can independently carry out economic activities and, therefore, can be deemed a taxable person within the meaning of Article 4 of the Sixth Directive.

As the Commission rightly observes, this position under Netherlands law does not conflict with the letter and spirit of the Sixth Directive. First, under Article 4(1) of the Sixth Directive a taxable person is `any person' who independently carries out the economic activities specified in that article. Second, in accordance with the aim of the Sixth Directive of ensuring greater fiscal neutrality by means of a broad definition of the term `taxable person', the Court of Justice has repeatedly maintained in its case-law that Article 4 of the directive has a very wide scope. (6) In general, the particular legal form in which a given person exists does not by itself affect whether that person may be deemed a `taxable person'. In particular, therefore, the possession of legal personality is not a sine qua non for the classification of an association of persons as a `taxable person'. Where, under national law, an association of persons lacking legal personality can, in practice, carry out economic activities which are subject to VAT in accordance with the provisions of Article 4 of the Sixth Directive, it may, from the point of view of the VAT system, be deemed a `taxable person' in exactly the same way as any person possessing legal personality.

16 It should also be noted that, rightly, neither the referring court nor any of the parties involved has disputed the `economic nature' of the letting of the immovable asset by Mr Heerma to the partnership of which he is a member.

The Court, which adopts a very wide interpretation of `economic activity' and `exploitation of tangible or intangible property' (7) in Article 4 of the Sixth Directive, (8) provided that they are carried out `for the purpose of obtaining income therefrom on a continuing basis', (9) has held that `the hiring out of tangible property constitutes exploitation of such property which must be classified as an "economic activity" within the meaning of Article 4(2) of the Sixth Directive if it is done for the purpose of obtaining income therefrom on a continuing basis'. (10) In order for it to be determined whether, in a given instance, the hiring out of tangible property is carried on with a view to obtaining income on a continuing basis, the Court has held that `it is for the national court to evaluate all the circumstances of the particular case' (11) and, in particular, to examine the nature of the property and the circumstances in which it is used. (12)

In the present case, since, as the referring court states, the national court which had jurisdiction to evaluate the issues of fact (namely the Gerechtshof te Leeuwarden, whose findings of fact, as mentioned in the order for reference, are not subject to review in the appeal on a point of law before the referring court) held that the letting at issue in the main proceedings took place with a view to obtaining income on a continuing basis, it must be accepted that that letting of a cattle shed, which was agreed for a term of six years at an annual rent of NLG 12 000, is rightly regarded by the referring court and all the parties involved as an economic activity within the meaning of Article 4(2) of the Sixth Directive.

17 It follows from the foregoing considerations that, in the present case, the decisive question is in fact whether the economic activity concerned is carried out `independently' in accordance with the meaning of that word in Article 4 of the Sixth Directive.

18 In Article 4(1) of the Sixth Directive, the word `independently' is used without further definition. However, the following points must be accepted: first, judging by the wording of the paragraph as a whole, `independence' does not describe at a general level the legal regime or the occupation of the person carrying out an economic activity, but the particular circumstances in which that activity is carried out; second, in so far as the `independent' exercise of the economic activity is a precondition for the classification of a person as a `taxable person', the purpose or results of that activity are irrelevant to the import of the term `independently', as they are to that of the more general concept of a `taxable person'; (13) third, in accordance with the aim of the Sixth Directive of ensuring greater fiscal neutrality, the concept of the `independent' exercise of an economic activity can be given a broad interpretation, like the more general concept of a `taxable person'.

(14)

19 The requirement for a broad interpretation also follows from Article 4(4) of the Sixth Directive, which seeks to define negatively the meaning of the word `independently' as used in Article 4(1). Specifically, Article 4(4) provides for a case where legal independence is precluded (in the first subparagraph) and then for a case where two persons who, while legally independent, are closely bound to one another by financial, economic and organisational links may by way of exception be treated as a single taxable person (in the second subparagraph).

20 In view of the above, before analysing the economic activity at issue in the main proceedings on the basis of general observations regarding Article 4(1) of the Sixth Directive, it should be examined whether that activity might fall within the scope of the two subparagraphs of Article 4(4).

21 In the first subparagraph of Article 4(4) of the Sixth Directive, the word `independently' is defined negatively as excluding `employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability'. (15)

It is clear that a partner in a partnership who lets an immovable asset to the partnership is not an employee, nor is that letting a legal tie `creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability'. The only question which could be considered in this connection is, therefore, whether in the case in point the lease between a partner in a partnership and that partnership constitutes a legal relationship which in any event creates ties of dependence of a strength similar to those created by an employment relationship between a person and his employer. (16)

Irrespective of whether or not any such application by analogy of the provision concerned to the case of a tenancy agreement is legitimate, (17) it is also clear that, as the Commission and the German Government rightly observe, a lease such as that at issue in the main proceedings does not contain ties of dependence between the contracting parties similar to those inherent in gainful employment or any other legal relationship relating to work which creates ties of dependence as regards working conditions, remuneration and the employer's liability.

The lease of an immovable asset which is at issue in the main proceedings seems to create a legal relationship under which Mr Heerma carries out the economic activity of letting on his own account and own responsibility, does not receive recommendations and orders from the partnership which is the lessee and bears the economic risk and liability entailed in the letting. Nor do the documents in the case indicate that the partnership relationship connecting the lessor with the lessee creates, in the circumstances in which the economic activity under consideration is carried out, that is to say, within the contractual letting relationship, (18) ties of legal dependence within the meaning of the first subparagraph of Article 4(4) of the Sixth Directive.

It thus follows that there can be no question of the particular circumstances of the main proceedings falling within the first subparagraph of Article 4(4) of the Sixth Directive.

22 The second subparagraph of Article 4(4) of the Sixth Directive provides: `Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links'. (19) The Netherlands has already complied with the preconditions of that article and is entitled to avail itself in general of the possibility provided for by it. (20)

According to the Commission, there is no question of that possibility applying here for two reasons: first, the partnership has no legal personality and, hence, no legal independence; and second, the

Netherlands administration has not pleaded that there is a single taxable person pursuant to the abovementioned provision.

As regards the first part of the Commission's comments, lack of legal personality should not, in my view, be relied on as a basis for there being no legal independence in the present case. The fact that, under Netherlands law, the partnership concerned constitutes an entity possessing the capacity to conclude a valid lease (21) endows it with the legal independence needed in order to raise on a formally sound basis the question of possible financial, economic and organisational dependence.

The second part of the Commission's comments is, on the other hand, more pertinent. The fact that the Netherlands administration has not invoked the second subparagraph of Article 4(4) of the Sixth Directive indeed seems to mean that that provision is inapplicable for two reasons: first, because procedurally it is for the Netherlands administration to plead and prove that the preconditions for application of the exception introduced by that provision are met; and second, because, under Netherlands law, the treatment of two persons as a single taxable person for the purposes of VAT liability on the ground that they form a single tax unit must be based on a prior formal act of the tax inspector and cannot be the result of an a posteriori interpretation of the particular circumstances in which the persons concerned carry out an economic activity. (22)

It follows that there can equally be no question of the particular circumstances of the main proceedings falling within the special exception provided for by the second subparagraph of Article 4(4) of the Sixth Directive. It therefore remains to examine the facts of the main proceedings in the light of the general interpretation of the word `independently' within the meaning of Article 4(1).

23 In connection with that interpretation, the Commission, relying on the spirit and purpose of the exception introduced by the second subparagraph of Article 4(4) of the Sixth Directive, (23) observes, inter alia, that Mr Heerma and the partnership should not be classified as a single taxable person because there is no probability of infringement or abuse of the provisions of the Sixth Directive with a view to tax evasion or avoidance. (24)

24 It should be pointed out at the outset with regard to that observation that the Court does not have at its disposal the evidence needed even to make the negative determination that there is no such probability, nor does the provision by the Court of a useful answer to the question referred for a preliminary ruling depend on examining the probability of such infringement or abuse.

The order for reference does not indicate that the main proceedings involve administrative simplification or possible abuse of the provisions of the Sixth Directive by Mr Heerma and the partnership; certainly, a relationship between family members or between associated persons does not, in itself, constitute sufficient evidence to prove tax evasion or avoidance. (25) Furthermore, the referring court has neither asked the Court of Justice to examine any such issue nor, as the German Government also observes, provided it with all the facts and information regarding national law needed for such an examination. (26)

It should be recalled that, according to the case-law of the Court, `it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court'. (27)

It is therefore for the national court, which has a better knowledge of the facts of the case and the details of the Netherlands legislation, to examine in the first place, if necessary referring a question on the matter to the Court of Justice for a preliminary ruling, whether any issue is raised of abuse, tax avoidance or tax evasion, affecting the decision regarding whether the economic activity at issue is carried out independently. (28)

25 I am, however, of the opinion, with regard to the foregoing observation of the Commission, that in the context of the general interpretation of the word `independently' within the meaning of Article 4(1) of the Sixth Directive it would not, in any event, be right to raise the question of the exception provided for in the second subparagraph of Article 4(4) in circumstances not involving the particular formal and substantive preconditions specified in that subparagraph. First, the fact that the subparagraph concerned, with a view to simplifying administration or avoiding any abuses, leaves it to the discretion of the Member States to decide whether two persons who, while legally independent, are nevertheless closely bound to one another by financial, economic and organisational links should be treated as a single taxable person means that under the Sixth Directive the existence of such links between two persons does not necessarily and automatically prevent the economic activity which is carried out between them from being independent in nature. Second, any introduction of the question of the second subparagraph of Article 4(4) of the Sixth Directive into the context of the general interpretation of the word `independently' would essentially result in a wide interpretation of that provision. Such an interpretation is not, however, consistent with the fact that the provision in question constitutes a negative definition of `independently' in Article 4(1) of the Sixth Directive, a word which can be given a broad interpretation. (29)

26 In the context of the general interpretation of the abovementioned word it is therefore my view that in the main proceedings, on the basis of the meaning of the relevant provisions of the Sixth Directive, it cannot be denied that the economic activity of letting the cattle shed is carried out `independently' merely on the ground that the lease is granted by a partner in a partnership to that partnership.

27 I am led to this conclusion by the fact that the lease was concluded between two persons who are not equated with each other in legal terms. In so far as the two contracting parties are separate legal entities possessing, under Netherlands law, the capacity to conclude a valid lease of an immovable asset, the legal transaction concluded between them was carried out in a legally independent manner and in principle reciprocal rights and obligations were created such as those which would be created between third parties who enter into a contract and are not simultaneously linked by a relationship as members of a partnership. Furthermore, the fact that Mr Heerma concludes an agreement with a partnership of which he is himself a member but within which, as the Netherlands Government itself also points out, he does not bear sole liability for its contractual obligations, does not justify the view that, in letting the cattle shed to the partnership, he is in fact renting his own assets.

28 Correspondingly, as the Commission mentions, any natural person has the right to set up partnerships or legal persons and there is nothing to prevent those natural persons, partnerships or legal persons from supplying goods or services to the associated persons and simultaneously being classified as taxable persons with respect to VAT. This observation also follows indirectly from the grounds of the judgment in Skripalle, (30) where the Court, by acknowledging that a relationship between family members or between associated persons is not, in itself, sufficient to prove tax evasion or avoidance, seems to accept a fortiori that such a relationship can in principle be subject to VAT.

29 Furthermore, in acting as the lessor of an immovable asset of his own, Mr Heerma is carrying out an activity which clearly has no connection with the management or representation of the partnership of which he is a member, inasmuch as he is acting as lessor in his own name and not as an organ of the partnership. (31) Therefore, although it is for the national court, which has a

better knowledge of the national law and the facts of the case, to determine the precise cases in which the acts of a partner are deemed, having regard to the overall structure, to be acts of the partnership and hence are imputed to it, the partnership tie which exists in the present case does not seem to affect the lease which was entered into in such a way that the letting of the immovable asset cannot be regarded as legally independent of the lessor's capacity as a partner of the lessee.

30 Conversely, the activity of letting the immovable asset in question to the partnership cannot, as a matter of principle, be equated to a contribution made by Mr Heerma to the partnership in the context of the partnership relationship. In letting the cattle shed at an agreed annual rent of NLG 12 000 Mr Heerma is exploiting that immovable asset with a view to obtaining income from it on a continuing basis. Consequently, as any third party might do, he is effecting a supply to the partnership for consideration within the meaning of Article 2 of the Sixth Directive, not a supply which is counterbalanced by participation in the profits and losses of that partnership.

31 Accordingly, the combined presence of a lease and capacity as a partner, as in the main proceedings, does not seem, as a matter of principle, to make it necessary to conclude that the letting in question, whilst being an economic activity, is not an independent activity and that the partner who is the lessor and the partnership which is the lessee must therefore together be deemed to constitute a single taxable person within the meaning of Article 4(1) of the Sixth Directive.

VI - Conclusion

32 In view of the foregoing considerations, I would propose that the Court reply to the question referred to it for a preliminary ruling by the Hoge Raad der Nederlanden as follows:

On a proper construction of Article 4(1) of 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, the fact that a person's sole economic activity consists in the letting of tangible property to the partnership of which he is a member does not, in itself, mean that that letting, whilst being an economic activity, is regarded as not being an independent activity and that the partner and the partnership must, in consequence, together be deemed to constitute a single taxable person within the meaning of Article 4(1).

(1) - OJ 1977 L 145, p. 1.

(2) - This footnote concerns only the Greek version of the Opinion.

(3) - See paragraph 1 of its written observations.

(4) - In paragraph 5 of its written observations the Netherlands Government refers to the provisions of Article 11(1)(b) of the 1968 Wet op de Omzetbelasting (Law on Turnover Tax), which is also mentioned in the order for reference.

(5) - Case C-230/94 Enkler v Finanzamt Homburg [1996] ECR I-4517.

(6) - See, for example, the judgment in Case C-186/89 Van Tiem v Staatssecretaris van Financiën [1990] ECR I-4363, paragraph 17.

(7) - See paragraph 17 of the judgment in Van Tiem, cited in footnote 6, where the Court held that `Article 4 of the Sixth Directive confers a very wide scope on value added tax, comprising all stages of production, distribution and the provision of services.'

(8) - On the connection between these expressions, and in particular the fact that the `exploitation of tangible or intangible property' as referred to in the second sentence of Article 4(2) of the Sixth

Directive is not an exception but a particular embodiment of an `economic activity' as referred to in the first sentence of that paragraph, see paragraph 22 of the judgment in Enkler, cited in footnote 5, and points 12, 13 and 14 of my Opinion in that case.

(9) - As stated in paragraph 18 of the judgment in Van Tiem, cited in footnote 6, `in accordance with the requirements of the principle that the common system of value added tax should be neutral, the term "exploitation" refers to all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis'. As regards the necessity of examining whether the activity in question is carried out with a certain degree of permanence and continuity, see point 15 of my Opinion in Enkler, cited in footnote 5.

Thus, according to the case-law of the Court, activities which do not constitute economic activities conferring on the person who carries them out the status of a taxable person include `the mere acquisition of ownership in and the holding of bonds, activities which are not subservient to any other business activity, and the receipt of income therefrom ...' (see the judgment in Case C-80/95 Harnas & Helm v Staatssecretaris van Financiën [1997] ECR I-745, paragraph 20), and also the mere acquisition and holding of shares in a company: `The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property' (see the judgment in Case C-60/90 Polysar Investments Netherlands [1991] ECR I-3111, paragraph 13). The Court has also held that, since the receipt of dividends does not constitute consideration for any economic activity within the meaning of the Sixth Directive, it does not fall within the scope of VAT (see the judgment in Case C-333/91 Sofitam [1993] ECR I-3513, paragraph 13).

(10) - See paragraphs 21 and 22 of Enkler, cited in footnote 5. The Court has also held: `The grant by an owner of immovable property to a third party of a building right over that property must be deemed to be an exploitation of the property if that right is granted in return for a consideration for a specified period. That condition must be deemed to be satisfied when, as is the case in the main proceedings, the building rights are granted for a period of 18 years in return for an annual consideration' (see Van Tiem, cited in footnote 6, paragraph 19).

(11) - See Enkler, cited in footnote 5, paragraph 30.

(12) - See Enkler, cited in footnote 5, paragraphs 23 to 29.

(13) - See also, in this connection, Enkler, cited in footnote 5, paragraph 25: `... as Article 4(1) of the Sixth Directive makes clear, the purpose or results of the activity are irrelevant as such for the purposes of determining the scope of the Sixth Directive'.

(14) - See point 15 above.

(15) - The Second Council Directive (67/228/EEC) 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, p. 16; `the second Directive') provided, in Annex A, under point 2 headed `Regarding Article 4' (first sentence of the fourth paragraph): `The expression "independently" is intended in particular to exclude from taxation wage-earners who are bound to their employer by a contract of service'.

It should be noted that in the Sixth Directive the phrase `in particular' no longer appears, but in my view that does not mean that the specific negative definition of the word `independently' has ceased being indicative.

(16) - In relation to the definition of those ties, see the judgment in Case C-202/90 Ayuntamiento de Sevilla [1991] ECR I-4247, which concerned activities such as those of tax collectors entrusted

with the collection of local taxes in Spain. In that judgment the Court held as follows: (i) with regard to working conditions, there is no relationship of employer and employee where the person who carries out the economic activity procures and organises independently, within the limits laid down by law, the staff and the equipment and materials necessary for him to carry out his activities (paragraph 11); (ii) with regard to remuneration, there is no relationship of employer and employee where the person concerned bears the economic risk entailed in his activity; and (iii) the decisive criterion is the liability arising from the contractual relations entered into by the person concerned in the course of his activity and his liability for any damage to third parties. Thus, as also pointed out by Advocate General Tesauro in his Opinion in that case, `an independent worker is one who does not form part of the organisation of an undertaking, who has sufficient freedom to organise the human and material resources necessary for the activity in question to be carried out and who bears the economic risk of that activity' (point 6).

See also the judgment in Case 235/85 Commission v Netherlands [1987] ECR 1471, paragraph 14: `Notaries and bailiffs ... are not bound to the public authorities as employees since they are not integrated into the public administration. They carry out their activities on their own account and on their own responsibility; they are free, subject to certain limits imposed by statute, to arrange how they shall perform their work and they themselves receive the emoluments which make up their income. The fact that they are subject to disciplinary control under the supervision of the public authorities (a situation to be found in other regulated professions) and the fact that their remuneration is determined by statute are not sufficient grounds for regarding them as persons who are bound by legal ties to an employer within the meaning of Article 4(4)'.

(17) - At first sight, such an application by analogy might be thought to be incompatible with the fact that the case of non-independent pursuit of an economic activity provided for in the first subparagraph of Article 4(4) of the Sixth Directive must, as an essentially negative definition of the concept of a `taxable person', be interpreted strictly. In my view, however, the application by analogy can legitimately be regarded as an autonomous interpretation of the word `independently' used in Article 4(1) of the Sixth Directive, given that the abovementioned negative definition appears to be indicative. See footnote 15 above.

(18) - As I have stated, the examination as to whether a person carries out an economic activity independently which is conducted for the purpose of determining whether he can be classified as a `taxable person' within the meaning of the Sixth Directive does not concern generally the legal regime to which he is subject but relates solely to the particular circumstances in which he carries out the particular activity (see point 18 above).

(19) - The Second Directive provided in Annex A, under point 2 headed `Regarding Article 4' (second sentence of the fourth paragraph): `This expression [namely the word "independently"] also makes it possible for each Member State not to consider as separate taxable persons, but as one single taxable person, persons who, although independent from the legal point of view, are, however, organically linked to one another by economic, financial or organisational relationships. Any Member State intending to adopt such a system shall enter into the consultations mentioned in Article 16'.

(20) - See footnote 7 of the Opinion of Advocate General Van Gerven in Polysar, cited above. See also First Report from the Commission to the Council on the application of the common system of value added tax, COM (83) 426 final, 13 September 1983, pp. 10 and 11.

In relation to the same possibility under the system laid down by the Second Directive, see the judgment in Joined Cases 181/78 and 229/78 van Paassen v Staatssecretaris van Financiën [1979] ECR 2063.

(21) - See point 10 above.

(22) - See, for example, A. Boomsma et al. (eds.), in Ernst and Young, VAT in Europe, Sweet & Maxwell, London (1989), p. 146.

(23) - The Commission refers to its statement of reasons for Article 4 of its original proposal of 29 June 1973 for the Sixth VAT Directive (Bulletin of the European Communities, Supplement 11/73, p. 8). It stated there that the purpose of being able, by virtue of that provision, to treat legally independent undertakings as a single taxable person was either administrative simplification or the avoidance of certain abuses (for example, the splitting up of one undertaking among several taxable persons in order to benefit from a special regime).

(24) - See the observations of the Commission, paragraph 16.

(25) - See, in this connection, the judgment in Case C-63/96 Finanzamt Bergisch Gladbach v Skripalle [1997] ECR I-2847, paragraphs 24, 25 and 26.

(26) - For example, it is not stated specifically whether the partnership (a farming business) is covered by the common flat-rate scheme for farmers, and if so, subject to what conditions.

(27) - See, in particular, the judgments in Case C-67/91 Asociación Española de Banca Privada and Others [1992] ECR I-4785, paragraphs 25 and 26; Joined Cases C-332/92, C-333/92 and C-335/92 Eurico Italia and Others [1994] ECR I-711, paragraph 17; Case C-369/89 Piageme and Others [1991] ECR I-2971, paragraph 10; Case C-231/89 Gmurzynska-Bscher [1990] ECR I-4003, paragraph 19; Case C-343/90 Lourenço Dias v Director da Alfândega do Porto [1992] ECR I-4673, paragraph 15; Case C-62/93 BP Supergas v Greek State [1995] ECR I-1883, paragraph 10; and Joined Cases C-422/93, C-423/93 and C-424/93 Zabala Erasun and Others [1995] ECR I-1567, paragraph 14.

(28) - It is also for the national court to consider the points of national law which the Commission mentions in the introductory section of its observations: namely, in what circumstances acts of a partner are binding on the partnership of which he is a member and whether the marital property arrangements adopted by Mr Heerma and his wife affect the contractual capacity of the parties concerned as regards the immovable asset in question and hence the validity of the lease.

(29) - See point 18 above.

(30) - Cited in footnote 25.

(31) - See also, in this connection, point 6 of the Opinion of Advocate General Van Gerven in Polysar, cited in footnote 9.