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OPINION OF ADVOCATE GENERAL

LÉGER

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Case C?72/05

Hausgemeinschaft Jörg und Stefanie Wollny

v

Finanzamt Landshut

(Reference for a preliminary ruling from the Finanzgericht München (Germany))

(Sixth VAT Directive – Article (6)(2)(a) – Article 11(A)(1)(c) – Use for private purposes by a taxable person of part of a building forming, in its entirety, part of the assets of his business – Treatment of private use as a supply of services for consideration – Determination of the taxable amount – Definition of ‘full cost’ to the taxable person of providing those services)

1. The present reference for a preliminary ruling seeks to establish the taxable amount for value added tax (‘VAT’) payable by a taxable person in respect of the use for his private purposes of part of a building which, in its entirety, forms part of the assets of his business.

2. Where a taxable person acquires or constructs a building which he chooses to allocate, in its entirety, to his business, but which he also wishes to use partly for private purposes, he is entitled to deduct the whole of the input tax which he has paid on the acquisition or construction cost.

3. However, in respect of the part of the building used for his private purposes, the taxable person is in a situation similar to that of a final consumer. In that case the Sixth Directive 77/388/EEC (2) provides for a system for the recovery of the proportion of the corresponding VAT which the taxable person has deducted.

4. For this purpose, the Sixth Directive creates a legal fiction by virtue of which private use is treated as a supply of services for consideration by the taxable person to himself.

5. In the present case the Court is asked to determine what is the taxable amount for VAT for such supply of services. The Finanzgericht (Finance Court) München (Germany) asks whether the taxable amount must be determined solely by reference to the general rules of depreciation reflecting the gradual wear and tear on the building or whether it may be determined by reference to the period for ‘adjustment of deductions’ in respect of VAT.

I – **The legal context**

A – *The relevant provisions of Community law*

1. The Sixth Directive

6. VAT is a tax on consumption that is to be applied generally to goods and services. The Community system of VAT consists in applying to goods and services a tax exactly proportionate to the price of such goods and services chargeable on every transaction in the production and distribution channel, but which must be levied only on the final consumer.

7. To enable taxable persons who recover the tax not to have to bear it themselves, the Sixth Directive provides for a deduction system intended to ensure the 'neutrality' of the tax so far as they are concerned.

8. The Sixth Directive also includes several provisions intended to ensure that this system applies where a taxable person uses the same goods for both business purposes and private purposes. The most relevant provisions for the purpose of the main proceedings are the following.

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

10. Point (a) of the first paragraph of Article 6(2) of that directive treats as a supply of services for consideration 'the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the [VAT] on such goods is wholly or partly deductible'.

11. Article 11(A)(1)(c) of that directive, upon which the present dispute centres, defines the taxable amount in a situation of that kind. It states that the taxable amount shall be, 'in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services'.

12. Article 17(2) of that directive provides as follows:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the country in respect of goods or services supplied or to be supplied to him by another taxable person;

….'

13. Article 20 of the Sixth Directive relates to adjustment of the deduction. It provides that the initial deduction of VAT is to be adjusted where, first, that deduction is higher or lower than that to which the taxable person was entitled and, secondly, where, after the return is made, some change occurs in the factors used to determine the amount to be deducted.

14. Article 20 also provides as follows:

'…

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one-fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in

which the goods were acquired or manufactured.

By way of derogation from the preceding subparagraph, Member States may base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years.

3 In the case of supply during the period of adjustment capital goods shall be regarded as if they had still been applied for business use by the taxable person until expiry of the period of adjustment. Such business activities are presumed to be fully taxed in cases where the delivery of the said goods is taxed; they are presumed to be fully exempt where the delivery is exempt. The adjustment shall be made only once for the whole period of adjustment still to be covered. …'

B – *The relevant provisions of national law*

15. Paragraph 3(9a)(1) of the Law on Turnover Tax 1999 (Umsatzsteuergesetz) (3) treats as transactions for consideration the use by a taxable person of goods forming part of the assets of a business for purposes other than those of his business where the input tax on such goods is wholly or partly deductible.

16. The taxable amount for the supplies referred to in Paragraph 3(9a)(1) is defined in Paragraph 10 of the UStG. In the version in force until 30 June 2004, Paragraph 10 stated that the taxable amount for such services was 'the costs arising from making those supplies, to the extent that the input tax on such transactions was wholly or partly deductible'.

17. In the version which entered into force on 1 July 2004, Article 10 of the UStG provides as follows:

'(4) The supply shall be assessed to tax

…

2. … in accordance with the costs arising from making those supplies, to the extent that the input tax on such transactions was wholly or partly deductible. The acquisition or production cost of an asset, to the extent that the asset forms part of the business and is used to carry out the other transaction, shall be included in those costs. Where the acquisition or production cost is at least EUR 500, it shall be apportioned evenly over a period which corresponds to the adjustment period applicable to the asset under Paragraph 15a;

…'

18. Paragraph 15a of the UstG relates to the adjustment of deductions. Subparagraph (1) thereof is worded as follows:

'Should the relevant conditions for the initial deduction in respect of an asset alter within five years from the time at which the asset is first used, each calendar year during the alteration shall be compensated by an adjustment of the deduction in the amounts of tax apportionable to the acquisition or production cost. In the case of immovable property, including the essential parts thereof, rights governed by provisions of civil law relating to immovable property and buildings on a third-party's land, a period of ten years shall be substituted for the period of five years.'

II – **The facts**

19. In 2003 the Hausgemeinschaft, (4) Jörg and Stefanie Wollny, a household made up of Mr and Mrs Wollny and governed by German law 'the household' or 'the claimant'), had a building constructed the whole of which they allocated to their business. The building is occupied as to 20.33% by the rooms of a tax adviser's office which are let to one of the householders and, as to the remaining 79.67%, by the private accommodation of the two members of the household. The letting for business use is subject to VAT, the claimant having waived the exemption for leasing transactions. (5)

20. In its provisional VAT returns for December 2003 and January to March 2004, the claimant deducted the whole of the VAT which it had been charged on the construction costs of the building.

21. To determine the taxable amount for VAT payable in respect of private occupation, the claimant relied on the fact that, under the German income tax law (Einkommensteuergesetz), the depreciation period for immovable property is 50 years. The claimant therefore concluded that the taxable amount was a monthly amount equal to 1/12th of 2% of the construction costs relating to the part of the building used for private purposes.

22. The Finanzamt (tax office) Landshut, for its part, decided that the taxable amount should be determined by reference to the period for adjustment of VAT deductions, laid down by Paragraph 15 of the UstG, in accordance with Article 20 of the Sixth Directive. Consequently it corrected the claimant's calculation and fixed the monthly taxable amount for VAT on the private use of part of the building as 1/12th of 10% of the construction costs for that part.

23. The Finanzamt Landshut having dismissed the claimant's objections to the tax prepayment notices issued in accordance with the calculation described in the foregoing paragraph, the claimant appealed to the Finanzgericht (Finance Court) München.

III – **The question referred**

24. The Finanzgericht considers that the outcome of the action before it depends on determining the taxable amount in respect of the private use of a building which has been allocated in its entirety to a business. It observes that Paragraph 11(A)(1)(c) of the Sixth Directive does not define 'full cost'. It states that adding that it is uncertain of the meaning to be given to that term for the following reasons.

25. First, in *Enkler*, (6) the Court found that, according to that said provision, the taxable amount must be determined by taking into account only expenses which relate to the goods themselves, such as the 'writing-off of depreciation, or expenses incurred by the taxable person which entitle him to deduct VAT'. (7)

26. This point could support the claimant's position in so far as the private use of part of a building liable to depreciation is covered by taxing the construction costs by instalments, spread over the entire depreciation period. It could also confirm the claimant's argument that the purchase price of the land is not to be included in the taxable amount where the input tax is deductible because the land on which the building stands cannot depreciate by use.

27. This conclusion could also be corroborated by the meaning of 'cost', which implies depreciation of the asset as a result of use. However, there cannot be total depreciation of immovable property within a period of 10 years.

28. Secondly, it has also been held that the purpose of Article 6(2)(a) of the Sixth Directive is to

ensure equal treatment as between a taxable person who uses a business asset for private use and a final consumer. (8) This provision is intended to obviate the effects of deducting input tax in respect of the part of the asset used for private purposes because a final consumer would bear the corresponding charge to VAT.

29. Consequently the aim of Article 6(2)(a) of the Sixth Directive would lead rather to apportioning the total acquisition or construction costs of the asset over the period for adjustment of VAT deductions under national law, that is to say, 10 years in the present case. This would make it possible to avoid 'untaxed end use', that is to say, situations where the deduction of input tax would not be repaid in full.

30. There could in fact be untaxed end use if, for example, the building were transferred, without being subject to VAT, at the end of the 10-year adjustment period. (9) In that situation, if the taxable amount is determined by reference to the depreciation period of the building, that is to say, 50 years, after 10 years the taxable person will have repaid only 1/5th of the VAT which was deducted. A situation of that kind would be contrary to the aim of Article 6(2)(a) of the Sixth Directive.

31. The purpose of that provision would also justify the inclusion, in the taxable amount, of the purchase price of the land where the input tax is deductible because a final consumer would also pay the tax at the time of purchase.

32. However, contrary to this argument, the Finanzgericht München observes that, in *Seeling*, (10) the Court of Justice put that purpose into perspective by finding that, if the adjustment period provided for in Article 20(2) of the Sixth Directive is likely to correct only to a limited extent the deduction of input tax, that is a consequence of a deliberate choice on the part of the Community legislature. (11)

33. In the light of these considerations, the Finanzgericht München has decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'How is the term 'full cost' in Article 11(A)(1)(c) of the [Sixth Directive] to be interpreted? Does the full cost for the privately used dwelling in a building forming, in its entirety, part of the assets of a business, comprise in addition to recurring expenses, annual depreciation for the wear and tear of buildings in accordance with the applicable national rules and/or the annual proportion of the acquisition and production cost – calculated on the basis of the applicable national period for adjustment of deductions – that has given rise to a right to deduct value added tax?'

IV – **Analysis**

34. VAT constituting a tax on consumption which is collected by the taxable person but is to be charged only to the final consumer, every taxable person is entitled to deduct the input tax which he has himself borne when purchasing goods and services necessary for his business from the amount of tax which he recovers from his customers and for which he is accountable to the State. (12) Consequently a taxable person may make that deduction only in so far as such goods and services, which are themselves subject to VAT, are used for the purposes of his business.

35. Where goods or services acquired by a taxable person are used for purposes of transactions that are exempt from or do not fall within the scope of VAT, as a rule no output tax can be collected or input tax deducted. (13)

36. Where capital goods are used for both business and private purposes the taxpayer has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business,

(ii) retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes. (14)

37. If the taxable person chooses to treat capital goods used for both business and private purposes as business goods, it has consistently been held that the VAT due as input tax on the acquisition or construction of those goods is in principle wholly and immediately deductible. The Court has applied this interpretation of the Sixth Directive on several occasions. (15) The Grand Chamber of the Court recently confirmed this interpretation in *Charles and Charles-Tijmens*, cited above. (16)

38. Therefore, a taxable person who chooses to allocate the whole of a building to his business and who uses part of it for private purposes has the right to deduct the VAT paid as input tax from the total acquisition or construction cost of the building.

39. However, in so far as, with regard to the part of the building used for private purposes, the taxable person is in a situation similar to that of a final consumer, he must pay the VAT corresponding to such use. This obligation is set out in Article 6(2) of the Sixth Directive, which provides that such use is to be treated as a supply of services for consideration, supplied by the taxable person to himself.

40. As, in this situation, there is no transaction with a third party and no consideration paid by a third party which could constitute the taxable amount for VAT, Article 11(A)(1)(c) of the Sixth Directive provides that the taxable amount is ‘the full cost to the taxable person of providing the services’.

41. In the present proceedings, the Finanzgericht München asks whether ‘full cost’ must be understood as meaning that, in addition to current expenditure, it takes into account only the depreciation of the building, calculated by reference to the useful life of the building in accordance with the national depreciation rules.

42. Thus, the national court’s question asks, in essence, whether Article 11(A)(1)(c) of the Sixth Directive must be interpreted as meaning that it precludes national legislation whereby the taxable amount for VAT in respect of the private use of part of a building forming in its entirety part of the assets of a business is to be fixed annually as a proportion of the acquisition or construction cost, calculated by reference to the period for adjustment of deductions for VAT, laid down in accordance with Article 20 of the Sixth Directive.

43. The reply to this question raises three issues which the national court sets out as follows.

44. The first issue is obviously the amount of VAT paid annually by the taxable person in respect of private use. If the full cost is to take account only of the depreciation of the building, in the present case the VAT would correspond annually to 2% of the cost of constructing the part of the building used for private purposes because the depreciation period laid down by national law is 50 years. Otherwise the taxable amount would be equal to 10% of such cost because the period for adjustment of deductions for VAT is set by national law at 10 years.

45. The second issue, which follows directly from the first, is the risk of untaxed end use in the case of, for example, a tax-exempt sale of a building at the end of the period for adjustment of deductions. That risk would not arise if the taxable amount is determined by reference to the national adjustment period because, on the expiry of that period, the taxable person will have fully repaid the VAT deducted as input tax, which corresponds to the part of the building used for private purposes.

46. The third issue is whether the taxable amount should include the cost of acquiring the land on which the building stands, where the purchase was subject to VAT and the purchaser deducted the VAT. If the definition of 'full cost to the taxable person of providing the services', referred to in Article 11(A)(1)(c) of the Sixth Directive, must be understood to mean only the depreciation of the building, the acquisition cost of the land may have to be excluded from the taxable amount because the land on which the building stands does not in principle suffer depreciation.

47. In the present proceedings there are three competing arguments.

48. The claimant submits that the full cost referred to in Article 11(A)(1)(c) must be understood to cover, in addition to recurring expenses, only the annual allowance for depreciation of the buildings, determined in accordance with the relevant national rules.

49. The claimant observes that 'cost' presupposes that the taxable person suffers a diminution of his assets. According to the claimant, the taxable person does not suffer such diminution where a building is purchased or constructed because the costs of those transactions are offset by the value of the building. Consequently there is a diminution of assets and, accordingly, of cost within the meaning of Article 11(A)(1)(c) only as a result of the depreciation of the asset. However, depreciation is a function of the period of use, not of the period for adjustment of deductions provided for in Article 20 of the Sixth Directive.

50. The claimant also submits that the acquisition cost of the land on which the building stands must not be included in the taxable amount because the land does not suffer depreciation over time.

51. On the other hand, the German and the United Kingdom Governments submit that Article 11(A)(1)(c) of the Sixth Directive does not preclude legislation such as the German law at issue.

52. They claim that that provision does not define what exactly is covered by the term 'full cost'. They conclude from this that the Member States enjoy some discretion with regard to the application of that concept. They observe that the national legislation in question is in keeping with the objective pursued by that provision, which is to ensure equal treatment between a taxable person who uses a business asset for private purposes and a final consumer who acquires an asset of the same kind.

53. In view of that aim, 'full cost' must be understood as covering the cost of purchasing or constructing the building as well as the purchase cost of the land, where appropriate, if it has given rise to entitlement to deduct VAT. It would also be in conformity with that aim to apportion the cost of constructing the part of the building used for private purposes over the period for adjustment of deductions for VAT because that would avoid any risk of untaxed end use.

54. The Commission of the European Communities for its part takes an intermediate position. Unlike the German and United Kingdom Governments, it submits that apportionment of the acquisition or construction costs of the building cannot be effected according to national rules on the adjustment of deductions for VAT. First, according to the Commission, there is no compelling

reason for applying Article 20(2) of the Sixth Directive in the context of Article 6(2(a). Secondly, the implications of the argument concerning the risk of untaxed end use were put into perspective by the Court in *Seeling* cited above.

55. However, contrary to the claimant's argument, the Commission observes that the apportionment of acquisition and construction costs must not be determined by reference to national rules for depreciation in relation to income tax either because they differ significantly within the European Union. In addition, such rules have particular aims that are not related to the common system of VAT. According to the Commission, apportionment must be effected on the basis of objective accounting criteria, generally recognised and specific to VAT. The Commission also submits that the taxable amount should, where appropriate, include the acquisition cost of the land.

56. For my part I consider, like the German and United Kingdom Governments, that Article 11(A)(1)(c) of the Sixth Directive does not preclude the apportionment of the acquisition or construction costs of the part of a building used by a taxable person for private purposes over the period for the adjustment of deductions for VAT fixed pursuant to Article 20 of the Sixth Directive.

57. Before setting out the grounds on which this position is based, I think it is helpful to describe briefly the connection between the periods specified in Articles 20(2) and 6(2)(a) of the Directive.

58. As the claimant and the Commission observe, there is no reason in the Sixth Directive which would require the adjustment period provided for in Article 20(2) to be applied in the context of Article 6(2)(a).

59. Where a taxable person uses the same asset for business and for private purposes, Article 20 relates to the situation in which he has chosen to allocate the asset to his business only in the proportion in which he uses it for business purposes. If that is the case, he has been able to deduct the input tax on the acquisition or construction cost of the asset only in proportion to the part of it which he uses for business purposes.

60. The aim of Article 20 is to enable correction of that deduction in the light of subsequent changes in the use of the asset by the taxable person by reference to his original tax return or possibly because the deduction was based on an incorrect return.

61. Article 20(2) of the Sixth Directive provides that such adjustment can be made only during a specified period, which is, as a rule, five years. It states, however, that this period may be extended in the case of immovable property. In the original version of the Sixth Directive, the period could be extended to 10 years. With the entry into force of Directive 95/7, it can be extended to 20 years.

62. Where, as in the present case, the taxable person chooses to allocate the entire building to his business and is thus entitled to deduct the whole of the input tax on the acquisition or construction cost of the building, it is Article 6(2) of the Sixth Directive that must be applied. As we have seen, the private use of part of the building is treated as a supply of services for consideration. It is on the basis of that provision that the taxable person repays the VAT on the acquisition or construction cost of the part of the building used for private purposes.

63. If that part of the building increases or diminishes in the course of time, the adjustment system in Article 20 of the Sixth Directive does not have to be applied. The change will be passed on, for the relevant tax period, in proportion to the acquisition or construction costs taken into account in determining the taxable amount referred to in Article 11(A)(1)(c) of the Sixth Directive.

64. However, where a building forming in its entirety part of the assets of a business is sold, the periods laid down in Article 20(2) of the Sixth Directive will become relevant. Under Article 20(3) of that directive, if the sale takes place during the period of adjustment of deductions for VAT referred to in Article 20(2), the building is deemed to have been allocated to business use by the taxable person until the expiry of that period and the deduction of the VAT on the acquisition or construction cost of the building may then be adjusted subsequently.

65. Conversely, it also follows from those provisions that, if the building is sold after the expiry of that period, subsequent adjustment is no longer possible. In that case, there will be a risk of untaxed end use.

66. It is, in particular, in order to guard against such a risk that the German and United Kingdom Governments submit that the taxable amount for VAT for the use for private purposes of a building entirely allocated to a business must admit of calculation by reference to the period for adjustment of deductions which is specified in national law in accordance with Article 20(2) of the Sixth Directive.

67. It seems to me that these Governments' argument can be accepted for the following reasons. First, Article 11(A)(1)(c) of the Sixth Directive allows the Member States some discretion in implementing it. Secondly, determining the taxable amount at issue by reference to the period for adjustment of deductions is in conformity with the aim of Article 6(2) of the Directive. Third, determining it in that way is also compatible with the Directive's aim of harmonising the basis of assessment.

68. On the first point, let us bear in mind that Article 11(A)(1)(c) of the Sixth Directive provides that, in respect of supplies referred to in Article 6 (2), the taxable amount is 'the full cost to the taxable person of providing the services'. As the national court points out, this term is not defined in the Sixth Directive.

69. The following information may nevertheless be inferred from the wording of Article 6(2). The word 'cost' is defined as 'the use of money, particularly for purposes other than investment'. (17) The literal meaning of 'the full cost to the taxable person of providing the services' is therefore relatively wide and imprecise. (18) I think it can be understood as meaning all the costs which were and are necessary in order for the services to be provided. It can therefore be read as referring to all the costs of acquiring goods or of effecting their supply, in addition to recurring expenses.

70. Secondly, the fact that the use by the taxable person of a business asset for private purposes is treated as a supply of services for consideration, that is to say, a transaction which takes place over a period of time, leads to the logical conclusion that the recovery of the VAT on those costs must be effected in instalments.

71. It may also be inferred from such treatment and from the aim pursued by the legislature through Article 6(2) that the recovery of VAT by instalments should take place throughout the useful life of the asset. It has consistently been held that the purpose of that provision is to ensure equal treatment as between taxable persons and final consumers. (19) It is necessary to prevent a taxable person, who has been able to deduct VAT on the purchase of goods used for his business, from escaping payment of VAT when he sets those goods aside from his business assets for private purposes and from thereby enjoying undue advantages over an ordinary consumer who buys the goods and pays VAT on them. (20)

72. The recovery of VAT by instalments over the entire useful life of the asset has the

advantage of making it possible to adjust the taxable amount according to any changes in the portion of the asset used by the taxable person for private purposes. Consequently the taxable amount referred to in Article 11(A)(1)(c) of the Sixth Directive was interpreted by the Court in *Enkler* as including expenses which relate to the goods themselves, (21) 'such as the writing-off of depreciation', as the order for reference points out.

73. The question that arises in the present case is whether that interpretation of Article 11(A)(1)(c) is the only one which is compatible with Community law. In other words, it is necessary to establish whether, in implementing that provision, the Member States enjoy some discretion whereby they may spread the recovery of the VAT relating to the use of goods for private purposes over a shorter period, based on that for the adjustment of VAT deductions.

74. In my opinion, the Member States have such discretion.

75. It is common ground that, unlike other provisions of the Sixth Directive, (22) Article 11(A)(1)(c) does not refer to national law for determining its meaning and scope. The concept of 'the full cost to the taxable person of providing the services' is an independent concept of Community law which cannot be left to the discretion of each Member State. (23)

76. However, the Sixth Directive does not contain all the information needed to make it possible decide whether the concept has a uniform meaning throughout the Union. Neither the wording of the phrase nor the system of which it forms part makes it possible, in my opinion, to establish with certainty that the costs of acquiring or building the asset in question must necessarily be apportioned over its entire useful life. In any case, the Sixth Directive does not lay down the basis upon which the allowance for depreciation of the asset must be calculated.

77. It is, therefore, necessary to ascertain whether determining the taxable amount for the VAT in question by reference to the period for the adjustment of deductions is consistent with the aims of Article 6(2) of the Sixth Directive and of the Directive itself.

78. On the first point, as we have seen, Article 6(2) aims to ensure equal treatment between a taxable person who takes away an asset from his business after deducting the whole of the VAT paid on the acquisition or construction costs, and a final consumer who would have to pay the tax on the acquisition or construction of an identical asset.

79. Determining the taxable amount for VAT on private use by reference to the period for the adjustment of deductions in order to prevent untaxed end use if the goods are sold on the expiry of that period certainly accords with that aim.

80. I do not think that *Seeling* casts any doubt on this conclusion.

81. It is true that, in the case which led to that judgment, the Court was confronted with the German Government's argument concerning the risk of untaxed end use in the event of a VAT-exempt sale of the building after the expiry of the period for adjustment of deductions. It is also established that the Court observed that the fact that the adjustment period is likely to correct only to a limited extent the deduction of input tax was a consequence of a deliberate choice on the part of the Community legislature and that the adjustment period for capital goods in the form of immovable property had been extended to 20 years in order to take account of the economic life of such goods. (24)

82. However, in my opinion, the implications of this reply should be assessed in relation to the context in which it was given.

83. At the material time in *Seeling*, German law provided that the taxable amount for VAT purposes for the private use of a building which, in its entirety, formed part of the assets of a business had to be calculated by reference to the depreciation of the building. The German Government wished to question the case?law which states that a taxable person who chooses to allocate an entire building to his business and who subsequently uses part of the building for private purposes is entitled to deduct the input tax on all the acquisition or construction costs of the building.

84. It based this argument on Article 13(B)(b) of the Sixth Directive, which provides that the leasing or letting of immovable property is, in principle, exempt from VAT, so that the deduction of input tax is not possible. The Government reasoned that, since Article 6(2)(a) of the Directive treats the use of a business asset for private purposes as a supply of services, and since that use most closely resembles, from the point of view of end use, a letting, the exemption provided for in Article 13(B)(b) of the directive applies by analogy.

85. In support of this conclusion, the German Government asserted that non-deduction of input tax had the advantage of avoiding untaxed use if the building were sold free of VAT on the expiry of the 10-year adjustment period.

86. In *Seeling*, the Court dismissed the German Government's argument that Article 13(B)(b) applied. The Court held that the private use by the taxable person of a dwelling in a building which he has treated as forming, in its entirety, part of the assets of his business does not fall within Article 13B(b) because it does not constitute a genuine letting within the meaning of that provision. (25)

87. That is the context in which the Court observed that, if authorising a taxable person to treat a building as forming, in its entirety, part of the assets of his business, and thus to deduct the input VAT on all the construction costs, may have the result that there will be untaxed end use, because the adjustment period provided for in Article 20(2) of the Sixth Directive is likely to correct to a limited extent only the deduction of input tax made when the building was constructed, that is a consequence of a deliberate choice on the part of the Community legislature and cannot have the effect of requiring Article 13(B)(b) of the directive to be given a broad interpretation.

88. Like the German and United Kingdom Governments, I do not think that, in the *Seeling* judgment, the Court intended to call into question the implications of the purpose of Article 6(2) of the Sixth Directive.

89. I understand that judgment as a reaffirmation of the settled case?law to the effect that a taxable person who chooses to treat an entire building as forming part of the assets of his business and who subsequently uses part of that building for private purposes is, on the one hand, entitled to deduct the input VAT paid on all the construction costs for that building and, on the other, is subject to the corresponding obligation to pay VAT on the full cost incurred to effect such use.

90. Even though, in that judgment, the Court finds limits to the capacity of the system to ensure complete equality as between taxable persons and final consumers, I do not think it calls into question the principle that it is incumbent on the national legislature to avoid untaxed end use so far as possible.

91. In the light of those considerations, it seems to me incontrovertible that the German Government's intention of avoiding untaxed end use in the event of a VAT-exempt sale of the goods after the expiry of the period for adjustment of deductions does indeed conform with the

purpose of Article 6(2) of the Sixth Directive.

92. In response to this conclusion it might be objected that, by shortening the period for repayment of VAT to the duration of the adjustment period, the German Government is also creating a risk of untaxed end use. The Government in fact stated that, if the taxable person continues to make private use of the building at the end of the 10-year period, the acquisition or construction costs will no longer be included in the taxable amount. Therefore private use will be taxed thereafter only on the basis of the recurring expenses generated by the building.

93. Excluding the acquisition or construction costs from the taxable amount appears to be justified as the input tax deducted will have been repaid in full. However, the repayment will have been calculated according to the part of the building used for private purposes during the 10-year period. If, at the end of that period, the taxable person is using a larger part of the building for private purposes, there are grounds for assuming that the use of the additional portion for private purposes will not be taxed. At this stage, the question remains open.

94. However, this potential shortcoming in the system does not seem to me to cast doubt on the compatibility of the German legislation in issue with the purpose of Article 6(2) of the Sixth Directive.

95. In my opinion, determining the taxable amount by reference to the adjustment period has another advantage in favour of greater equality of treatment as between taxable persons and final consumers. That advantage consists in the increased amount of VAT paid annually by the taxable person for private use. The increase contributes to reducing the inequality in the respective situations, caused by the cash benefit to the taxable person of spreading the debt, by comparison with the final consumer, who must pay the whole of the VAT on acquiring or constructing the building.

96. Finally, in my view, determining the taxable amount by reference to the adjustment period remains within acceptable limits with regard to the purpose of the Sixth Directive.

97. As its title indicates, the directive is aimed at determining the basis of VAT in a uniform manner according to Community rules. (26) However, the implications of this aim are expressed in a measured fashion in the ninth recital in the preamble to the Sixth Directive in the original version, which states that the directive seeks to obtain ‘comparable’ results in all the Member States. In view of the discretion granted to the Member States by Article 20 of the directive, I take the view the national legislation at issue fulfils this condition.

98. The reference to Article 20 seems to me relevant in connection with this assessment for the following reasons. Like Article 20, Articles 6(2) and 11(A)(1)(c) of the Sixth Directive are intended to apply to situations where goods for which the VAT paid on the acquisition or construction cost was deductible are subsequently made over to a use for which the VAT is not deductible. These are supplementary provisions of the directive which deal with situations where goods have been put to mixed use, that is to say, have been used simultaneously for business and for private purposes.

99. In addition, the mechanisms provided for by these different provisions have the same economic effect. (27) In both cases it is a matter of repaying the VAT which the taxable person has deducted and which must ultimately remain payable by him.

100. It must be observed that Article 20 of the Sixth Directive gives the Member States relatively broad discretion to determine the duration of the adjustment period for deductions with regard to immovable property because they may provide for a period varying from five to twenty years.

101. In view of the connections existing between the mechanism under Article 20 of the Sixth Directive and that under Article 6(2) of that directive, the fact that the taxable amount for the private use of a building which is entirely given over to a business is determined by reference to the duration of the adjustment period for deductions does not seem to me to be contrary to the Sixth Directive's aim of harmonising the basis of assessment.

102. Admittedly, the approach favoured by the Commission, which consists in requesting the Member States to lay down rules for depreciation over the entire useful life of immovable property on the basis of generally recognised objective criteria, would perhaps result in a more uniform basis of assessment.

103. However, even though this approach may appear desirable, I do not think it sufficient reason, as the Sixth Directive stands at present, to call into question the view that the German law in issue does not go beyond the discretion left to the Member States in determining the taxable amount referred to in Article 11(A)(1)(c) of the Sixth Directive.

104. Furthermore, the likelihood that the approach proposed by the Commission would result in greater harmonisation was seriously questioned at the hearing by the United Kingdom Government, which claimed that there are no common depreciation rules. It is true that, if we examine the international accounting standards adopted by the European Parliament and the Council of the European Union in 2002 (28) with the aim of improving the comparability of the financial statements of publicly traded companies, we find that different methods of depreciation may be used to allocate on a systematic basis the depreciable amount of an asset over its useful life. (29)

105. As a final point, it is also necessary to give an opinion on the question whether or not the acquisition costs of the land on which the building stands are to be included in the taxable amount where such costs were subject to VAT and the taxable person deducted that amount of tax.

106. Like the German and the United Kingdom Governments, and also the Commission, I am of the opinion that, in that situation, such costs must be included in the taxable amount for private use.

107. First of all, in the wording of Article 11(A)(1)(c) of the Sixth Directive I find no decisive reason for excluding them. The term 'full cost to the taxable person of providing the services' must cover, from the literal viewpoint, all the costs incurred in order to be able to provide that service. The costs of acquiring the land on which the building in question was built forms part of those costs in principle.

108. Secondly, to exclude them from the taxable amount would be contrary to the aim of Article 6(2) of the Sixth Directive which, as we have seen, seeks to ensure equal treatment as between taxable persons and final consumers. In so far as the latter would pay the VAT on the costs when purchasing a plot of land for building, it would run counter to that aim to exempt the taxable person from doing so.

109. In the context of the present proceedings, it has not been clearly established whether the claimant's purchase of the land on which the building was constructed was subject to VAT and whether it was deducted. The reply to that question depends on an assessment of the facts which

is a matter for the national court.

110. Having regard to all those considerations, I propose that the reply to the question referred should be that Article 11(A)(1)(c) of the Sixth Directive must be interpreted as meaning that it does not preclude national legislation whereby the taxable amount, for VAT purposes, in respect of the private use of part of a building forming, in its entirety, part of the assets of a business, is fixed annually as a portion of the acquisition or construction costs, determined by reference to the period for the adjustment of deductions, provided for in accordance with Article 20 of the Sixth Directive. The taxable amount must, if appropriate, include the acquisition costs of the land on which the building was constructed.

V – **Conclusion**

111. I accordingly propose that the following reply be given to the question referred to the Court by the Finanzgericht München:

‘Article 11(A)(1)(c) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as meaning that it does not preclude national legislation whereby the taxable amount, for VAT purposes, in respect of the private use of part of a building forming, in its entirety, part of the assets of a business, is fixed annually as a portion of the acquisition or construction costs, determined by reference to the period for the adjustment of deductions, provided for in accordance with Article 20 of the Sixth Directive 77/388, as amended. The taxable amount must include the acquisition costs of the land on which the building was constructed, where that acquisition was subject to VAT and the taxable person deducted the VAT.’

1 – Original language: French.

2 – Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18, ‘the Sixth Directive’).

3 – BGBl, 1993 I, p. 565, ‘UStG’.

4 – At the hearing this term was defined by the claimant as a community constituted by two or more persons who have a house and let it.

5 – It should be borne in mind that, under Paragraph 13(B)(b) of the Sixth Directive, the leasing and letting of immovable property are, subject to certain exceptions, exempt from VAT but, under Paragraph 13(C)(a), the Member States may allow taxpayers a right of option for taxation in such cases.

6 – Case C-230/94 *Enkler* [1996] ECR I-4517.

7 – Paragraph 36.

8 – See *Enkler*, paragraph 35.

9 – The national court does not specify the basis of this exemption. It probably refers to Article 13(B)(g) of the Sixth Directive, under which the Member States may exempt, under conditions which they lay down, the supply of buildings after they are first occupied.

10 – Case C-269/00 *Seeling* [2003] ECR I-4101.

11 – *Ibid*., paragraph 54.

12 – Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraph 27.

13 – Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I?3039, paragraph 24.

14 – Case C-434/03 *Charles and Charles-Tijmens* [2005] ECR I-7037, paragraph 23 and cases cited.

15 – See *Seeling*, paragraph 41 and cases cited.

16 – Paragraph 24.

17 – See *Le Petit Robert,Dictionnaire de la langue française,* publ. Ed. Dictionnaires Le Robert, Paris, 1996, p. 595.

18 – For the term ‘the full cost’ in other language versions of the Sixth Directive, see ‘Betrag der Ausgaben’ in German, ‘uitgaven’ in Dutch, ‘montant des dépenses’ in French, ‘udgifter’ in Danish, and ‘spese sostenute’ in Italian.

19 – See *Enkler*, paragraph 35.

20 – *Ibid.,* paragraph 33.

21 – Paragraph 36. In this case, the Court was questioned concerning the taxable amount for VAT in relation to the private use, for certain periods of the year, of a motor caravan which was wholly appropriated to a business. The Court held that it was necessary to take into account a portion of the expenses, as defined in paragraph 36 of that judgment, proportionate to the ratio between the total duration of actual use of the goods and the duration of actual non-business use (paragraph 37).

22 – See Article 4(3)(b) regarding the definition of ‘building land’, and Article 13(A)(1)(c) regarding ‘medical and paramedical professions’.

23 – See, to that effect, Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraphs 10 and 11.

24 – See *Seeling*, paragraphs 54 and 55.

25 – *Ibid.,* paragraphs 49 to 52.

26 – Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 48.

27 – See *Uudenkaupungin kaupunki*, paragraph 30.

28 – Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1).

29 – See, for example, Articles 47 and 62 of international accounting standard IAS 16, Property, plant and equipment, annexed to Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation No 1606/2002 (OJ 2003 L 261, p. 1).