

OPINION OF ADVOCATE GENERAL

Mazák

delivered on 10 July 2007 (1)

Case C-442/05

Finanzamt Oschatz

v

Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien

(Reference for a preliminary ruling from the Bundesfinanzhof (Germany))

(Taxation – Sixth VAT Directive – Article 4(5) – Annex D(2) – ‘Supply of water’ – Article 12(3)(a) – Reduced rate – Annex H, Category 2 – ‘Water supplies’)

1. This reference for a preliminary ruling under Article 234 EC concerns the interpretation of the terms ‘supply of water’ under Annex D(2) and ‘Water supplies’ under Annex H, Category 2, to 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 (2) (‘the Sixth Directive’). The referring Court, the Bundesfinanzhof (Federal Finance Court) (Germany), asks in particular whether the connection of a household to the water distribution network for a separately calculated fee comes within those terms.

I – Relevant Community law

2. Article 2 of the Sixth Directive provides:

‘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;

...’

3. Article 4 of the Sixth Directive defines who is to be considered a ‘taxable person’ 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. 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 ...

...

5. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.

However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

...'

4. In Annex D the 'supply of water' is listed as one of the activities referred to in the third subparagraph of Article 4(5) of the Sixth Directive.

5. Article 12(3)(a) of the Sixth Directive provides:

'The standard rate of value added tax shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services ...

...

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount which may not be less than 5% and shall apply only to supplies of the categories of goods and services specified in Annex H.'

6. In Annex H 'Water supplies' are listed amongst the goods and services which may be subject to reduced rates of value added tax ('VAT').

II – Relevant national law

7. According to Paragraph 1(1)(1) of the Law on Turnover Tax (Umsatzsteuergesetz, 'the UStG'), in the version in force at the time of the events in the main proceedings, turnover tax is chargeable on supplies of goods and services which an operator, in the course of his business, makes for consideration within Germany.

8. Paragraph 2(3), first sentence, of the UStG provides that a legal person governed by public law is only subject to turnover tax if it carries on a trade or profession of a commercial nature as defined in Paragraph 1(1)(6) and Paragraph 4 of the Law on Corporation tax (Körperschaftsteuergesetz, the 'KStG'). The supply of water to the public is one of the activities of a commercial nature listed under Paragraph 4(3) of the KStG.

9. At the material time, the standard tax rate was 16% in Germany pursuant to Paragraph 12(1) of the UStG.

10. In accordance with Paragraph 12(2)(1) of the UStG, in conjunction with Point 34 of the Annex to the UStG, the 'supply of water' is subject to the reduced tax rate of 7%.

III – The main proceedings and the order for reference

11. The Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien ('the applicant'), an association governed by public law, supplies drinking water and treats waste water. Its members are a number of towns and communes in an administrative region of Saxony.

12. In addition to supplying its customers with water, the applicant carries out household water connections at the request of property owners on payment of the costs. By laying the household connection the applicant connects its water distribution network to the particular installation of a property owner. The household connection pipes remain the property of the applicant.

13. The applicant considers that the reduced tax rate of 7%, which applies to the supply of water in Germany, should also be applicable to the provision of the household water connection as the connection is exclusively intended to ensure the supply of water to the property.

14. The Finanzamt (Tax Office) Oschatz ('the defendant') considers, however, that the laying of a household connection should be regarded as an independent service, namely, the 'Provision of a connection to the distribution network' and should be taxed at the standard rate. This position was set out in a letter of the Bundesministerium der Finanzen (Federal Ministry of Finance) of 4 July 2000.

15. The Finanzgericht (Finance Court) upheld a claim on the matter brought by the applicant against the defendant following an unsuccessful objection against a tax assessment of the applicant carried out by the defendant. The Finanzgericht held that the services rendered by the applicant to end users, namely the supply of water and the establishment of the household water connection, represent as a whole the unitary service 'supply of water' and should be taxed in accordance with German law at the reduced rate of 7%.

16. The Bundesfinanzhof is uncertain whether the laying of a household water connection for a separately calculated fee is covered by the term 'the supply of water' in Annex D(2) to the Sixth Directive. In the event that the third subparagraph of Article 4(5) of, in conjunction with Annex D(2) to, the Sixth Directive are not applicable to the laying of a household water connection for a separately calculated fee, the question arises, according to the Bundesfinanzhof, whether in laying that connection the applicant acted as a taxable person pursuant to the first and second subparagraphs of Article 4(5) of the Sixth Directive.

17. Moreover, in relation to the question of the rate of taxation to be applied, the Bundesfinanzhof is inclined to regard the laying of a household water connection as included in the term 'Water supplies' and should thus be taxed at the reduced rate. However, it considers that this question depends on an interpretation of Community law.

18. It is in these circumstances that the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court:

'Does connection of the water distribution network to a property owner's installation (the so-called "household connection") by a water supply undertaking for a separately calculated fee come under the heading of ["the supply of water"/"Water supplies"] (3) within the meaning of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (Annex D(2) and Annex H, Category 2)?'

19. Written observations were submitted by the applicant, the defendant, the German and Italian Governments and the Commission. The applicant and the Commission presented oral submissions at the hearing on 10 May 2007.

IV – Admissibility

20. The German Government expresses doubt as to the admissibility of the part of the question relating to the interpretation of the term ‘supply of water’ in Annex D(2) to the Sixth Directive. It considers that the outcome to the main proceedings is not dependent on an interpretation of Annex D(2) to the Sixth Directive as it is undisputed that the applicant when laying household water connections carried on a trade pursuant to Paragraph 2(3), first sentence, of the UStG. The question on Annex D(2) to the Sixth Directive is therefore not relevant and is hypothetical in nature. The defendant considers that a ruling by the Court in relation to Annex D(2) to the Sixth Directive would only be of relevance to the dispute in the main proceedings if the Court had been asked to consider, whether in the event that the laying of a household water connection does not come within the terms of Annex D(2), the applicant when engaging in such activity acted as a taxable person pursuant to Article 4(5) of that directive. That question has not been asked to the Court.

21. Where questions submitted by a national court concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. (4) However, it is for the Court, where necessary, to examine the circumstances in which the case was referred to it by the national court in order to assess whether it has jurisdiction and, in particular, determine whether the interpretation of Community law that is sought bears any relation to the facts of the main action or its purpose, so that the Court is not obliged to deliver advisory opinions on general or hypothetical questions. If it appears that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment. (5)

22. In the present case, it is not in my view obvious that the interpretation of Community law sought by the national court in respect of Annex D(2) to the Sixth Directive bears no relation to the subject-matter of the case in the main proceedings or is hypothetical in nature as maintained by the defendant and the German Government.

23. It is clear from the order for reference from the national court and from the pleadings of the German Government that the applicant, when laying household water connections, is under that an obligation to pay VAT pursuant to German law. However, the referring court has indicated in the order for reference that the applicant would appear, at least in principle, not to be a taxable person pursuant to the first subparagraph of Article 4(5) of the Sixth Directive. The referring court is thus uncertain whether the activity of laying a household water connection for a separately calculated fee is an activity covered by the term the ‘supply of water’ in Annex D(2) and whether the applicant may thus be considered a taxable person pursuant to the third subparagraph of Article 4(5) of the Sixth Directive.

24. The central question in the case pending before the national court would appear, from the order for reference from the national court, to relate to the application or otherwise of a reduced rate of tax to the activity of laying a household water connection pursuant to the third subparagraph of Article 12(3)(a) of, in conjunction with Annex H, Category 2 to, the Sixth Directive. However, in my view, that question only arises if the entity laying the connection acts as a taxable person when performing that activity and the latter is subject to VAT pursuant to Article 2 of the Sixth Directive.

25. Given that the national court has indicated, on the basis of the proceedings before it, that

the applicant may not be a taxable person pursuant to Article 4(5) of the Sixth Directive unless the laying of a water connection for a separately calculated fee comes within the terms of Annex D(2), I consider that the question of whether the laying of a household water connection for a separately calculated fee is covered by the term the 'supply of water' in Annex D(2) is relevant to the case pending before the referring court.

26. Accordingly, I consider that an answer should be given to the part of the question relating to Annex D(2) to the Sixth Directive with a view to providing the national court with all those elements for the interpretation of Community law which may be of assistance in deciding the case pending before it. The plea of inadmissibility raised must thus be rejected and the reference for a preliminary ruling in relation to Annex D(2) to the Sixth Directive be declared admissible.

V – Substance

A – *Main arguments of the parties*

27. The applicant and the Italian Government consider that the laying of a household water connection falls within the terms 'supply of water' or 'Water supplies' as provided in Annex D(2) and Annex H, Category 2, respectively to the Sixth Directive. They consider that the household water connection is indispensable to the supply of water. The Italian Government submits that the laying of the household connection is ancillary to the principal supply, namely the supply of water.

28. The applicant considers that the laying of the household connection is not a separate supply to the supply of water. From the point of view of a customer, the household water connection only serves to make the supply of water possible and has no other purpose. This is underscored by the fact that for legal and practical reasons the client cannot obtain water from another undertaking. The applicant considers that the fact that the laying of the household water connection is charged in a particular manner or on a one off basis is not relevant from a VAT perspective. The fact that the costs related to the laying of the household connection are deducted from the monthly fee for fixed costs and the fee linked to the actual consumption of water indicates that there is one price for the supply of water, part of which is calculated in a specific manner. Moreover, while the connection is only laid once, it is indispensable for the supply of water on a continual basis and thus cannot be considered an independent supply. It is not merely the connection, but also the presence of a water supply, that increase the value of the premises in question on an on-going basis. Contrary to what has been argued by the defendant, the presumption that water may not be consumed in buildings with a connection does not reflect reality. In addition, the (high) amount charged for the household connection is not a valid basis for concluding that it represents an independent supply. While the connection may cost EUR 1 000, the consumption of water by a household may amount to EUR 8 000 to EUR 12 000 over a 40 to 50 year period.

29. The defendant and the German Government have limited their arguments to the interpretation of Annex H, Category 2, to the Sixth Directive. The defendant, the German Government and the Commission submit that the laying of a household water connection is not covered by the term 'Water supplies' in Annex H, Category 2, to the Sixth Directive. They consider that as the rules on the application of a reduced rate derogate from the general rules under the Sixth Directive they must, in accordance with the Court's case-law, be strictly interpreted. The term 'Water Supplies' should therefore be limited to the supply of water *stricto sensu* and should not include any additional services such as construction works to ensure the supply of the water. The defendant and the German Government consider therefore that the laying of the household connection should be charged at the standard rate.

30. The German Government added that the principle of neutrality of VAT would be impaired if

the term 'Water supplies' was interpreted too broadly as comparable performances, such as for example the laying of gas or electricity connections, are not subject to a reduced tax rate. The defendant also submits that if the submissions of the applicant are accepted, the laying of the household water connection by the supplier of the water would be taxed at the reduced rate while the laying of the connection by an independent building company would be taxed at the standard rate.

31. In addition, the German Government notes that Member States in accordance with the third subparagraph of Article 12(3)(a) of the Sixth Directive are free to decide whether to apply a reduced rate.

32. The German Government and the Commission thus consider that the laying of the household water connection and the supply of water should be treated as two principal supplies, subject according to the German Government to different rates. The household water connection may not therefore be considered an ancillary supply.

33. The Commission accepts that the laying of a household connection is a preliminary and necessary condition for the supply of water. However, from a technical perspective the construction of the connection bears no relation to the supply of water strictly speaking. The defendant, the German Government and the Commission consider, in particular, that the fact that the person liable for the payment of the household water connection is the owner of the building while the fees for actual water consumption may be charged, for example, to the lessee of the building, demonstrates that the connection and the water itself are not a single supply. The defendant also notes that the connection benefits on an on-going basis the premises. Moreover, according to the defendant and the Commission the connection is only laid once and has no temporal link with the supply of water. The fact that the laying of the household connection costs on average a few thousand euros while the supply of water costs in general only a few hundred per year also suggests that the laying of the connection is not an ancillary activity. Thus according to the Commission from a financial perspective there are two distinct supplies which are perceived as such by consumers. This conclusion complies with the distinction drawn between the construction and provision of a network and the supply of water through the network. (6)

34. The German Government submits that while from the point of view of an average consumer the laying of the connection and the supply of water serve the same economic objective, that in itself is not sufficient for them to be considered a single supply. For there to be a single supply the different elements must be so closely linked as to be indistinguishable. This is not the case in the present proceedings. The German Government also notes that the household connection can be laid without any obligation to use and thus to be supplied with water.

35. As regards the interpretation of the term 'supply of water' in Annex D, the Commission considers that there is not enough evidence available to the Court to ascertain whether the applicant in the case before the referring court is a body which satisfies the criteria laid down in Article 4(5) of the Sixth Directive. The Commission therefore considers that the Court should answer the part of the question on Annex D by stating that the national court should examine whether the activities of the applicant are taxable.

B – Assessment

36. The parties to these proceedings are essentially in disagreement as to whether the terms 'supply of water' in Annex D(2) and 'Water supplies' in Annex H, Category 2, to the Sixth Directive include the laying of a household water connection.

37. It should be noted that the Sixth Directive does not define either the term 'supply of water' in

Annex D(2) or the term 'Water supplies' in Annex H, Category 2. The preamble to Annex H to the Sixth Directive provides that the Member States, when transposing the categories of goods referred to in Annex H into national legislation, may use the combined nomenclature to establish the precise coverage of the category concerned. The combined nomenclature established by Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, (7) as amended, consists, inter alia, of a harmonised system nomenclature for goods only. It does not, however, provide any assistance in defining the term 'Water supplies', nor indeed the term 'supply of water'.

38. Moreover, in my opinion, the question referred to the Court cannot be resolved solely on the basis of the wording of Annex D(2) and Annex H, Category 2, to the Sixth Directive. On any view, the terms of those provisions are ambiguous particularly when the different language versions of the Sixth Directive are examined and compared. While the wording of certain language versions may favour a narrow interpretation of the terms contained in Annex D(2) and Annex H, Category 2, to the Sixth Directive which would limit their scope to the mere delivery of water, other language versions favour a broader interpretation. (8) In view of the linguistic differences, the scope of the terms in question cannot be determined on the basis of an interpretation which is exclusively textual. It is therefore appropriate to take account of other interpretation criteria, in particular the general scheme and the purpose of the regulatory system of which the provisions in question form part. (9)

39. I consider that it is thus necessary to examine separately Annexes D and H in the system of the Sixth Directive and consider their particular purpose.

1. Annex D

40. The first subparagraph of Article 4(5) of the Sixth Directive provides that States, regional and local government authorities and other bodies governed by public law are not to be considered taxable persons, as defined in Article 4(1), in respect of the activities or transactions in which they engage as public authorities. (10) Pursuant to the second subparagraph of Article 4(5), Member States are required to ensure that bodies governed by public law are treated as taxable persons where the contrary would lead to significant distortions of competition. Moreover, pursuant to the third subparagraph of Article 4(5) of the Sixth Directive an obligation is imposed '[i]n any case' on Member States to treat bodies governed by public law as taxable persons in respect of the activities listed in Annex D to that directive, in so far as the activities in question are not negligible in scale.

41. The second subparagraph of Article 4(5) of and the third subparagraph of Article 4(5) of, in conjunction with Annex D to, the Sixth Directive, are thus in my view exceptions to or derogate from the 'general rule' contained in the first subparagraph of Article 4(5). The purpose of both the second and third subparagraphs of Article 4(5) of the Sixth Directive is to ensure that the neutrality of the tax is preserved in situations in which bodies governed by public law engage, under the special legal regime applicable to them, in activities which may also be engaged in, in competition with them, by private individuals under a regime governed by private law or on the basis of administrative concessions. (11)

42. Where an activity is listed in Annex D there is however no need to examine the legal status of the body exercising that activity nor the quality in which the activity is exercised. That exercise is redundant as if an activity falls within the terms of Annex D to the Sixth Directive the entity exercising that activity is, in principle, taxable in respect of that activity. This in my view stems from the words '[i]n any case' used in that provision. Moreover, there is no need to determine, as in the case of the second subparagraph of Article 4(5), whether the treatment of a public body as a non-taxable person would lead to significant distortions of competition. Where the activity is covered by

Annex D, a significant distortion on competition is presumed. As Advocate General Kokott pointed out in her Opinion in Case C-369/04, (12) Annex D lists those activities which can be engaged in by both public bodies and by private-sector undertakings and where the 'economic connection is primary and clear'. (13) The third subparagraph of Article 4(5) of, in conjunction with Annex D to, the Sixth Directive is designed to ensure that public bodies and private-sector undertakings are placed on an equal-footing for tax purposes in respect of the activities listed in Annex D.

43. As regards the activity of supply of water listed in Annex D(2) to the Sixth Directive, it is clear from Directive 2004/17 (14) that public and private undertakings are active in certain Member States in the water sector and compete in 'the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water' and 'the supply of drinking water to such networks'. (15) Furthermore, at the public hearing in this case the applicant confirmed that a number of different types of entities of both a private and public nature lay household water connections in Germany. In addition, it would appear from the pleadings that the activity of laying household water connections is of considerable economic relevance given the costs involved.

44. It would thus in my opinion appear within the spirit and purpose of the third subparagraph of Article 4(5) of, and Annex D to, the Sixth Directive to include the laying of a household connection within the term the 'supply of water' in Annex D(2) to that directive.

2. Annex H

45. The third subparagraph of Article 12(3)(a) of the Sixth Directive provides that Member States may apply a reduced rate of VAT to supplies of the categories (16) of goods and services referred to in Annex H to that directive. Those provisions are in the nature of exceptions to the principle that the standard rate of VAT applies and must therefore be interpreted strictly. (17)

46. Annex H was incorporated into the Sixth Directive by Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates). (18) In addition to 'Water supplies', Annex H contains 16 other categories of goods and services which may be subject to a reduced rate of tax.

47. Neither the recitals to Directive 92/77, nor indeed to the Sixth Directive, provide any explanation of the purpose and scope of Annex H. However, it would appear in my opinion, firstly from the categories of goods and services listed in Annex H itself and secondly from the Opinion of the Economic and Social Committee on the proposal for a Council Directive supplementing the common system of value added tax and amending Directive 77/388, approximation of VAT rates, (19) that the purpose of Annex H to, in conjunction with the third subparagraph of Article 12(3)(a) of, the Sixth Directive is to allow Member States to apply a reduced rate of tax to major everyday goods and services and to activities serving a social or public purpose.

48. In my view, clean water is an essential commodity of daily use and access thereto undoubtedly promotes the interests of human health. (20) As the establishment of a household water connection serves no purpose other than to connect a dwelling to a water distribution network and is a preliminary and necessary condition for obtaining water from that network, the possibility for Member States to apply a reduced tax rate to the provision of such connections would in my view comply with the purpose envisaged by the third subparagraph of Article 12(3)(a) of and Annex H to the Sixth Directive.

49. I therefore consider that the term 'Water supplies' referred to in Annex H, Category 2, to the Sixth Directive includes the activity of laying a household water connection.

50. It remains in my view to be examined in this case whether the selective application of a reduced rate of VAT to certain aspects only of the category 'Water supplies' is permissible, and if so, in the context of the present proceedings, whether the exclusion of laying a household water connection from that treatment is permissible. (21) It is clear from the wording of the third subparagraph of Article 12(3)(a) of the Sixth Directive and the use of the term 'may' in that provision that the application of a reduced rate by the Member States is optional in nature. The decision whether to apply a reduced rate of tax thus lies within the Member States' competence.

51. In *Commission v France*, (22) the Court confirmed that the text of Article 12(3)(b) of the Sixth Directive, which permits the charging of a reduced rate of VAT on supplies of natural gas and electricity, does not prohibit the selective application of the reduced rate to concrete and specific aspects, such as the standing charge conferring entitlement to a minimum quantity of electricity for account holders, provided that no risk of distortion of competition exists. (23)

52. In my view, the third subparagraph of Article 12(3)(a) of the Sixth Directive may also be interpreted in this manner, thereby permitting Member States to charge a reduced rate of VAT on distinct and independent aspects of the supply of water, subject however to the important caveat that the principle of fiscal neutrality, inherent in the common system of VAT, is not compromised. In order to ascertain whether the laying of a household water connection may be distinguished or isolated from other aspects of the category 'Water supplies', I consider that the Court's case-law on composite supplies could usefully be applied.

53. According to that case-law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine if there were two or more distinct supplies or one single supply. Taking into account the two facts that, firstly, it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making several distinct principal supplies to the customer or a single supply. In that regard, the Court has held that it is a single supply where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. (24)

54. In addition, it is clear from the case-law of the Court that a service must be regarded as ancillary to a principal service, and thus share the tax treatment of the principal service, if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. (25)

55. I consider that the laying of a household water connection does not constitute an aim in itself for the person requesting the laying of the connection. As pointed out in point 48 above, the only purpose of laying a household water connection, from the point of view of the person requesting it and indeed the undertaking laying that connection, is to enable the delivery of water from a water distribution network to a dwelling. In fact, the German Government itself admits in its pleadings that from the point of the average consumer the laying of the household connection and the supply of water serve the same economic objective. (26) It would seem to me highly artificial to distinguish or isolate the laying of the household connection from the water actually delivered from the network to the dwelling in question.

56. The existence of a household water connection is an essential requirement in order to obtain water from the water distribution network and should thus, in my view, enjoy the same tax

treatment as the water supplied which would appear to be taxed in Germany, according to the referring court, at a reduced tax rate.

57. In this regard, the fact that the connection is laid only once while water may be delivered to a dwelling over an extended period of time does not, in my view, alter the above analysis given the on-going necessity of the connection in order to obtain water from the water distribution network. Furthermore, the fact, in the present proceedings, that the laying of the connection may be a costly up-front fee as compared, for instance, to the monthly charge for water consumption is not in my view decisive and does not serve to sever the intrinsic, functional link between the laying of the connection and the supply of water from the distribution network to a dwelling.

58. I consider that the arguments of the German Government and the defendant at point 30 above are unfounded and that there is no risk of impairment of the principle of fiscal neutrality (27) of the VAT system if the laying of a household connection is included in the term 'Waters supplies' in Annex H, Category 2, to the Sixth Directive.

59. There is in my view no relationship between the laying of a household water connection and the laying, for example, of gas or electricity connections from a VAT perspective. There may admittedly be certain technical similarities between the laying of a household water connection and the laying of connections for the supply of gas or electricity. However, the supply of gas and the supply of electricity, on the one hand, and the supply of water on the other hand, enjoy a different legal status under the Sixth Directive. In this regard, one only has to note that while the supply of gas and the supply of electricity are included in Annex D(2) to the Sixth Directive alongside the supply of water, only 'Water supplies', and not the supply of gas and the supply of electricity, figure amongst the categories of goods and services listed in Annex H to the Sixth Directive. In my opinion, the supply of water on the one hand and the supply of gas and the supply of electricity on the other may not therefore be considered as 'comparable performances' from a VAT perspective.

60. Consequently, the term 'Water supplies' referred to in Annex H, Category 2, to the Sixth Directive includes the activity of laying a household water connection. Moreover, the laying of the household water connection and the water delivered to the dwelling in question should be considered a single transaction for the purposes of VAT.

VI – Conclusion

61. In the light of the above considerations, I am of the opinion that the Court should give the following answer to the question referred for a preliminary ruling by the Bundesfinanzhof:

The connection of the water distribution network to a property owner's installation by a water supply undertaking for a separately calculated fee comes under the heading of ['the supply of water'/'Water supplies'] within the meaning of 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 (Annex D(2) and Annex H, Category 2) and should be regarded, with the water delivered to the dwelling in question, as forming a single transaction for the purposes of VAT.

1 – Original language: English.

2 – OJ 1977 L 145, p. 1.

3 – It should be noted that in the original German language version of the question referred to the Court, the national court uses the term 'Lieferungen von Wasser', which reflects the fact that identical terminology is used in Annex D(2) and Annex H, Category 2, to the German language

version of the Sixth Directive. However, identical terminology is not used in those two provisions in certain other language versions. For example, the term the 'supply of water' is used in Annex D(2) while the term 'Water supplies' is used in Annex H, Category 2, to the English language version of the Sixth Directive.

4 – See Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 13.

5 – See Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 15.

6 – See, Article 4 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1). See also Article 9(2)(e), ninth indent, of the Sixth Directive which concerns the question of access to the network in respect of electricity and gas.

7 – OJ 1987 L 256, p. 1.

8 – For example the German language version of the terms of Annex D(2) and Annex H, Category 2, to the Sixth Directive might imply a more narrow scope as the words 'Lieferungen von Wasser' could be interpreted as referring to the mere delivery of water. On the other hand the terms used in the English (the supply of water), French (la distribution d'eau), Italian (Erogazione di acqua), Spanish (Distribución de agua) and Slovak (Zásobovanie vodou) language versions of Annex D(2) to the Sixth Directive would permit a different, broader interpretation and could be interpreted as comprising the more comprehensive task of ensuring public access to water.

9 – See, in particular, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50, and Case C-53/05 *Commission v Portugal* [2006] ECR I-6215, paragraph 20.

10 – This is so even where they collect dues, fees, contributions or other payments in connection with those activities or transactions.

11 – This approach to the second subparagraph of Article 4(5) of the Sixth Directive was most recently confirmed by the Court in Case C-430/04 *Feuerbestattungsverein Halle* [2006] ECR I-4999, paragraph 24.

12 – Opinion delivered in *Hutchison 3G and Others* on 7 September 2006 [2007] ECR I-0000.

13 – See, points 93 and 94 of Advocate General Kokott's Opinion in *Hutchison 3G and Others*.

14 – Cited in footnote 6. Annex III to Directive 2004/17, which lists contracting entities in the sectors of production, transport or distribution of drinking water in the Member States, refers to both private and public undertakings. It would appear from the recitals to Directive 2004/17, in particular the 10th recital, that that directive was adopted, inter alia, to ensure the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced.

15 – See, Article 2 on the definition of the entities subject to Directive 2004/17 and Article 4 entitled 'Water' on the list of activities in that sector covered by that directive.

16 – The use of the term 'category' in the third subparagraph of Article 12(3)(a) of the Sixth Directive indicates that the items listed in Annex H to that directive are headings for groups or classes of goods or services which may be subject to a reduced rate of tax.

17 – See, Case C-83/99 *Commission v Spain* [2001] ECR I-445, paragraphs 18 and 19.

18 – OJ 1992 L 316, p. 1.

19 – OJ 1988 C 237, p. 21.

20 – See, for example, the sixth recital to Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ 1998 L 330, p. 32.

21 – This arises in view of the fact that, pursuant to the letter of the Bundesministerium der Finanzen of 4 July 2000, the ‘Provision of a connection to the distribution network’ should be taxed at the standard rate, while according to the referring court pursuant to German law the supply of water is subject to the reduced rate.

22 – Case C-384/01 [2003] ECR I-4395, paragraphs 24 and 26 to 28.

23 – In her Opinion in Case C-251/05 *Talacre Beach Caravan Sales* [2006] ECR I-6269 Advocate General Kokott indicated, however, that the position of the Court in *Commission v France*, which was an action based on Article 226 EC, should not be misinterpreted. In her view, while the Court in *Commission v France* seems to accept that ‘one part’ of a supply may be subject to a reduced rate of taxation, that case was principally concerned with the question whether the Commission had produced evidence that the application of the reduced rate of taxation indeed led to a distortion of competition in that specific case. It is thus not possible, according to Advocate General Kokott, to draw wide ranging conclusions from the ruling of the Court in *Commission v France* (see points 33 and 34).

24 – See, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraphs 19, 20 and 22.

25 – See Case C-349/96 *Card Protection Plan* [1999] ECR I-973, paragraph 30, citing Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24.

26 – See point 34 above.

27 – As is apparent from the Court’s case-law, the principle of neutrality precludes in particular treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subject to a uniform rate (see, Case C-109/02 *Commission v Germany* [2003] ECR I-12691, paragraph 20, and Case C-481/98 *Commission v France* [2001] ECR I-3369, paragraphs 21 and 22).