OPINION OF ADVOCATE GENERAL

TRSTENJAK

delivered on 9 December 2008 1(1)

Case C?572/07

RLRE Tellmer Property sro

v

Finan?ní ?editelství v Ústí nad Labem

(Reference for a preliminary ruling from the Krajský soud v Ústí nad Labem (Czech Republic))

(Tax legislation – Harmonisation – Turnover taxes – Interpretation of Articles 6 and 13B(b) 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 – Principle of fiscal neutrality – Exemptions under the Sixth Directive – Exemption for lettings of immovable property – Letting of a dwelling or non-residential premises – Cleaning of the common parts related to the letting of residential premises)

I – **Introduction**

1. By its reference to the Court of Justice of the European Communities in accordance with Article 234 EC, the Krajský soud v Ústí nad Labem (Ústí nad Labem Regional Court (Czech Republic); 'the referring court') seeks a preliminary ruling on two questions concerning the interpretation of Articles 6 and 13B(b) 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 ('the Sixth Directive'). (2)

2. This reference arises in the framework of a legal dispute between RLRE Tellmer Property sro ('the plaintiff') and the Finan?ni ?editelství v Ústí nad Labem (Tax Directorate of Ústí nad Labem; 'the defendant') concerning the extent of the exemption from value added tax (VAT) for income arising on lettings of housing. In particular, the parties disagree on whether the cleaning of the common parts of a building in connection with the letting of dwellings constitutes an economic activity which is subject to VAT.

II – **Legal framework**

A – *Community law*

3. Under Article 2(1) of the Sixth Directive, the supply of services effected for consideration within the national territory is, in principle, subject to VAT.

4. Article 6(1) of the Sixth Directive provides as follows:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include inter alia:

– assignments of intangible property whether or not it is the subject of a document establishing title,

– obligations to refrain from an act or to tolerate an act or situation,

– the performances of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.’

5. Article 13B(b) of the Sixth Directive governs the exemption from VAT for lettings of housing as follows:

‘Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption’.

B – *National law*

6. The application of VAT in the Czech Republic since accession to the European Union is determined by Law No 235/2004 on Value Added Tax. Article 56 of that law headed ‘Transfer and letting of plots of land, buildings, apartments and non-residential premises, leasing of other apparatus’ governs in paragraph 4 the exemption from VAT in relation to the letting of real property as follows:

‘The letting of plots of land, buildings, apartments and non-residential premises is exempt from the tax. The exemption does not apply to the short-term letting of a building, the letting of premises and spaces for the parking of vehicles, the letting of safes or permanently installed equipment or machines. Short-term letting of a building means letting including internal movable fittings, possibly with the addition of electricity, heating, cooling, gas or water, for a period not exceeding 48 hours.’

III – **Facts, main proceedings and questions referred for a preliminary ruling**

7. The plaintiff is the owner of buildings in which dwellings are let. In addition to the basic rent, it receives from its tenants a payment in consideration of the cleaning of the common parts – invoiced separately – effected by its own caretaking staff.

8. Following their determination that insufficient VAT had been assessed, the national tax authorities increased the VAT payable by the plaintiff for May 2006 by CZK 155 911 by reason of its receipts from cleaning activities. Following the decision of the Tax Directorate of Ústí nad Labem of 5 February 2007 to uphold the assessment of Litvínov Tax Office of 20 September 2006, the plaintiff commenced proceedings before the referring court.

9. The plaintiff argues that such economic activity is exempt from VAT. It takes the view that letting and services related to the use of dwellings let constitute indivisible services. In that connection, the plaintiff refers to Community law, in particular to the case-law of the Court, from which it follows, according to that party, that indivisible services are subject to a single regime of VAT and, thus, in the present case to that of VAT-exempt lettings.

10. The referring court admits to uncertainties on the interpretation of the relevant legislation, concerning not only Czech but also Community law. Accordingly, it has stayed proceedings and referred to the Court the following questions for a preliminary ruling:

‘(1) … Can the provisions of Article 6 … and Article 13 … of the Sixth Directive be interpreted as meaning that the letting of an apartment (and possibly of non-residential premises) on the one hand and the related cleaning of the common parts on the other hand can be regarded as independent, mutually divisible taxable transactions?

(2) If … the answer to the first question is in the negative, do the provisions of Article 13 of that directive, and in particular the introduction and Part B(b) thereof: (1) require; (2) preclude; or (3) leave to the determination of the Member State the application of VAT to payment for cleaning of the common parts of a rented apartment block?’

IV – **Procedure before the Court**

11. The order for reference of 18 December 2007 was registered at the Court Registry on 24 December 2007.

12. Within the period established by Article 23 of the Statute of the Court, written observations were lodged by the defendant in the main proceedings, the Governments of the Czech Republic and the Hellenic Republic and by the Commission of the European Communities.

13. At the hearing on 6 November 2008 the representatives of the plaintiff in the main proceedings, the Governments of the Czech Republic and the Hellenic Republic and the Commission presented their observations.

V – **Main arguments of the parties**

14. At the hearing, the *plaintiff* in the main proceedings gave an account of current practice in the Czech Republic in relation to the invoicing of cleaning services. Moreover, it expressed the view that the letting of premises and the cleaning of the common parts constitute one comprehensive supply not subject to VAT. Further, it pointed to the necessity for a uniform interpretation of the concept of the ‘letting of immovable property’ by the Court in order to avoid divergent interpretations in the Member States.

15. Making reference to the provisions on letting contained in the Czech Civil Code, the *defendant*

in the main proceedings explains that a dwelling, as the subject-matter of a letting agreement, comprises a collection of rooms which satisfy all the requirements for residence therein on account of their technical and functional features and on account of their fittings. It argues that, from a legal and practical point of view, the common parts cannot be let for residential purposes. For that reason, the defendant proposes that the first question should be answered in the affirmative.

16. In connection with the second question, the defendant queries the need in the present case for an interpretation of the Sixth Directive, as national legislation – adopted in conformity with Community law – provides a clear answer thereto, namely that the letting of real property is exempt from VAT, but that such exemption does not extend to services provided independently, even if related to the exempt supply.

17. The *Czech Government* takes the view that the questions of the referring court must be interpreted as requesting the Court to determine whether in a situation where, in addition to the actual letting, a landlord supplies to a tenant a service by way of cleaning of the common parts of the building, the cleaning service at issue and the letting together constitute a complex supply and whether as such that is covered by the exemption provided for by Article 13B(b) of the Sixth Directive.

18. Further, the Czech Government recalls that the main purpose of the concept of a comprehensive supply is to avoid unnecessary disruption to the VAT system as might arise from the artificial division of a supply which is unified in economic terms. To presume such comprehensive supply in the present case would counteract that purpose.

19. Therefore, the Czech Government proposes that the answer to the questions referred should indicate that it is for the national court to assess whether a service consisting in the supply of cleaning services and a service consisting in the letting of dwellings, when viewed together, satisfy the requirements for a comprehensive supply as established in the case-law of the Court. None the less, having regard to the specific circumstances at issue, it takes the view that such a question can be answered only in the negative in the present case.

20. However, should the national court come to a different conclusion, in the view of the Czech Government, application of the concept of a comprehensive supply in the main proceedings contradicts the principle of fiscal neutrality and the requirement for strict interpretation of the exemptions established by the Sixth Directive.

21. The *Commission* argues, first, that the exemptions established in Article 13 of the Sixth Directive are autonomous concepts of Community law requiring autonomous interpretation. Moreover, as those exemptions constitute derogations, they must be interpreted strictly. Further, in the light of *Faaborg-Gelting Linien*, (3) the Commission queries whether cleaning of the common parts of a building might not be regarded as a supply ancillary to the main supply of letting.

22. Correspondingly, the Commission proposes that in answering the questions referred the Court should hold that whilst the exemption from VAT for the letting of dwellings established by Article 13B(b) of the Sixth Directive applies only to the economic activity of letting, a service consisting in cleaning of the common parts may be covered by the said exemption if included the letting agreement as an ancillary supply. In its view, it is for the national court to determine whether cleaning of the common parts constitutes an element of letting arrangements, having regard in that connection both to the wording of the letting agreement and established practice.

23. The *Greek Government* rejects any broad interpretation of Article 13B(b) of the Sixth Directive. In its view, to adopt the legal stance taken by the plaintiff would result in the said provision covering all expenses dedicated to improving the conditions of use for the premises let.

Accordingly, the Greek Government proposes that the answer to the questions referred should indicate that the letting of a dwelling or non-residential premises must be regarded as a service distinct from that of cleaning the common parts. In its view, two separate supplies are at issue, one, letting, is exempt from VAT, whilst the other, cleaning of the common parts, is subject to VAT.

VI – **Legal appraisal**

A – *Introductory remarks*

24. The enlargements of the European Union by way of 10 new Member States on 1 May 2004 and a further two on 1 January 2007 constitute significant events in the history of that integration system with profound consequences of a geopolitical nature. Not only did the enlargements confer the status of Member State and the rights attendant thereon on new Member States but also the obligation to incorporate into national law the '*acquis communautaire*', including VAT rules. (4) Thus, accession to the European Union at the same time implied accession to the common system of VAT, a harmonised system for the taxation of turnover, by which, in essence, fiscal and economic policy objectives are pursued.

25. Whilst the first aspect is connected with the financing of the Community through own resources, (5) the economic policy objective of harmonisation is to eliminate the factors resulting from divergent VAT systems liable to distort the conditions for competition both on a national and Community level. (6) To ensure the effectiveness of that common system of VAT, it is necessary, thus, to have uniform transposition and interpretation of the VAT directives, including the exemptions established by the Sixth Directive, (7) at issue in the present case.

26. The questions referred concern the interpretation of the VAT exemption for the letting of immovable property established in Article 13B(b). In that regard, the first question seeks, in substance, to establish whether cleaning of the common parts of a building is included in the concept of 'letting', with the result that the remuneration which a landlord receives from a tenant for performing that activity must be regarded, in the same way as rent payments, as exempt from VAT. The second question applies only in the case that the Court negates the existence of such a conceptual link between both services and concerns the question of principle whether an obligation to levy tax derives from Community or national law.

B – *The first question*

1. The concept of 'letting' for the purposes of Article 13B(b) of the Sixth Directive

27. To answer the question whether cleaning of the common parts is covered by the concept of 'letting' requires, first, an interpretation of the Sixth Directive, in particular Article 13B(b), having recourse in that regard not only to the usual techniques of interpretation employed by the Community Courts but to the principles of interpretation which are characteristic of the Community VAT regime. (8) In turn, the precise categorisation of a taxable transaction must take account of all the circumstances in which the transaction in question takes place. (9)

28. It follows from the scheme of the Sixth Directive that the scope of the VAT regime is very broad, in that Article 2 on taxable transactions includes in addition to the importation of goods the supply of goods or services effected for consideration within the territory of a country and Article 4(1) defines as a taxable person any person who independently carries out any economic activity whatever the purpose or results of that activity. (10) Under Article 4(2) of the Sixth Directive, the concept of an economic activity comprises all activities of producers, traders and persons supplying services.

29. Further, according to settled case-law of the Court, the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive must be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. (11)

30. Moreover, in relation to the exemptions provided for in Article 13 of the Sixth Directive, the Court has consistently held that these have their own independent meaning in Community law which must therefore be given a Community definition. (12)

31. Admittedly, Article 13B(b) of the Sixth Directive does not define the 'letting of immovable property', nor does it refer to relevant definitions adopted in the legal orders of the Member States. (13) However, in numerous cases, having regard to the context in which it is used and the objectives and the scheme of that directive, (14) the Court defined the concept as 'the landlord assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it'. (15) However, at the same time, the Court stressed that from a Community law perspective the expression 'leasing or letting' in Article 13B(b) of the Sixth Directive must be regarded as broader than the corresponding national law concepts. (16)

32. The cleaning services supplied by the plaintiff to its tenants do not correspond – strictly speaking and having regard to the abovementioned principles of interpretation – to the above definition of 'letting' for the purposes of Article 13B(b) of the Sixth Directive. The activity of cleaning common parts effected for consideration clearly exceeds the mere transfer for consideration of premises for the purposes of use. It implies, in fact, an activity of an active nature, in this case of the landlord itself, fundamentally distinguishable from the activity of 'letting immovable property' characterised as 'passive' by the Court in *'Goed Wonen'* (17) and *Temco Europe*. (18)

2. Related services within the meaning of the case-law

33. None the less, from a Community law perspective, it is conceivable, in principle, to consider such cleaning services as 'letting' for the purposes of Article 13B(b) of the Sixth Directive on condition that such service is merely ancillary to a comprehensive supply comprising several elements, with the result that the transactions arising through both activities must be regarded as a single transaction.

34. As the Court has held on many occasions, the question whether a transaction which comprises several elements must be regarded as a single transaction or as several distinct and independent individual transactions to be assessed separately is of particular importance for VAT purposes, inter alia, for applying the rate of tax, but also for the application of the exemptions established by the Sixth Directive. (19)

35. The Sixth Directive does not make any specific provision regarding the conditions under which several related supplies should be treated as one comprehensive supply. Instead, the relevant assessment criteria result directly from the case-law of the Court.

36. In determining the essential features of a composite supply there are two opposing aims. On the one hand, it is necessary to differentiate between the various individual supplies according to their character. On the other hand, so as not to distort the functioning of the VAT system, a supply which comprises a single service from an economic point of view should not be artificially split. (20) Splitting a comprehensive supply into too many separately classified individual supplies overcomplicates the application of the VAT rules. (21) In any case, an objective criterion must be used. The subjective perspective of the provider and/or recipient of the supply is irrelevant.

37. In that regard, it follows from Article 2 of the Sixth Directive that every transaction must normally be regarded as distinct and independent; (22) however, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent. (23)

38. Such is the case, for example, where, in the course of a purely objective analysis, it is found that there is a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. (24) In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. (25) It can also be held that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. (26)

39. If one considers the factual and legal basis for the main proceedings, in my view, there are few features which point in favour of classifying the service at issue as an ancillary supply.

40. Admittedly, it is true to assert that cleaning of the common parts, generally speaking, constitutes an essential condition for ordinary use of the premises let. However, as the Greek Government and the defendant correctly argue, that activity concerns not the areas let for living purposes, which, strictly speaking, constitute the actual subject-matter of the letting agreement, but simply the common parts inside a building which are unsuited to living and to which everyone has access. The same applies to the letting of premises for other purposes, for example, office premises, which permit office activities only within the confines of the space assigned for that purpose. To that extent one can detect already both spatial and functional limits to the service at issue.

41. Leaving that on one side, to distinguish between the economic activity of letting dwellings and the activity of cleaning of the common parts does not constitute the splitting of a single, indivisible economic supply. Both activities are not so closely linked that to separate them would seem artificial, especially as, generally speaking, it is for the parties concerned, exercising their contractual freedom, to allocate that task in a particular case. As the Czech Government argues, referring to current practice in the Czech Republic, (27) in principle, cleaning of the common parts can be organised in three different ways: (1) the tenants themselves assume that task; (2) cleaning services are supplied by a third party which subsequently invoices the tenants for that supply; (3) the landlord ensures the cleaning of the common parts, whether through his own employees (for example, caretaking staff) or a cleaning firm commissioned to perform the task. The multiplicity of potential arrangements demonstrates that neither the right of use nor the actual opportunity to use dwellings for their intended purpose is severely prejudiced if cleaning services, exceptionally, are not assumed by the landlord.

3. The principle of the neutrality of VAT

42. That multiplicity of potential variants is relevant, too, from the perspective of fiscal neutrality and the consistent application of the provisions of the Sixth Directive. In this context, I wish to recall that, according to the case-law of the Court, observance of the principle of fiscal neutrality is of crucial importance, inter alia, in the application of the exemptions provided for in Article 13B(b) of the Sixth Directive. (28)

43. The principle of fiscal neutrality which is laid down in Article 2 of the First Directive (29) and which is inherent in the common system of value added tax, requires, as the fourth and fifth

recitals in the preamble to the Sixth Directive state, that all economic activities should be treated in the same way. (30) In *Cimber Air* (31) and *Jyske Finans*, (32) the Court clarified that principle to mean that economic operators carrying out the same transactions may not be treated differently in relation to the levying of VAT.

44. If we consider the first set of circumstances mentioned in point 41 of this Opinion, it is evident that the cleaning of the common parts cannot be subject to VAT, since neither a supply of goods nor a supply of services within the meaning of Article 2 of the Sixth Directive is at issue.

45. However, if we consider the second set of circumstances, it must be concluded that such economic activity, as with every service, is subject to VAT. In itself, the activity is unconnected to letting and, having regard to the principle I already mentioned, namely that every transaction must normally be regarded as distinct and independent, (33) therefore must be treated differently for tax purposes, that is, the VAT exemption provided for in Article 13B(b) of the Sixth Directive cannot be applied thereto. The same conclusion is reached – in my view, correctly – both by the referring court in its reference for a preliminary ruling (34) and the Czech Government. (35)

46. From an objective point of view, the third set of circumstances, which constitutes the facts at issue in the main proceedings, may be distinguished from the second example only by reason of the fact that the provider of the cleaning service is, at the same time, the landlord. The question thus arises whether one is justified in assuming, a priori, an ancillary supply dependent on letting simply on account of the overlap in identity between a landlord and the provider of cleaning services for the common parts. Although, as the Court hinted in *Henriksen*, (36) under certain circumstances that fact may constitute evidence of a single economic transaction, by itself, it is not decisive. The fact that the plaintiff in the main proceedings invoices cleaning services separately and not as a single price including rent may be cited just as readily as evidence of an independent supply. As the Court held in *CPP*, (37) the fact as to whether a service consisting of several elements is supplied either in consideration for a single price or on the basis of separate invoices has evidential value. Consequently, in the main proceedings, the separate invoicing of the cleaning services constitutes a further indication pointing against a single service.

47. Inasmuch as the Czech Government asserts in that regard that this third variant potentially may be supplemented with additional features, making it increasingly difficult to reach an assessment in an individual case, that contention must be upheld. For example, the situation is conceivable in which a landlord supplies cleaning services also in other buildings which are not let by that party. None the less, the service supplied by such person is, in essence, the same as that at issue in the main proceedings. Therefore, in my view, it would undermine both the principle of fiscal neutrality (38) and the coherence of the common system of VAT if the two variants mentioned above were treated differently depending on whether the landlord or a third party assumes the cleaning services in question. The uncertainty connected with each individual case would unnecessarily overcomplicate the application of the provisions on VAT (39) and make the decisions of the national tax authorities correspondingly less predictable for the taxpayer.

4. Historical and teleological interpretation of the exemption from VAT

48. The social policy considerations advanced by the referring court are incapable in themselves of invalidating the above conclusions. They cannot automatically be invoked more as an argument in favour of a VAT exemption for cleaning of the common parts. Admittedly, inasmuch as the referring court states that where VAT is not applied to cleaning of the common parts a dwelling is less expensive, that assertion must be upheld. Indeed, the exemption of Article 13B(b) of the Sixth Directive appears to be based – from a historical perspective also – on social policy considerations. In any event, in most of the Member States, prior to harmonisation under the Sixth Directive, the letting of residential property was not subject to VAT for social reasons. (40) It

was intended that this position should be maintained in the Sixth Directive in order to avoid a rise in rents for residential premises.

49. However, as an interpretation of the relevant provisions of the Sixth Directive on the basis of their wording (41) and their schematic position (42) and taking account of the principle of fiscal neutrality (43) has already demonstrated, the Community legislature intended to limit the VAT exemption provided for in Article 13B(b) of the Sixth Directive expressly to 'letting' within the strict meaning of that term and to extend it only to services constituting – on an objective assessment – an element of a comprehensive supply which retains its character as a 'letting'. However, those requirements are not satisfied in all cases, nor, as I have already indicated, are they satisfied in the present case.

50. Moreover, the fact may not be overlooked that a further reason exists to exempt the letting of immovable property. As Advocate General Jacobs stated in *Blasi*, (44) land that has already been used is not the result of a production process. Once immovable property has been developed for the first time and a building has been constructed, that property is generally used in a passive manner not entailing added value. It is therefore only the first supply of developed building land and the supply of a building before first occupation that are subject to VAT, whilst the later transfer of a previously occupied building and the leasing thereof are not subject to VAT. However, that justification for the tax exemption cannot apply in the case of an activity of an active nature (45) such as cleaning of the common parts.

5. Conclusion

51. On the basis of the foregoing considerations, I take the view that the transaction effected by a landlord in the cleaning of the common parts must in principle constitute an exception to the exemption under Article 13B(b) of the Sixth Directive and be subject to VAT, save that I do not wish to exclude a priori the possibility that, for example, provisions of the relevant letting agreement, house rules applicable to the premises let or established legal practice in a particular Member State might, exceptionally, suggest an assessment other than that reached on an abstract basis in this Opinion. It is for the national court which must apply the answers to the facts before it to verify, having regard, where applicable, to the above considerations, the extent to which that applies in the present case.

52. Accordingly, the answer to the first question should be that Articles 6 and 13 of the Sixth Directive require the letting of a dwelling (and possibly of non-residential premises) on the one hand and the related cleaning of the common parts on the other hand to be regarded, in principle, as independent, mutually separable transactions. However, it is for the national court to verify the extent to which provisions of the relevant letting agreement, house rules applicable to the premises let or established legal practice in the Member State concerned permit, exceptionally, an alternative assessment.

C – *The second question*

53. In the light of the answer I propose to the first question, the second question needs to be answered only in the case that the referring court, having taken into account all the circumstances of the main proceedings, reaches the view that the letting of a dwelling on the one hand and the related cleaning of the common parts on the other hand, exceptionally, cannot be regarded as independent, mutually separable transactions.

54. In such a case, a comprehensive supply must be presumed which satisfies the requirements for a 'letting of immovable property' in accordance with Article 13B(b) of the Sixth Directive. Accordingly, that provision excludes the application of VAT to the remuneration for

cleaning the common parts of a residential building.

55. The answer to the second question should therefore be that if a national court concludes that the letting of a dwelling on the one hand and the related cleaning of the common parts on the other hand, exceptionally, cannot be regarded as independent, mutually separable transactions, the cleaning of the common parts must be regarded as an element of the 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive, with the result that the application of VAT to the remuneration for that activity is precluded.

VII – **Conclusion**

56. In the light of the foregoing, I propose that the Court should answer the questions as follows:

(1) Articles 6 and 13 of the Sixth Directive require the letting of a dwelling (and possibly of non-residential premises) on the one hand and the related cleaning of the common parts on the other hand to be regarded, in principle, as independent, mutually separable transactions.

However, it is for the national court to verify the extent to which provisions of the relevant letting agreement, house rules applicable to the premises let or established legal practice in the Member State concerned permit, exceptionally, an alternative assessment.

(2) If a national court concludes that the letting of a dwelling on the one hand and the related cleaning of the common parts on the other hand, exceptionally, cannot be regarded as independent, mutually separable transactions, the cleaning of the common parts must be regarded as an element of the 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive, with the result that the application of VAT to the remuneration for that activity is precluded.

1 – Original language: German.

2 – OJ 1977 L 145, p. 1.

3 – Case C?231/94 [1996] ECR I?2395.

4 – On that issue, see Albert, J.-L., *L'IVA nella prospettiva dell'ampliamento dell'Unione Europea, Fiscalità e globalizzazione*, Turin, 2007, p. 53 et seq., who, having regard to the multiplicity of existing national rules on VAT, points to the adaptation difficulties facing accession States, requiring the adoption of transitional rules in certain areas of the services sector.

5 – Terra, B. and Kajus, J., *A guide to the European VAT Directives – Introduction to European VAT 2008*, Volume 1, Chapter 3, heading 3.1.1, p. 87, and Communier, J.-M., *Droit fiscal communautaire*, Brussels, 2001, p. 194 et seq., consider the main impulse for further harmonisation in the area of VAT to be Council Decision **70/243/ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources(OJ, English Special Edition 1970 (I), p. 224)**. That decision established that commencing with the year 1975, in addition to customs duties and agricultural levies, a proportion of VAT revenue was to be used in financing the Community budget. The own resources decision lays down fundamental rules for the financing of the budget of the Communities. As a rule, the decision – most recently Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17) – is adopted by the Council unanimously and ratified by all Member States. Decision 2007/436 provides in Article 2(1)(b) that own resources entered in the general budget of the European Union

are to include revenue from the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases determined according to Community rules. The assessment base to be taken into account for that purpose may not exceed 50% of gross national income for each Member State, as defined in Article 2(7) of that decision. On the functioning of the own resources system, see the report from the Commission 'Financing the European Union' of 6 September 2004 (COM(2004) 505 final).

6 – To that effect, see Voß, R., 'Steuerrecht', in Dauses, M. (ed.), *Handbuch des EU-Wirtschaftsrechts*, Volume 2, Part J, points 184 and 185, Communier, J.-M., cited in footnote 5, p. 192, and Pinheira, G., *A fiscalidade directa na União Europeia*, Coimbra, 1998, p. 22, with the latter author identifying the economic policy objective of harmonisation to be, first, the realisation of the internal market through the elimination of discrimination and distortions of competition in the application of national tax systems and, second, the integration of national economies. Reich, M. and König, B., *Europäisches Steuerrecht*, Zürich, 2006, p. 16, argue that the concept of harmonisation enshrined in Article 93 EC is aimed mainly at removing features of the trade in goods which hinder competition.

7 – The Court stressed on several occasions the need for a uniform application of VAT exemptions, referring in that regard to the 11th recital in the preamble to the Sixth Directive which states 'that a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States'. From that the Court concluded that even though Article 13B of the Sixth Directive refers to the exemption conditions laid down by the Member States, the exemptions provided for by that provision must constitute independent concepts of Community law so that the basis for assessing VAT is determined uniformly and according to Community rules (see Case C?326/99 *'Goed Wonen'* [2001] ECR I?6831, paragraph 47; Case C?358/97 *Commission* v *Ireland* [2000] ECR I?6301, paragraph 51; and Case C?240/99 *Försäkringaktiebolaget Skandia* [2001] ECR I?1951, paragraph 23). Cornia, C., 'Le locazioni di immobili ai fini Iva tra interpretazione della norma e riqualificazione della fattispecie', *Rassegna tributaria*, 2/2005, p. 647, emphasises, too, the need for a uniform application of VAT exemptions.

8 – See the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C?284/03 *Temco Europe* [2004] ECR I?11237, point 1, and of Advocate General Kokott in Case C?428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I?1527, point 16. Haunold, P., *Mehrwertsteuer bei sonstigen Leistungen – Die Besteuerung grenzüberschreitender Dienstleistungen*, Vienna, 1997, pp. 47 and 49, indicates that in interpreting Community law the Court employs all the traditional techniques of interpretation (literal, schematic, teleological and historical interpretations). In his view, a particular feature of the interpretation of VAT directives developed by the Court is the fact that exceptions have, in principle, to be strictly construed, as they constitute derogations from general taxation on consumption and, thus, may result in distortions of competition. That is particularly relevant – he argues – in the application of the exemptions established by the Sixth VAT Directive and also in the interpretation of other VAT provisions which establish derogations from specific principles. In the author's view, the rule of strict interpretation which applies, in principle, to derogations constitutes simply a subcategory of the schematic and teleological approaches to interpretation.

9 – *Faaborg-Gelting Linien,* cited in footnote 3 above, paragraph 12; Case C?150/99 *Stockholm Lindöpark* [2001] ECR I?493, paragraph 26; and Case C?275/01 *Sinclair Collis* [2003] ECR I?5965, paragraph 26.

10 – See Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 6; Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 10; Case C?186/89 *van Tiem*

[1990] ECR I?4363, paragraph 17; *Commission* v *Ireland*, cited above in footnote 7, paragraph 27; and Case C?288/07 *Isle of Wight Council and Others* [2008] ECR I?0000, paragraph 28. In his Opinion in Case 122/87 *Commission* v *Italy* [1988] ECR 2685, Advocate General Vilaça emphasised the broad scope of the Sixth Directive. As he argued there, in my view, correctly, Articles 2 and 4 of the Sixth Directive reflect the general principle applicable to the structure of Community VAT, which is expressed in the preambles to the First and Sixth Directives. In the terms of the fifth recital in the preamble to the First Directive 'a system of value added tax achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution and the provision of services'.

11 – *Stichting Uitvoering Financiële Acties*, cited above in footnote 10, paragraph 13; Case C?453/93 *Bulthuis-Griffioen* [1995] ECR I?2341, paragraph 19; Case C?2/95 *SDC* [1997] ECR I?3017, paragraph 20; Case C?216/97 *Gregg* [1999] ECR I?4947, paragraph 12; *Commission* v *Ireland*, cited above in footnote 7, paragraph 52; *Stockholm Lindöpark*, cited above in footnote 9, paragraph 25; *'Goed Wonen'*, cited above in footnote 7, paragraph 46; and Case C?280/04 *Jyske Finans* [2005] ECR I?10683, paragraph 21.

12 – *Stichting Uitvoering Financiële Acties*, cited above in footnote 10, paragraph 11; *Bulthuis-Griffioen*, cited above in footnote 11, paragraph 18; *SDC*, cited above in footnote 11, paragraph 21; *Commission* v *Ireland*, cited above in footnote 7, paragraph 51; Case C?315/00 *Maierhofer* [2003] ECR I?563, paragraph 25; *Sinclair Collis*, cited above in footnote 9, paragraph 22; *Temco Europe,* cited above in footnote 8, paragraph 16; and *Fonden Marselisborg Lystbådehavn*, cited above in footnote 8, paragraph 27.

13 – *'Goed Wonen'*, cited above in footnote 7, paragraph 44, and *Sinclair Collis*, cited above in footnote 9, paragraph 24.

14 – To that effect, see *Temco Europe*, cited above in footnote 8, paragraph 18, and *Fonden Marselisborg Lystbådehavn*, cited above in footnote 8, paragraph 28.

15 – *Commission* v *Ireland*, cited above in footnote 7, paragraphs 52 to 57; Case C?409/98 *Mirror Group* [2001] ECR I?7175, paragraph 31; *'Goed Wonen'*, cited above in footnote 7, paragraph 55; Case C?108/99 *Cantor Fitzgerald International* [2001] ECR I?7257, paragraph 21; and *Temco Europe*, cited above in footnote 8, paragraph 19. In points 20 and 21 of his Opinion in *Temco Europe*, Advocate General Ruiz-Jarabo Colomer summarised the case-law of the Court defining the letting of immovable property exempt from VAT as follows: '(1) transfer by the owner of an immovable property to another person, (2) to the exclusion of all others, (3) of the use and enjoyment thereof, (4) for an agreed term, (5) in exchange for the payment of rent. In order to decide whether that definition applies to a specific agreement, account must be taken of all the elements of the transaction and the circumstances in which it takes place, the objective content thereof being decisive, regardless of how the parties have characterised it.'

16 – For that reason in *'Goed Wonen'*, cited above in footnote 7, paragraph 59, the Court held that on a proper construction of Article 13B(b) and C(a) of the Sixth Directive, it does not preclude adoption of a national provision which, for the purposes of the application of the VAT exemption, allows the grant, for an agreed period and for payment, of a right *in rem* entitling the holder to use immovable property (the main proceedings in that case concerned a usufructuary right) to be treated as the leasing or letting of immovable property.

17 – See *'Goed Wonen'*, cited above in footnote 7, paragraph 52, in which the Court held that although the leasing of immovable property is in principle covered by the concept of economic activity within the meaning of Article 4 of the Sixth Directive, it is normally a relatively passive

activity, not generating any significant added value.

18 – See *Temco Europe*, cited above in footnote 8, paragraph 27. In his Opinion in Case C?346/95 *Blasi* [1998] ECR I?481, point 15, Advocate General Jacobs identified the letting of immovable property also to be a ‘comparatively passive activity’.

19 – Case C?349/96 *CPP* [1999] ECR I?973, paragraph 27; Case C?41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I?9433, paragraph 18; and Case C?425/06 *Part Service* [2008] ECR I?897, paragraph 49.

20 – See *CPP*, cited above in footnote 19, paragraph 29.

21 – The concept of practicability is an important factor in determining whether in a particular case there is a comprehensive supply or two independent supplies. As Advocate General Kokott in footnote 23 to her Opinion in *Levob Verzekeringen and OV Bank*, cited above in footnote 19, observes, in my view, correctly, there is in some Opinions even a discernible tendency in this situation to give precedence to practicability over accuracy. See the Opinion of Advocate General Cosmas in *Faaborg Gelting Linien*, cited above in footnote 3, point 14; the Opinion of Advocate General Fennelly in Case C?327/94 *Dudda* [1996] ECR I?4595, point 35; and the Opinion of Advocate General Fennelly in *CPP*, cited above in footnote 19, point 47 et seq.

22 – See *CPP*, paragraph 29, *Levob Verzekeringen and OV Bank*, paragraph 20, and *Part Service* , paragraph 50, all cited above in footnote 19.

23 – *Part Service*, cited above in footnote 19, paragraph 51.

24 – To that effect, see *CPP*, cited above in footnote 19, paragraph 30; Case C?34/99 *Primback* [2001] ECR I?3833, paragraph 45; *Levob Verzekeringen and OV Bank*, cited above in footnote 19, paragraph 21; and *Part Service*, cited above in footnote 19, paragraph 52.

25 – See, *CPP*, paragraph 29, and *Part Service*, paragraph 52, both cited above in footnote 19.

26 – See *Levob Verzekeringen and OV Bank*, paragraph 22, and *Part Service*, paragraph 53, both cited above in footnote 19.

27 – See the submission of the Czech Government, p. 5.

28 – See *‘Goed Wonen’*, cited above in footnote 7, paragraph 56, in which the Court cited the ‘observance of the principle of the neutrality of VAT’ and the ‘requirement for a consistent application of the provisions of the Sixth Directive, in particular the proper, simple and uniform application of the exemptions provided for’ in justification of its decision to treat the grant of a right such as a usufructuary right like leasing and letting, for the purposes of the application of Article 13B(b) and C(a) of the Sixth Directive. See also Case C?283/95 *Fischer* [1998] ECR I?3369, paragraph 28. Cornia, C., cited above in footnote 7, p. 647, takes the view that the uniform application of Community law in the context of VAT exemptions results from the need to ensure fiscal neutrality at the level of competition. She contends that fiscal neutrality requires transactions which from the perspective of the final consumer are equal to receive the same VAT treatment. Birkenfeld, W., *Mehrwertsteuer der EU*, 4th edition, Bielefeld, 2001, pp. 32 and 33, indicates that on grounds of fiscal neutrality the Court adopts a wide interpretation to basic concepts (taxable person, economic activity, supply, consideration) with which the tax is assessed. For the same reason, he continues, the Court is strict in its interpretation of exemptions and derogations from the basis of assessment. Lohse, C., ‘Der Neutralitätsgrundsatz im Mehrwertsteuerrecht’, in Achatz, M. and Tumpel, M. (eds), *EuGH-Rechtsprechung und Umsatzsteuerpraxis*, Vienna, 2001, pp. 58

and 59, argues that the principle of neutrality is apt to limit the scope of exemptions with a strict interpretation of their conditions. Inversely, he argues, that principle requires that the conditions establishing the scope of VAT must be interpreted widely.

29 – The first and second paragraphs of Article 2 of Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (First Directive) (OJ, English Special Edition 1967, p. 14) are worded as follows: 'The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.'

30 – See Case C?155/94 *Wellcome Trust* [1996] ECR I?3013, paragraph 38, and Case C?381/97 *Belgocodex* [1998] ECR I?8153, paragraph 18.

31 – Case C?382/02 [2004] ECR I?8379, paragraphs 23 and 24.

32 – Cited above in footnote 11, paragraph 39.

33 – See point 37 of this Opinion.

34 – See point 6 of the reference for a preliminary ruling.

35 – See point 13 of the submissions of the Czech Government.

36 – Case 173/88 [1989] ECR 2763, paragraph 16. That case was centred on the question whether the concept of the 'letting of premises and sites for parking vehicles' set out in Article 13B(b)(2) of the Sixth Directive which provides for a derogation from the general exemption for 'letting or leasing of immovable property' contained in Article 13B(b) of the same directive covers the letting of all places designed to be used for parking vehicles, including closed garages. The Court held that such lettings cannot be excluded from the exemption in favour of the 'leasing or letting of immovable property' if they are closely linked to lettings of immovable property for another purpose which are themselves exempt from VAT. According to the Court, a single economic transaction exists 'if the parking place and the immovable property to be used for another purpose are part of a single complex and ... if both properties are let to the tenant by the same landlord'.

37 – Cited above in footnote 19. In paragraph 31 of that judgment, the Court stated that although the fact that a single price is charged is not decisive, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. *A contrario*, it must follow therefore that separate invoicing for an element of the composite supply may point against the existence of a single service.

38 – See point 42 of this Opinion.

39 – Ibáñez García, I., 'Las exenciones en el IVA: Pecado original del impuesto comunitario', *Noticias de la Unión Europea*, 2003, No 226, p. 103 et seq.; he is also the author of 'El IVA en la actividad inmobiliaria: cuestiones pendientes', *Gaceta jurídica de la Unión Europea y de la competencia*, 4/2008, p. 43 et seq., in which he criticises the legal uncertainty which results from the list of derogations and exemptions from VAT having regard to their complex application. The

author considers that to restrict the principle of fiscal neutrality. The theoretical considerations of Scholsem, J.-C., *La T.V.A. européenne face au phénomène immobilier*, Liège, 1976, point 55, pp. 93 and 94, are of particular interest for the case giving rise to the main proceedings. The author examines different hypothetical tax models governing letting arrangements. In one model, all transactions related to letting, including the letting itself, are subject to VAT. In his view, that solution is the closest to the principle of fiscal neutrality. An alternative solution, corresponding arguably to the model of the Sixth Directive, exempts the letting of immovable property from VAT on social policy grounds; a position, in his view, which although contrary to fiscal neutrality is justified all the same. However, the 'costs of maintenance and repair' would in all cases be removed from the scope of that exemption, a restriction which the author justifies on grounds of 'administrative simplicity'.

40 – See the Commission proposal for the Sixth Directive (*Bulletin of the European Communities*, No 11-1973, p. 17). On that point, see the Opinion of Advocate General Kokott in *Fonden Marselisborg Lystbådehavn*, cited above in footnote 8, point 46. Communier, J.-M., cited above in footnote 5, p. 230, argues that the exemptions contained in Article 13B(b) of the Sixth Directive may be explained by general political considerations which are common to the Member States of the European Community. According to Scholsem, J.-C., cited above in footnote 39, point 163, p. 264, Article 13B(b) reflects the rule which prevailed with certain variations in all Member States before the Sixth Directive entered into force.

41 – See point 32 of this Opinion.

42 – See points 28 and 29 of this Opinion.

43 – See points 42 to 47 of this Opinion.

44 – Opinion of Advocate General Jacobs in *Blasi*, cited above in footnote 18, points 15 and 16.

45 – See point 32 of this Opinion.