OPINION OF ADVOCATE GENERAL

TRSTENJAK

delivered on 2 April 2009 1(1)

Case C?37/08

RCI Europe

v

Her Majesty’s Commissioners of Revenue and Customs

(Reference for a preliminary ruling from the VAT and Duties Tribunal (United Kingdom))

(Tax law – Harmonisation – Turnover taxes – Interpretation of Article 9 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 – Rules for the determination of the place of taxable transactions – Supply of services connected with immovable property – Services designed to facilitate for owners of timeshare interests in certain holiday properties the exchange of those usage rights – Exchange club)

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I – **Introduction**

1. By its reference for a preliminary ruling under Article 234 EC, the London VAT Tribunal Centre ('the referring tribunal') refers to the Court of Justice of the European Communities a number of questions concerning the interpretation of Article 9(2) of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (Sixth Directive). (2)

2. That reference is being made in the context of an appeal brought by RCI Europe ('the applicant') before the Value Added Tax Tribunals in the United Kingdom ('the VAT Tribunal') against three decisions of the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners'). In that appeal, the applicant is challenging before the courts an assessment for VAT on the transactions carried out by it, which the Commissioners consider to have been under?declared.

3. The parties in the main proceedings are essentially in dispute over the assessment for VAT purposes of cross?border supplies of services, in particular over the decisive point of reference in determining the place of supply of the services. That will in turn determine the answer to the question whether the tax jurisdiction of the United Kingdom, where the applicant as a company has its registered office, applies at all to the transactions concerned.

II – **Legislative context**

4. The Sixth Directive lays down rules for determining the place of a taxable transaction. That directive was recast by Council Directive 2006/112/EC of 28 November 2006, (3) which entered into force on 1 January 2007, although the provisions which are relevant to the case at issue in the main proceedings were incorporated in largely unchanged form.

5. Article 9(1) of the Sixth Directive (4) lays down the following general rule:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

6. Article 9(2) of the Sixth Directive (5) contains a number of special rules. Thus, under Article 9(2)(a), 'the place of the supply of services connected with immovable property, including the services of estate agents and experts, and of services for preparing and coordinating construction works, such as the services of architects and of firms providing on site supervision' is to be 'the place where the property is situated'.

7. Article 26 of the Sixth Directive (6) contains a special scheme for travel agents:

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

2. All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services. The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of this service shall be the travel agent's margin, that is

to say, the difference between the total amount to be paid by the traveller, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller.'

III – **Facts**

A – *The business of RCI Europe*

8. The applicant in the main proceedings was established in the United Kingdom on 29 November 1973. Its business is facilitating and organising the exchange of timeshare interests held by its members in holiday homes abroad (also known as 'the timeshare model').

9. The legal nature of a specific timeshare interest is governed by the laws of the country in which the property is located. However, the timeshare owner typically has the right to occupy a specific holiday property at a particular resort for a specified length of time within an identified range of dates. The timeshare interest that the member has in the property is referred to as his 'holiday usage rights'.

10. The applicant operates a week?for?week timeshare exchange programme known as 'RCI Weeks', which has a number of specific features, as described below.

11. Under that programme, holiday resort developers are invited to become 'affiliates'. Individuals who own timeshare interests (purchased from a developer) in an affiliated resort can apply to become members of RCI Weeks.

12. Membership of RCI Weeks entitles the member to deposit holiday usage rights in respect of his timeshare property into a pool of timeshare accommodation ('the Weeks Pool') and have made available to him the holiday usage rights deposited by other members into the Weeks Pool. During that process, members are in contact only with the applicant. When holiday usage rights are deposited into the Weeks Pool, the applicant does not acquire title to the property in which the timeshare interest is held. On the contrary, the original timeshare owner retains his interest in the timeshare at all material times.

13. RCI Weeks members pay an enrolment fee, which covers a period from one to five years, and subscription fees, which are payable annually. In addition, there is an exchange fee payable in advance, on the date of the request for exchange. From an accounting perspective, the applicant treats this fee as a returnable deposit. If the applicant is unable to identify an exchange acceptable to the member from within the Weeks Pool, it holds the exchange fee as a credit to the member's account against future exchange fees or, if requested by the member, refunds it.

14. The Weeks Pool can be supplemented by the applicant buying in accommodation from a third party, or a developer making extra weeks available. A member of RCI Weeks can request an exchange in respect of this supplemental accommodation on payment of an exchange fee.

B – *The procedure before the national tax authorities*

15. The applicant has its registered office in the United Kingdom. A large proportion of its members consists of nationals of that Member State. On the other hand, a large proportion of the properties which are subject to the RCI Weeks exchange programme is in Spain.

16. Because of those circumstances, the competent United Kingdom and Spanish tax authorities reached differing conclusions with regard to the applicant's VAT status. In their view, the services supplied by the applicant are subject to their respective national VAT rules. Consequently, they each demanded that the applicant pay the VAT on the transactions effected,

which ultimately amounts to double taxation in two different Member States.

1. The position taken by the tax authorities in the United Kingdom

17. The Commissioners contend that the supply of membership of a timeshare exchange club is a service supplied in the place where the applicant has established its business, that is, in the United Kingdom. Accordingly, the enrolment fee and subscription fee income should be subject to VAT in the United Kingdom. The exchange fee income was treated by the Commissioners as falling within the scope of the national provisions which implement Article 26 of the Sixth Directive. The service supplied in return for the exchange fee was classified by the Commissioners as a 'designated travel service' and, therefore, taxable in the United Kingdom.

18. It is apparent from the order for reference that, until 31 December 2003, the applicant was paying VAT in the United Kingdom on all enrolment fees received from new members and on all subscription fees received from existing members in respect of subsequent membership years. In addition, until 31 December 2005, the applicant was also paying VAT in the United Kingdom on exchange fee income that it received from members who had acquired the right to use a timeshare interest in a property located in a Member State of the European Union. The applicant did not pay VAT in the United Kingdom on exchange fee income that it received from members who had acquired the right to use a timeshare interest in a property located outside the European Union.

2. The position taken by the tax authorities in Spain

19. The Spanish tax authorities, on the other hand, proceed on the basis that the services supplied by the applicant were connected with immovable property and therefore subject to VAT in the country in which the timeshare property is located.

20. The tax certificates executed against the applicant by the Spanish tax authorities, including the adverse judgments of the finance courts, are currently the subject of an appeal in cassation brought before the Spanish Supreme Court.

IV – **Main proceedings and questions referred**

21. On the basis of the above position of the Spanish authorities, as from 1 January 2004 the applicant ceased to account for VAT in the United Kingdom on enrolment and subscription income that it received from members with properties in Spain. It also ceased to account in the United Kingdom for VAT on exchange fee income that it received from members who exchanged their holiday usage rights for equivalent rights in respect of a Spanish property.

22. On 23 March 2005, the Commissioners decided to raise an assessment to recover the amount of VAT that they considered the applicant should have accounted for, during the course of 2004, on enrolment and subscription income received from members with holiday usage rights in properties in Spain and exchange fees received for holiday usage rights in respect of Spanish properties. The assessment was raised on 5 April 2005 for the sum of GBP 1 339 709.

23. On 5 May 2005, the applicant lodged an appeal against that assessment before the referring tribunal.

24. The referring tribunal refers in its order for reference to the continuing legal uncertainty surrounding the determination of the place of supply and to the danger that it could adversely affect the applicant in the conduct of its business. It therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. In the context of the services supplied by the applicant for:

– the enrolment fee;

– the subscription fee; and

– the exchange fee

paid by members of the applicant’s Weeks Scheme, what are the factors to be considered when determining whether the services are “connected with” immovable property within the meaning of Article 9(2)(a) of the Sixth VAT Directive (now Article 45 of the Recast VAT Directive)?

2. If any or all of the services supplied by the applicant are “connected with” immovable property within the meaning of Article 9(2)(a) of the Sixth VAT Directive (now Article 45 of the Recast VAT Directive), is the immovable property with which each or all of the services are connected the immovable property deposited into the pool, or the immovable property requested in exchange for the deposited immovable property, or both of these properties?

3. If any of the services are “connected with” both immovable properties, how are the services to be classified under the Sixth VAT Directive (now the Recast VAT Directive)?

4. In light of the divergent solutions found by different Member States how does the Sixth VAT Directive (now the Recast VAT Directive) characterise the “exchange fee” income of a taxable person received for the following supplies:

– facilitating the exchange of holiday usage rights held by one member of a scheme run by the taxable person for the holiday usage rights held by another member of that scheme; and/or

– supplying usage rights in accommodation purchased by the taxable person from taxable third parties to supplement the pool of accommodation available to members of that scheme?’

V – **Proceedings before the Court of Justice**

25. The order for reference dated 9 January 2008 was received at the Court Registry on 31 January 2008.

26. The applicant in the main proceedings, the Governments of the United Kingdom, the Kingdom of Spain and the Hellenic Republic, and the Commission submitted written observations within the period specified in Article 23 of the Statute of the Court of Justice.

27. Representatives of the applicant in the main proceedings and of the Governments of the United Kingdom, the Kingdom of Spain and the Hellenic Republic, and the Commission presented oral submissions at the hearing held on 19 February 2009.

VI – **Main arguments of the parties**

A – *The first and second questions*

28. The *applicant* in the main proceedings submits that the services which were supplied in return for payment of the enrolment fees and subscription fees did not have a sufficient connection with a specific immovable property and therefore did not fall within the scope of Article 9(2) of the Sixth Directive. On the contrary, the general rule in Article 9(1) of that directive is applicable, with the consequence that the place of the services to be supplied, namely the registration and enrolment of new members, is the place where the supplier of the services has established his

business. In this case, that is the United Kingdom.

29. The same must be true of those services which were supplied in return for payment of the exchange fees, particularly since that would be consistent with a view to tax treatment of the entirety of the services supplied. It would be artificial to apply differential treatment to what is essentially a single supply of services.

30. The *Government of the United Kingdom* argues that the services which were supplied in return for payment of the enrolment fees and subscription fees must fall within the scope of Article 9(1) of that directive. Along similar lines to the applicant in the main proceedings, it maintains that the services which were supplied in return for the fees in question do not have a sufficiently direct connection with any immovable property. Its reason for taking this view is, inter alia, that the applicant merely supplies access to a form of marketplace in which members may exchange their usage rights. As regards the exchange fees, the Government of the United Kingdom explains that there is no connection with any immovable property, particularly since the member can both deposit his usage right and pay the exchange fee up to 24 months before taking his usage rights out of the pool.

31. The *Government of the Kingdom of Spain* submits, in regard to the first question, that there are essentially two factors to be taken into account in determining whether it is the rule for services connected with immovable property or the special scheme for travel agents that must apply. First, it is necessary to take into account the manner in which the intermediary acts and to ascertain whether it acts in its own name or on behalf of another person. Second, it must be established whether or not the intermediary acquires the goods and services necessary for its business from other taxable persons.

32. With regard to the second question, the Government of the Kingdom of Spain states that, if it is correct to assume that the services in question are connected with the particular immovable property, the enrolment and subscription fees must be directly connected with the immovable properties in which the member’s own timeshare interests which they deposit in the pool. They are in fact fees which are payable merely for belonging to the scheme itself, even if no use is made of it by the member.

33. The *Government of theHellenic Republic* takes the view that the factors to be considered in order to be able to determine whether services are “connected with immovable property” within the meaning of Article 9(2)(a) of the Sixth Directive include the type of business carried on by the applicant and the relationship between the services in question and the property. In particular, it must be examined whether those services are independent services in the form of travel services to be supplied to the timeshare owners or whether they are reciprocal services between timeshare owners participating in the exchange programme, which are performed through the intermediary of the applicant.

34. The Government of the Hellenic Republic proposes that the second question should be answered to the effect that the enrolment fee and subscription fees are directly connected with the immovable property in which the member has a timeshare interest, whereas the exchange fee is directly connected with the immovable property in respect of which the exchange right is exercised.

35. The *Commission* argues that the service supplied by the applicant consists in facilitating the exchange of timeshare rights. The fees payable must therefore be regarded as consideration for participation in that scheme. In its view, those timeshare rights are rights in immovable property and their cession in exchange for the enjoyment of equivalent rights is in turn a service connected with immovable property within the meaning of Article 9(2) of the Sixth Directive. The place of

supply of the service for which the enrolment and subscription fees are paid is the place where the immovable property in which the member holds timeshare rights is situated. The place of supply of the services for which the exchange fees are paid is, on the other hand, the place where the immovable property in which the member receives timeshare rights in exchange is situated.

B – *The third question*

36. In the view of the *applicant*, the third question in the form in which it is worded by the referring tribunal in its reference to the Court for a preliminary ruling does not arise at all. As its observations on the first and second questions show, the services supplied by it do not have a sufficient connection with immovable property.

37. It further submits that the conclusion that the supply of services could be connected with both immovable properties, namely, both with the deposited property and with that requested in exchange for the deposited property, is contrary to the meaning and purpose of Article 9 of the Sixth Directive. By Article 9 of the directive, the Community legislature intended to prevent conflicts between Member States over their jurisdiction to levy VAT and to avoid double taxation. It is therefore only one property, namely that with which the most immediate connection is established, which can be relevant for the purposes of Article 9(2)(a).

38. The *Government of the United Kingdom* is of the view, for the same reasons as the applicant, that the third question referred does not require an answer, because the service supplied by the applicant is not in fact connected with immovable property. Rather, this question illustrates the problems inherent in holding the opposite view. If the services provided by the applicant were actually connected both with the property usage right deposited and with that obtained by way of exchange, it would be necessary to apply two different national VAT rates to the same service.

39. The *Government of the Kingdom of Spain* also considers it very unlikely that a supply of services could be connected with both immovable properties. This follows from its observations on the second question: the service of admission to the Weeks Pool, which is provided in return for the enrolment fee and the subscription fees, is connected solely with the immovable property in which the member holds his timeshare interest; however, the service which is provided in return for the exchange fee – offering the member another member's timeshare interest which meets his wishes for the exchange of his timeshare interest – relates directly to the immovable property over which the exchange right is exercised. However, should the consideration for the enrolment fee/subscription fees, on the one hand, or the exchange fee, on the other, in fact be connected with both immovable properties, then, applying the judgment in Case C?429/97 *Commission* v *France*, (7) the place where the supplier of the services has established his business is to be regarded as the place of supply of the services.

40. Following its observations on the second question, which are essentially the same as those of the Spanish Government, the *Government of the Hellenic Republic* likewise comes to the conclusion that the third question should be answered to the effect that a transaction is never connected with both immovable properties at the same time.

41. Finally, the *Commission* does not deal with the third question at all in its written observations, because, in its view, which is essentially identical with that of the Kingdom of Spain and the Hellenic Republic, that question does not arise. The services supplied by the applicant are either connected with the immovable property in which the member holds the timeshare interest (as is the case with admission to the exchange scheme in return for the enrolment fee and subscription fees) or with the immovable property which the member may use in exchange (as is the case with the service supplied in return for the exchange fee), but never with both immovable

properties at the same time.

C – *The fourth question*

42. The *applicant* takes the view that it makes no difference to the place of supply of the services whether the timeshare interests were deposited in the Weeks Pool by another member or purchased by the applicant from taxable third parties to supplement its pool of accommodation. That is because the applicant's service which it provides in return for the exchange fee is the same regardless of the source of the timeshare interest which is offered to the member in exchange for his deposited timeshare interest. Consequently, regardless of the source of the timeshare interest obtained in exchange, the service should be treated for VAT purposes in accordance with the applicant's observations on the first and second questions.

43. The *Government of the United Kingdom* also submits that the source of the timeshare interest has no bearing on the place where the service is supplied. In both situations identified in the fourth question, the applicant simply provides, in return for the exchange fee, an administrative service which consists in offering the member a number of timeshare interests in other resorts which match his exchange wishes. No actual transmission of a timeshare interest takes place, because the applicant cannot guarantee that it will find anything suitable at all and the member does not have to accept any of the timeshare interests offered. Consequently, the income from the service which the applicant provides in return for the exchange fee is taxable under Article 9(1) of the Sixth Directive irrespective of the source of the timeshare interest.

44. In the alternative, however, the Government of the United Kingdom submits that, if it is wrong in its analysis and the exchange fee is charged as consideration for the actual transmission of the timeshare interest in another resort, then, in the second situation referred to in the fourth question, in which the applicant purchased the timeshare interest from a taxable third party, it would nevertheless be taxable at the applicant's place of business. That is because the special scheme for travel agents would apply in that case.

45. The *Government of the Kingdom of Spain* refers, for the purpose of answering the fourth question, to its observations on the exchange fee. As it has already observed with regard to the second question, the exchange fee is paid for the right to use the timeshare interest in another resort, is therefore connected with that property, and is consequently taxable at the place where that property is situated.

46. The *Government of the Hellenic Republic* differentiates between the two situations referred to in the fourth question, in which regard it appears to proceed on the basis that an additional fee is payable for making available usage rights purchased by the applicant from taxable third parties. In the first situation – where the applicant offers the member the timeshare interest of another member – the exchange fee is taxable in the place where the property in which that other member's timeshare interest is held is situated. In the second situation, however, a further distinction must be drawn: where the applicant makes available a usage right of a developer of a holiday resort, the situation must be treated as described above. Where the applicant purchases the usage right in order to comply with the member's request and sells it on to that member, that service falls within the scope of the special scheme for travel agents. Finally, where the applicant makes available usage rights which it owns itself, this constitutes the activity of a hotelier and is therefore also taxable in the place where the property in which those usage rights are held is situated.

47. Finally, in its written observations, the *Commission* does not discuss the fourth question at all. Reference can therefore be made here only to its view that the service supplied in return for the exchange fee is connected with the immovable property which can be used in exchange for

the deposited timeshare interest.

VII – **Law**

A – *Introductory remarks*

1. Need for uniform determination of the place of supply

48. The legal dispute between the applicant and the Commissioners is sparked by the question regarding the place where the taxable transaction is carried out. The question which in turn hinges on the answer to that question is whether the income obtained by the applicant in the course of its business is subject to the jurisdiction of the United Kingdom or the Spanish tax authorities.

49. The provisions relating to the place of supply of services occupy a central place in the assessment of cross?border supplies of services for turnover tax purposes, since they govern the question concerning the applicability of national VAT legislation. (8) Since the scope of the VAT system covers supplies of goods and services which a trader makes for consideration within the territory of the country in the course of his business, only a place of supply within the territory of the country allows the application of national VAT legislation.

50. If each national tax jurisdiction were to refer to different criteria as the basis for determining the place of supply, not only double taxation, but also non?taxation, could be expected to occur. It is precisely from that point view that a uniform basis for determining the place of supply within the common market acquires particular importance. (9) The rules in the Sixth Directive concerning the place of supply are intended, according to the seventh recital in the preamble to the directive, to delimit the powers of taxation of the individual Member States from one another so as to avoid such conflicts of jurisdiction. (10) Uniform determination, on a Community?wide basis, of the place of supply for tax purposes is intended to secure the rational delimitation of the respective areas covered by national VAT rules. (11)

2. The fundamental principles underlying the rules on the place of supply

51. Conflicting classifications among Member States can be avoided by rules which are as simple and clear as possible, although, from a legislative point of view, different points of reference are possible, depending on whether precedence is given to the principle of the place where the undertaking is established or to the destination principle. Under the first principle, the place of supply is where the person supplying the services has established his business, whereas, under the second principle, the place of supply is fixed as the place where the likely consumption of and/or application of income from the supply takes place.

52. Conscious of the fact that both principles have advantages as well as disadvantages for the functioning of the common market, the Community legislature, in framing the rules on the place of supply in the Sixth Directive, decided in favour of a hybrid approach (12) by providing, in Article 9(1), that the place where services are supplied should, in principle, be the place of business of the person supplying them. However, in Article 9(2), it made numerous mandatory exceptions to that principle, which considerably restrict the scope of Article 9(1) and allow the principle of the place of business itself, which is the prevailing principle in the Sixth Directive, to become the exception. (13) In addition, there are special rules and schemes which take into account the particular features of certain economic activities.

B – *Analysis of the questions*

1. General considerations

a) Distinction between the supply of goods and the supply of services

53. It must first be noted that neither the referring tribunal nor the parties to the present proceedings deny that the applicant's business consists exclusively of the supply of services, within the meaning of Article 6(1), carried out for consideration. In my view, that legal assessment is correct and should therefore form the basis of the analysis that follows.

54. In the light of the clear distinction which the Sixth Directive draws with respect to the legal classification of transactions which are subject to VAT, (14) recourse to the provisions concerning the supply of goods in Article 5 and Article 8 of the Sixth Directive is ruled out. The only point at issue is therefore the applicability of Article 9(1) and (2)(a) and the special scheme for travel agents in Article 26(1) to the services in question.

b) Clarification of the questions

55. It should further be noted that the referring tribunal's questions display considerable overlap in terms of content, which in my view necessitates some clarification of those questions.

56. First, on an objective appraisal of the reference for a preliminary ruling, the questions referred seek an assessment of the extent to which the various types of fees which are payable by members participating in the RCI Weeks exchange programme can be attributed to individual services supplied by the applicant.

57. The existence of a synallagmatic legal relationship, pursuant to which the contracting parties undertake mutually to render reciprocal performance in the form of a supply of services and a consideration, is relevant in the light of the fact that, under Article 2(1) of the Sixth Directive, only the supply of services effected for consideration is to be subject to VAT. (15) Consequently, a precise identification of the applicant's individual contractual obligations is required in this case.

58. Second, the questions are directed towards an examination of which of the abovementioned provisions governing the place of supply is to be regarded as applicable to the services in question. By reference to those provisions, it will be possible to ascertain whether and to what extent the United Kingdom's tax jurisdiction applies.

59. For reasons of clarity and in the interests of providing a useful answer to the questions referred, I shall concentrate my legal analysis on those two main aspects.

2. Assessment for VAT purposes of the individual supplies

60. It seems most effective to analyse the applicant's supplies by applying a type of converse reasoning on the basis of the various fees which it charges its customers. The fees charged by the applicant are, first, enrolment fees in the form of a one?off admission fee which the member must pay on initial registration; second, the annual subscription fee; and, finally, what is termed an 'exchange fee' in the event of successful arrangement of an exchange of usage rights under the RCI Weeks programme. I shall consider below, differentiated on the basis of those fees, which of the applicant's supplies are connected with them. In that context, I shall examine whether those supplies constitute a single supply or supplies to be treated as separate and whether they constitute the proper consideration for the fee. It will then be possible to determine from the insights gained by which chargeable event for VAT purposes the supply is covered, and consequently deduce the place of supply.

61. Determining the supplies effected is difficult in the case of timeshare contracts. No single type of contract exists for them under civil law. (16) It is possible to find perpetual rights of use and enjoyment in the form of tenancy agreements, fiduciary models with arrangement of rights of use and enjoyment *in rem*, shareholding models, holiday club models and numerous other variants. That confused situation was also the reason why Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (17) was adopted. Since a number of new timeshare models were already being marketed immediately after that directive entered into force, in 2007, in order to close gaps in the law, the Commission submitted proposals for amendments in favour of stronger consumer protection, which were adopted in slightly amended form by the European Parliament on 22 October 2008.

62. However, this case is not concerned with the conclusion of timeshare contracts as such, but rather with the exchange of leisure?time usage rights between members of an exchange club.

a) Enrolment fees

i) Classification as consideration

63. It follows from the Court's case?law that a synallagmatic legal relationship can be taken to exist if there is a direct link between the service rendered and the consideration received, the sums paid constituting genuine consideration for an identifiable service supplied in the context of a legal relationship in which performance is reciprocal. (18)

64. In regard to the enrolment fees, there would therefore have to be a direct connection with a sufficiently identifiable supply.

65. A closer examination of the applicant's business model, as it is described in detail by the applicant itself and the Government of the United Kingdom in their written observations, shows that, in return for payment of the enrolment fees, a member initially receives only access to the RCI Weeks exchange programme.

66. However, mere enrolment does not yet confer the right to make use of the timeshare interests of other members. For that purpose, in addition to membership of RCI Weeks, it is necessary to deposit timeshare interests of one's own into the pool. It is a specified requirement in that regard that the holder of a timeshare interest submit a request to the applicant for an exchange, in which case he must, first, make available a specific timeshare interest of his own and, second, select an equivalent timeshare interest.

67. In addition to the possibility of participating in the exchange programme, the member receives access to a range of information on the holiday properties on offer, including in the form of a regularly updated catalogue in printed form and an internet-based directory. The member is also given a telephone number on which he can, if necessary, contact the applicant's staff and find out both about the exact detailed arrangements for an exchange and about any additional services which the applicant may provide on enquiry.

68. From the perspective of a new member, access to RCI Weeks therefore takes the form, to a certain extent, of a preliminary step towards participation in the exchange programme, in which all possibilities are potentially available to the member in return for payment of the enrolment fee. The information which is made available to the newly?enrolled member is aimed at preparing him for the actual exchange programme. However, enrolment does not yet involve the transmission of rights, but merely the procurement of access to a form of marketplace in which members can, with

the applicant's help, exchange their timeshare interests. Membership in itself, however, does not create an obligation to participate in that exchange programme.

69. In that respect, a direct link within the meaning of the case?law exists only between the activity of procuring access to the exchange programme in question and the payment of enrolment fees.

70. By contrast, a direct link cannot readily be made between enrolment and actual implementation of the exchange programme, since that requires further involvement on the part of the contracting parties, namely the making of a request by the member and the confirmation of the feasibility of the exchange by the applicant and, not least, the payment of the exchange fee.

ii) Determination of the place of supply

71. It must further be examined how that supply of services is to be classified within the overall scheme of the rules in the Sixth Directive governing the place of supply. An application of the rules contained in Article 9(1) and (2) of the Sixth Directive can be considered a possibility. This calls for some preliminary observations on the interpretation of those provisions.

72. Article 9(1) of the Sixth Directive contains a general rule for determining the place of supply for tax purposes, while Article 9(2) gives a number of special instances of such places. (19)

73. It is true that the Sixth Directive contains no express provisions on the relationship of the basic rule in Article 9(1) to the special rules in Article 9(2). Nevertheless, the Court has held that Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2) of that directive; if not, it falls within the scope of Article 9(1). (20) The Court has inferred from this that the special rule in Article 9(2)(a) of the Sixth Directive cannot be regarded as an exception to a general rule to be narrowly construed. (21)

74. The Court thus obviously starts from the assumption that Article 9(2) of the Sixth Directive contains the more specific rules which, under the *lex specialis derogat legi generali* principle, must be examined first and foremost and applied if the relevant conditions are fulfilled. (22)

75. It must therefore first be examined whether a transaction such that already described falls within the scope of the special rule in Article 9(2)(a) of the Sixth Directive. The prerequisite for this is that the supply of services is 'connected with immovable property'.

76. However, the question arises here of the precise identity of the property to which the supply of services relates. In principle, a connection with the property in which the member already holds a timeshare interest, as advocated by the Spanish and Greek Governments and the Commission, is possible.

77. Notwithstanding the strict factual requirements applicable to such a connection, which I shall discuss in more detail below, (23) there does not seem to me, even on first examination, to be a direct connection between the actual supply of services and the property in question.

78. As already explained, from the perspective of a new member, access to RCI Weeks is a preliminary step towards actual participation in the exchange programme. (24) The services which the applicant provides in the form of access and information procurement are actually aimed at preparing the member for the exchange programme, although that does not involve any obligation to participate. Consequently, at this early stage of membership, no exchange of holiday usage rights takes place yet either.

79. Although, after enrolling with RCI Weeks, the opportunity is available to the member to deposit his own timeshare interests into the pool, the granting of that right is of no value to the member so long as the conditions for the actual implementation of an exchange are not fulfilled.

80. The granting to a member of the mere opportunity to deposit his own timeshare interest in a property into the pool cannot, on its own, be regarded as a principal supply for VAT purposes. Considered objectively, it represents, at most, a minor ancillary supply which does not constitute for a member an aim in itself, but a means of better enjoying the principal service supplied, namely the facilitation of the exchange of holiday usage rights.

81. The principle of 'unity of the supply' (25) in VAT law precludes such an ancillary supply from being regarded as a separate supply. It is settled case?law of the Court (26) that the taxable transaction should not be broken down into its various parts in order to charge them separately to VAT. When classifying a transaction, it is necessary to focus on the predominant component within a bundle of supplies. Such an ancillary supply must *a fortiori* not be taken as a basis as the relevant supply when determining the place of supply, but must be subordinate to the actual principal supply. Only the latter is then deemed to be the taxable supply of services within the meaning of Article 2(1) of the Sixth Directive.

82. An application of Article 9(2) of the Sixth Directive must ultimately be ruled out, since, in this case, it is apparent that there is not a sufficiently close connection between the actual supply of services, in return for which a member pays an enrolment fee, and the immovable property in which the member's timeshare interest is held.

83. If, as advocated here, it is assumed that the supply of services in question, for which a member pays an enrolment fee, consists merely of access to the pool and of the provision of information concerning the opportunities of exchanging timeshare interests, an application of Article 26 of the Sixth Directive must also be ruled out, since the applicant does not thereby, in any event, use any supplies and services of other taxable persons which are intended for the provision of travel facilities.

84. Since no special rules or schemes are applicable, the supplies in question fall within the scope of the basic rule in Article 9(1) of the Sixth Directive. Consequently, the place of supply as regards the enrolment fees is the place where the applicant has established its business.

b) Subscription fees

i) Classification as consideration

85. It appears from the applicant's submissions that there is no material difference between the enrolment fee and the subscription fees, since together they constitute consideration for participation in the RCI Weeks exchange programme and for the opportunity to enjoy the benefits associated with membership. (27)

86. Payment of the subscription fees does not appear to involve anything other than the regular

payment of a fixed sum for the use of the full range of the applicant's services. Consequently, it is due even if the member does not participate in the exchange programme, whether that is because he has not deposited any of his own timeshare interests into the pool or because no suitable timeshare interest for an exchange has been found.

87. It is beyond dispute that this case involves a legal relationship pursuant to which there is reciprocal performance. That is not altered by the fact that the subscription fees cannot be related to each personal use of the exchange programme. As the Court held in *Kennemer Golf*, (28) a synallagmatic legal relationship exists even where an association provides a variety of services on a permanent basis and its members supply as consideration a fixed sum in the form of an annual fee. In that respect, the services provided by the applicant fulfil the requirements of a supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive and are thus subject, in principle, to VAT.

ii) Determination of the place of supply

88. However, in view of the fact that the subscription fees are intended as consideration for a variety of services which, first, do not always have a relationship to an immovable property and, second, are not necessarily provided in connection with the implementation of an exchange of timeshare interests, it would, in my view, be a mistake to assume that those services are connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive. That would not only be inconsistent with the facts before the Court, but would also lead to an unjustifiable extension of the special situation covered by that rule.

89. Like the enrolment fee, the subscription fees are linked to membership and its associated benefits. In that respect, it seems logical to treat them in a manner similar to the enrolment fee for VAT purposes.

90. Consequently, so far as concerns the subscription fees, the place of supply is, pursuant to Article 9(1) of the Sixth Directive, the place where the applicant has established its business.

c) Exchange fees

i) Classification as consideration

91. Unlike in the case of the fees mentioned previously, the member pays the exchange fee with a view to actual implementation of the exchange programme. By no later than the date on which such an exchange of timeshare interests is properly confirmed, the applicant, who has a coordinating function in that process, (29) invoices the member for the exchange fee.

92. Both contracting parties thus render their respective performance for the sake of the consideration. It is therefore beyond dispute that the claims of both contracting parties are based on a synallagmatic legal relationship.

ii) Determination of the place of supply

93. It is disputed, however, under which rule the place of supply is to be determined.

– Applicability of the special scheme for travel agents

94. The first possibility is the special VAT scheme in Article 26 of the Sixth Directive. Unlike the other parties to the proceedings, the Government of the United Kingdom does not categorically rule out its applicability.

Spirit and purpose of the scheme

95. Article 26 of the Sixth Directive introduces an exception to the general rules on the taxable amount with respect to certain operations of travel agents and tour operators. (30) As an exceptional provision, that article must be applied only to the extent necessary to achieve its objective. (31)

96. The objective of the special VAT scheme introduced by Article 26 of the Sixth Directive is to adapt the applicable rules to the specific nature of the activity of travel agents and tour operators. The services provided by such undertakings most frequently consist of multiple services, in particular transport and accommodation, supplied partly outside and partly inside the territory of the Member State in which the undertaking has established its business or has a fixed establishment. The application of the normal rules on place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations. (32)

97. In order to avoid that, Article 26(2) provides inter alia that all transactions performed in respect of a journey are to be treated as a single service supplied to the traveller. It is to be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which he has provided the services.

Preconditions for application

– Status of travel agent or tour operator

98. It should be noted as a preliminary point that the fact that the applicant is neither a travel agent nor a tour operator within the normal meaning of those terms does not, in itself, preclude the application of Article 26 of the Sixth Directive, in so far as, in accordance with the case?law of the Court, the applicant effects identical transactions in the context of another activity. (33)

99. That condition is fulfilled in this case. Since the applicant supplies services which enable its members to use holiday properties situated abroad for holiday purposes, it pursues an economic activity which is similar to that of a travel agent or tour operator in certain respects, although not completely identical with it. Moreover, the meaning and purpose of Article 26 of the Sixth Directive justify inclusion of the services in question within the scope of that scheme. The applicant’s business is in fact exposed, on account of the multiplicity of services which it supplies and the geographical separation of the undertaking’s place of business and the object of the supply, to similar risks of double taxation as a travel agent or tour operator.

– Acting in its own name

100. It is a condition for Article 26 to apply that, in accordance with Article 26(1), the travel agent deal with customers in his own name and use the supplies and services of other taxable persons in the provision of travel facilities. On the other hand, a travel agent who merely arranges travel services as an intermediary does not fall within the scope of Article 26, but is supplying agency services at his place of business in accordance with the general rule in Article 9(1) of the Sixth Directive. (34)

101. It is therefore crucial to determine, first, whether the applicant, in supplying its services, is acting in its own name or on behalf of others.

102. As the Spanish Government correctly observes, (35) the definitive criterion for this

classification is whether the applicant is simply putting two members in touch with one another for the purpose of enabling them to agree contractually on the exchange of holiday usage rights. In that case, the act in question would be one of agency, since the applicant would be acting on behalf of another person. However, if the members were to effect that exchange without knowing who the beneficiary was to be, because the applicant itself takes responsibility for the coordination and distributes the holiday usage rights, then the applicant would be acting in its own name.

103. According to the applicant in the main proceedings, in checking the availability of the selected holiday property and seeking to identify alternative offers, it is always ‘acting on behalf of the member’. (36) It further points out that the members are in contact only with its staff and never communicate directly with one another. (37) In the light of those submissions, it must be assumed that the members’ sole contracting partner is the applicant in the main proceedings.

104. Consequently, in this case, the applicant is not acting as an agent. On the contrary, it acts in its own name within the meaning of Article 26(1) of the Sixth Directive.

– Use of the supplies and services of other taxable persons

105. However, what is unclear is whether a further essential condition for the application of that scheme, namely, the requirement of using the supplies and services of other taxable persons, is fulfilled in this specific case. Such services would include, for example, accommodation and transport services to be provided by third parties. However, those supplies bought in from third parties would have to be more than a means of better enjoying the principal service supplied by the economic operator. Otherwise, according to the case?law of the Court, (38) those supplies would remain purely ancillary in relation to the in?house supplies, so should not be taxed under Article 26 of the Sixth Directive. If the applicant were to offer its members, in addition to the services connected with the exchange of residential usage rights, further services which are normally provided by third parties, such as, for example, travel to Spain, then Article 26 of the Sixth Directive would apply.

106. Neither the order for reference nor the applicant’s submissions give any definite indications that, in providing services to its members, the applicant makes use of the supplies and services of other taxpayers. It is known only that the Weeks Pool can be supplemented by the applicant buying in accommodation from a third party or by a developer making extra weeks available. A member can also request an exchange in respect of this supplemental accommodation on payment of an exchange fee. However, there do not appear to me to be sufficient details necessary for a legal assessment of those transactions.

107. It is therefore for the national court to examine in detail whether, in the case at issue in the main proceedings, there is any use of supplies and services. If not, Article 26 of the Sixth Directive would not apply.

– Applicability of Article 9(2) of the Sixth Directive

108. If Article 26 of the Sixth Directive is inapplicable, it must then be examined whether a supply of services, which consists in facilitating for the owners of timeshare interests in certain holiday properties the exchange of those usage rights, is connected with a specific immovable property for the purposes of Article 9(2)(a).

109. In my view, such a connection can be affirmed on a literal interpretation of that provision, since the supplies which the applicant makes are directed towards enabling the member to avail himself of the right to use a specific immovable property belonging to a third party for a specified period.

110. However, Advocate General Sharpston, in her Opinion in *Heger*, (39) expressed reservations regarding an exclusively literal interpretation of that provision. In that respect, she correctly pointed out that too broad an interpretation of 'connected with' would be inappropriate, since any service can ultimately be 'connected' in one way or another with an immovable property, understood as a delimited space. In fact, depending on the service supplied, such a connection with an immovable property may be close and/or well?developed to differing degrees.

111. The Court has up to now refrained from setting out in more detail what requirements are to be applied with regard to the nature and directness of that connection. In the judgment in *Heger*, (40) it merely stated that only supplies of services which have a 'sufficiently direct connection' with immovable property come under Article 9(2)(a) of the Sixth Directive, particularly as such a connection is characteristic of all the supplies of services listed in that provision.

112. In view of that, the question arises whether the interpretation of Article 9(2)(a) of the Sixth Directive advocated here is also supported by the schematic position of that provision within the overall structure of the provisions concerning the place of supply and by its spirit and purpose.

113. The list of examples contained in that provision, which, in view of the unequivocal wording of Article 9(2)(a) ('including', 'such as'), should on no account be construed as exhaustive, proves to be instructive, since, as the Court indicated in *Heger*, those examples provide important indications as to the nature and quality of such a connection.

114. When interpreting Article 9(2)(a) of the Sixth Directive, however, account must be taken of the Court's case?law according to which, in the absence of an express definition or of any reference to the legal orders of the Member States, the concepts contained in the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition. (41)

115. The examples of services connected with immovable property which are listed in Article 9(2)(a) of the Sixth Directive suggest, in any event, that physical contact cannot be a mandatory criterion, particularly as estate agents, like architects, are able to provide their services even when they have never viewed or entered the property. The agent must merely know the property in respect of which he is to act as agent, and the architect must have the plans of the property at his disposal.

116. It seems to be equally unnecessary for the supply of services to be made exclusively by the person who is legally competent to dispose of the property, whether *in rem* for transferring of title and mortgaging or even for letting to third parties within the meaning of the law of obligations, particularly as the person entitled and the estate agent are as a rule different people.

117. The decisive criterion ought rather to be that the central economic element of the supply would typically not be possible or meaningful without the existence of an actual immovable property. In that regard, any material connection with an immovable property or with parts of an immovable property should suffice. (42) That definition applies, for example, to those supplies of services which are directed towards the use, marketing, development and maintenance of an immovable property, including the supplies of services directly serving those operations, where there is no other economic operation to the fore. (43)

118. Those conditions are undoubtedly fulfilled in the case of an estate agent and an architect, since the activities of both professional groups are inconceivable without the existence of immovable properties. The same applies to the applicant's business model, which is unrealisable without the existence of immovable properties in which there are timeshare interests.

119. If, on the other hand, the nature of the supplies made by the applicant is compared with the types of profession cited as examples by the legislature, a far greater similarity between it and that of an estate agent can be observed. The service supplied by the latter is typically distinguished by the arrangement of the conclusion, or of an opportunity for the conclusion, of contracts relating to immovable properties, and the subject?matter of those contracts may be the sale or acquisition, but also the letting, of immovable properties or parts of immovable properties. The service supplied by an estate agent has in common with that provided by the applicant the fact that it concerns the supply of an immovable property for use, while the applicant, in similar fashion to an estate agent, acts to a certain extent as an intermediary between the respective interested parties and receives a consideration for the successful agreement on the grant of use.

120. It must be inferred from the above description of the type of occupation exercised by an estate agent that the grant of use which he facilitates by means of his supply of services will as a rule consist in selling or letting an immovable property. On account of the close connection with a particular immovable property, the latter activity may be classified for VAT purposes as a supply of services within the meaning of Article 9(2)(a) of the Sixth Directive. (44)

121. Nevertheless, in my view, the fact that this case is concerned solely with the exchange of timeshare interests does not preclude an application of Article 9(2)(a) of the Sixth Directive.

122. First, the list contained in that provision is, as already mentioned, illustrative rather than exhaustive, which means that it does not preclude an extension to cover new types of services by way of judicial interpretation.

123. Second, notwithstanding its legal nature which is to be determined in each case according to the laws of the Member States, (45) a timeshare interest confers on the owner a right of use which is in any case comparable with residential tenancy. (46) It is true that the exchange of timeshare interests, as operated commercially by the applicant, does not involve any transmission of rights from one member to the other. However, by virtue of the fact that timeshare contracts regularly provide for the possibility, whether free of charge or against payment, of supplying usage rights to third parties, the other member taking part in the exchange can also rely on those rights. (47)

124. Third, taxation of the income obtained at the place where the property is situated would accord with the destination principle. It would take account of the fact that the member can use the holiday property selected by him only *in situ* and consume the supply received, for VAT purposes, only in that place.

125. It follows that a sufficiently direct connection exists between a supply of services which consists in facilitating for the owners of timeshare interests in certain holiday properties the

exchange of those usage rights and the immovable property in relation to which the exchange right is exercised. Accordingly, the place of supply is the place where that property is situated, in accordance with Article 9(2)(a) of the Sixth Directive.

VIII – **Conclusions to be drawn**

126. In the light of the foregoing analysis, I come to the conclusion that the services which the applicant supplies in return for payment of the enrolment fee and subscription fees are not directly connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive (or Article 45 of Directive 2006/112) and therefore fall within the scope of the general rule in Article 9(1) of the Sixth Directive (or Article 43 of Directive 2006/112).

127. The determination of the place of supply as regards the services which the applicant supplies in return for payment of the exchange fees depends, on the other hand, on whether the applicant uses the supplies and services of other taxable persons. Since the Court does not have before it any specific indications that the applicant makes use of the supplies and services of other taxable persons when supplying services to its members, it is for the national court to examine in detail, whether that is the case. If so, the special rule in Article 26(1) of the Sixth Directive (or the second paragraph of Article 307 of Directive 2006/112) applies. However, should that condition not be fulfilled, Article 9(2)(a) of the Sixth Directive (or Article 45 of Directive 2006/112) must be applied.

IX – **Conclusion**

128. In the light of the foregoing observations, I propose that the Court should answer as follows the questions referred by the VAT and Duties Tribunal:

(1) The services which the applicant supplies in return for payment of the enrolment fee and subscription fees are not directly connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive (or Article 45 of Directive 2006/112/EC) and therefore fall within the scope of the general rule in Article 9(1) of the Sixth Directive (or Article 43 of Directive 2006/112). Consequently, the place of supply is the place where the applicant has established its place of business or has a fixed establishment from which it supplies the services.

(2) As regards the services which the applicant supplies in return for payment of the exchange fees, it is for the national court to examine whether the applicant uses the supplies and services of other taxable persons. If so, the special rule in Article 26(1) of the Sixth Directive (or the second paragraph of Article 307 of Directive 2006/112) applies. The place of supply must then be the place where the applicant has established its place of business or has a fixed establishment from which it supplies the services.

However, should that condition not be fulfilled, Article 9(2)(a) of the Sixth Directive (or Article 45 of Directive 2006/112) must be applied, with the consequence that the place of supply must be the place where the immovable property is situated.

1 – Original language: German.

2 – OJ 1977 L 145, p. 1.

3 – OJ 2006 L 347, p. 1.

4 – Corresponds to Article 43 of Directive 2006/112/EC.

5 – Corresponds to Article 45 of Directive 2006/112/EC.

6 – Corresponds to Article 306 et seq. of Directive 2006/112/EC.

7 – [2001] ECR I?637.

8 – Also according to Haunold, P., *Mehrwertsteuer bei sonstigen Leistungen – Die Besteuerung grenzüberschreitender Dienstleistungen*, Vienna 1997, p. 121. See also Terra, B. and Kajus, J., *A guide to the European VAT Directives 2008 – Introduction to European VAT*, Volume 1, p. 497, according to whom the doctrine of the determination of the place of supply is irrelevant in cases where transactions are subject to one and the same national tax jurisdiction. As soon as the jurisdiction of more than one national tax authority applies, because, for instance, goods are moved to the territory of another Member State or services are supplied to a person who has his place of residence in another Member State, it cannot be unequivocally determined whether economic activity has taken place within or outside a particular national territory. Determination of the place of supply is crucial in answering the question whether and which VAT is to be levied.

9 – Weiermayer, R., 'Der Leistungsort im Blicke der Rechtsprechung des EuGH', in: *EuGH-Rechtsprechung und Umsatzsteuerpraxis* (ed. Achatz, M. and Tumpel, M.), Vienna 2001, p. 125.

10 – See, to that effect, Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C?327/94 *Dudda* [1996] ECR I?4595, paragraph 20; Case C?167/95 *Linthorst and Others* [1997] ECR I?1195, paragraph 10; and Case C?452/03 *RAL* [2005] ECR I?3947, paragraph 23. In those cases, the Court stated, in connection with the provisions of Article 9 of the Sixth Directive concerning the place of supply, that the object of those provisions is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, second, non-taxation.

11 – According to Menner, S., *Die Umsatzsteuer-Harmonisierung in der Europäischen Gemeinschaft – Entwicklung und Zukunft unter besonderer Berücksichtigung der freien Berufe*, Cologne 1992, p. 81, the main objective of those rules is to delimit clearly tax jurisdiction between Member States, in order to avoid both double taxation and untaxed consumption.

12 – In her Opinion in Case C?166/05 *Heger* [2006] ECR I?7749, point 27, Advocate General Sharpston mentions the fact that the Community legislature created a degree of internal tension within the Sixth Directive, inasmuch as the general rules for the place of supply of services are based on the origin principle rather than the destination principle, although the basic principle behind VAT, as a tax on consumption, is that it should be charged at the place of consumption.

13 – Communier, J.?M., *Droit fiscal communautaire*, Brussels 2001, p. 293, explains this fact by reference to the drafting history of the Sixth Directive. According to this, when the proposal for the Directive was being drawn up, it was assumed that taking as a basis the place of business of the undertaking was the most practicable solution, although that proposal still provided for relatively few exceptions. Nevertheless, the number of exceptions grew in the course of the final negotiations within the Council, with the result that the legislative text which the Council adopted in May 1977 has not been easy to implement since then.

14 – Supplies of goods and supplies of services are mutually exclusive concepts. Article 6(1) of Directive 77/388/EEC provides that a 'supply of services' means any transaction which does not constitute a supply of goods within the meaning of Article 5. Under Article 5(1) of that directive, a 'supply of goods' means the transfer of the right to dispose of tangible property as owner. Problems of classification arise in the case of supplies which consist of a package of goods and services but which, under the principle of unity of the supply, can only be either a supply of goods or a supply of services (see Opinion of Advocate General Ruiz-Jarabo Colomer in Case C?412/03 *Hotel Scandic*

[2005] ECR I?743, point 21; Haunold, P., ‘Der Steuergegenstand’, in: *EuGH-Rechtsprechung und Umsatzsteuerpraxis* (ed. Achatz, M. and Tumpel, M.), Vienna 2001, p. 110). The Court has dealt on a number of occasions with the question whether, in the cases referred to it, a particular transaction fulfilled the criteria for a supply of goods or a supply of services (see, for example, Case C?172/96 *First National Bank of Chicago* [1998] ECR I?4387; Case C?231/94 *Faaborg?GeltingLinien* [1996] ECR I?2395; Case C?68/92 *Commission* v *France* [1993] ECR I?5881; and Case 139/84 *Van Dijk’s Boeckhuis* [1985] ECR 1405).

15 – With regard to the question whether services are supplied for consideration, the Court has already held that a supply of services is effected ‘for consideration’ within the meaning of Article 2(1) of Directive 77/388/EEC, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see, for example, Case C?16/93 *Tolsma* [1994] ECR I?743, paragraph 14; *First National Bank of Chicago*, cited above in footnote 14, paragraphs 26 to 29; and Case C?174/00 *Kennemer Golf* [2002] ECR I?3293, paragraph 39).

16 – Kelp, U., *Time-Sharing-Verträge*, Baden-Baden 2005, p. 45, points out, for example, that, owing to the diversity of the contractual arrangements, timeshare contracts are not a homogeneous type of contract. It is not possible to classify timeshare contracts as belonging to one of the classical types of contract in German private law, even if they are subdivided into those which are governed by the law of obligations, those which are *in rem* and those which are governed by the law of associations or company law. For that reason, after they appeared within the German judicial area, timeshare contracts were initially categorised as atypical contracts and/or typical business contracts not regulated by the civil code, which stood out due to the absence of any statutory regulation despite their increasing frequency in legal transactions, the uniformity of the interests involved and the content of the contractual rules. Vanbrabant, B., *Time-Sharing*, Brussels 2006, p. 29 et seq., and Mostin, C. and Feron, B., ‘Le timesharing: une nouvelle forme de propriété? Analyse en droit belge et en droit comparé’, *Annales de droit de Louvain(1994)* , p. 33, mention a number of possible legal devices for subsuming timeshare contracts under the categories applicable in Belgian and French civil law. In their view, devices pertaining to the law of obligations, *in rem* devices and devices pertaining to the law of associations or company law are worth considering. Vanbrabant points out that, in Portugal and Spain, timeshare interests were conceived as rights *in rem*. In Portugal, ‘direito de habitaçao periodica’ was created as early as the 1980s, whereas in Spain Law 42/1998 (Ley 42/1998, de 15 diciembre de 1998, sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias) was adopted on 15 December 1998. Papp, T., ‘Timesharing Contract’, *Tanulmányok Dr. Besenyei Lajos, Egytemi Tanár, 70. Születésnapjára*, Szeged 2007, p. 573, points out that timeshare contracts should be classified as atypical contracts.

17 – OJ 1994 L 280, p. 83.

18 – See Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11, 12 and 16; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11; *Tolsma*, cited above in footnote 15, paragraph 14; Case C?258/95 *Fillibeck* [1997] ECR I?5577, paragraph 12; *Kennemer Golf*, cited above in footnote 15, paragraph 39; Case C?149/01 *First Choice Holidays* [2003] ECR I?6289, paragraph 30; Case C?210/04 *FCE Bank* [2006] ECR I?2803, paragraph 34, and Case C?277/05 *Société thermale d’Eugénie-les-Bains* [2007] ECR I?6415, paragraph 19.

19 – Case C?166/05 *Heger* [2006] ECR I?7749, paragraph 15.

20 – See, to that effect, *Dudda*, cited above in footnote 10, paragraph 21; *RAL*, cited above in footnote 10, paragraph 24; Case C?41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I?9433,

paragraph 33; and *Heger*, cited above in footnote 19, paragraph 15. In that respect, that case?law represents a rejection of the case?law established by the judgment in *Berkholz* (cited above in footnote 10, paragraph 17) that, according to Article 9(1) of the Sixth Directive, the place where the supplier has established his business is, as a rule, the primary point of reference.

21 – See, to that effect, Case C?108/00 *SPI* [2001] ECR I?2361, paragraph 17.

22 – Also according to Weiermayer, R., cited above in footnote 9, p. 134.

23 – See point 108 et seq. of this Opinion.

24 – See point 68 of this Opinion.

25 – Advocate General Ruiz-Jarabo Colomer used this expression (‘principle of unity of the supply’) for the first time in his Opinion in *Hotel Scandic* (cited above in footnote 14, point 21). It goes back to Haunold, P., ‘Der Steuergegenstand’, cited above in footnote 14, p. 111.

26 – See, with regard to the nature of related supplies for the purposes of VAT law, my Opinion of 9 December 2008 in Case C?572/07 *Tellmer Property* [0000] ECR I?0000, point 33 et seq.. It follows from Article 2 of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent (see Case C?349/96 *CPP* [1999] ECR I?973, paragraph 29; *Levob Verzekeringen and OV Bank*, cited above in footnote 20, paragraph 20; and Case C?425/06 *Part Service* [2008] ECR I?0000, paragraph 50. However, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise to taxation or exemption, must be considered to be a single transaction when they are not independent (see *Part Service*, cited above, paragraph 51). Such is the case for example where, on the basis of a purely objective analysis, it is found that one or more elements constitute the principal service, while the other element or elements constitute one or more ancillary services which share the tax treatment of the principal service (see *CPP*, cited above, paragraph 30; Case C?34/99 *Primback* [2001] ECR I?3833, paragraph 45; *Levob Verzekeringen and OV Bank*, cited above in footnote 20, paragraph 21; and *Part Service*, cited above, paragraph 52). In particular, a service must be regarded as an ancillary rather than a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see *CPP*, cited above, paragraph 29, and *Part Service*, cited above, paragraph 52). There is also 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 (see *Levob Verzekeringen and OV Bank*, cited above in footnote 20, paragraph 22, and *Part Service*, cited above, paragraph 53).

27 – See point 32 of the applicant’s written observations.

28 – Judgment cited above in footnote 15, paragraph 40. The central issue in that case was the classification of the services provided by a sports association as a supply of services within the meaning of Article 2(1) of the Sixth Directive. In the view of the Court, the fact that the annual subscription fee paid by the members of a sports association was a fixed sum which could not be related to each personal use of the golf course did not alter the fact that there was reciprocal performance between the members of a sports association and the association itself. The services provided by the association consisted in the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members’ request. There was therefore a direct link between the annual subscription fees paid by members of a sports association such as that concerned in the main proceedings and the services which it provided.

29 – According to Kelp, U., cited above in footnote 16, p. 27, an exchange organisation coordinates the exchange requests of holders of usage rights in such a way that it places the rights of residence of those wishing to exchange with other holders of interests so that, in return, they can use ‘third-party’ timeshare properties in other resorts.

30 – Joined Cases C?308/96 and C?94/97 *Madgett and Baldwin* [1998] ECR I?6229, paragraph 5, and *First Choice Holidays*, cited above in footnote 18, paragraph 21.

31 – *Madgett and Baldwin*, cited above in footnote 30, paragraph 34, and *First Choice Holidays*, cited above in footnote 18, paragraph 22.

32 – Case C?163/91 *Van Ginkel* [1992] ECR I?5723, paragraphs 11 and 12; Case C?260/95 *DFDS* [1997] ECR I?1005, paragraph 13; *Madgett and Baldwin*, cited above in footnote 30, paragraph 18; *First Choice Holidays*, cited above in footnote 18, paragraphs 23 to 25; and Case C?200/04 *iSt internationale Sprach- und Studienreisen* [2005] ECR I?8691, paragraph 21.

33 – In *Madgett and Baldwin*, cited above in footnote 30, paragraph 20, the Court held that the underlying reasons for the special scheme for travel agents and tour operators are equally valid where the trader is not a travel agent or tour operator within the normal meaning of those terms, but effects identical transactions in the context of another activity, such as that of hotelier. To interpret Article 26 of the Sixth Directive as applying solely to traders who are travel agents or tour operators within the normal meaning of those terms would mean that identical services would come under different provisions depending on the formal classification of the trader. Confirmed by the judgment in *iSt internationale Sprach- und Studienreisen*, cited above in footnote 32, paragraph 22.

34 – See also, to that effect, Birkenfeld, W. and Forst, C., *Das Umsatzsteuerrecht im Europäischen Binnenmarkt*, 3rd edition, Bielefeld 1998, p. 169.

35 – See point 20 of the Spanish Government’s written observations.

36 – In point 11 of its written observations, the applicant states: ‘Once a member selects an available Exchange Property, the Applicant, *acting on behalf of the member*, seeks to confirm the exchange by checking the availability of the Exchange Property. If there is no availability, the Applicant, *still acting on behalf of the member*, will seek to identify alternative properties which may be suitable and offer them to the member who is free to accept them or not’ (emphasis added).

37 – See point 33 of the applicant’s written observations.

38 – See *Madgett and Baldwin*, cited above in footnote 30, paragraphs 24 to 27, and *iSt internationale Sprach- und Studienreisen*, cited above in footnote 32, paragraphs 25 to 27. The Court did not regard services which go beyond the tasks traditionally entrusted to a hotelier and which cannot be carried out without a substantial effect on the package price charged, such as travel to the hotel from distant pick-up points, as merely ancillary services. On the other hand, the Court did consider to be merely ancillary services travel services which are normally associated with language training and education, such as customers’ travel to and/or stay in the host State.

39 – Cited above in footnote 12, points 31 and 33.

40 – Cited above in footnote 19, paragraph 24.

41 – That case?law, which originally concerned the interpretation of the exemptions provided for in

Article 13 of the Sixth Directive (see Case C?358/97 *Commission* v *Ireland* [2000] ECR I?6301, paragraph 51; Case C?315/00 *Maierhofer* [2003] ECR I?563, paragraph 25; and Case C?275/01 *Sinclair Collis* [2003] ECR I?5965, paragraph 22), must apply *mutatis mutandis* to the definition of the concepts contained in Article 9(2)(a) of the Sixth Directive. First, Article 9(2)(a) does not expressly define the concepts it mentions, nor does it refer to the national legal orders for their definition. Second, conflicts between national jurisdictions and tax authorities, as mentioned in point 51 of this Opinion, can be avoided only by applying common and uniform criteria such as those of the Sixth Directive to the determination of the place of supply. However, that can only be achieved by giving the concepts in Article 9(2)(a) a Community definition. See, to that effect, the Opinion of Advocate General Sharpston in *Heger*, cited above in footnote 12, point 25.

42 – See also, to that effect, Haunold, P., *Mehrwertsteuer bei sonstigen Leistungen – Die Besteuerung grenzüberschreitender Dienstleistungen*, cited above in footnote 8, p. 138; Martin, S., *Umsatzsteuergesetz* (ed. Sölch and Ringleb), as at 1 September 2005, Munich, § 3a, point 74, p. 14.

43 – Martin, S., cited above in footnote 42, § 3a, point 75, p. 14 et seq.

44 – A letting of immovable property ought in any event to constitute a supply of services connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive. See the Commission Proposal for the Sixth Directive (*Bulletin of the European Communities*, Supplement 11/73, p. 12), which expressly mentions that situation as well as the hire of safes as covered by the provision. See also Fuster Gómez, M., *El IVA en las operaciones intracomunitarias – Entregas de bienes y prestaciones de servicios*, Madrid 2000, p. 79, which refers to the rule in Article 70(1)(A) of the Spanish Law on Value Added Tax (Ley 37/1992, de 28 de diciembre, del Impuesto sobre el Valor Añadido), under which the letting and grant of use of immovables are regarded as directly ‘connected with immovable property’. A similar rule is found in Paragraph 3a(2)(1)(a) in conjunction with Paragraph 4(12) of the German Law on Turnover Tax (Umsatzsteuergesetz) with regard to the letting and leasing of immovable property.

45 – Article 1 of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis provides that the Member States are, inter alia, to ‘remain competent for … determination of the legal nature of the rights which are the subject of the contracts covered by this Directive’. Article 2 of that directive accordingly defines the right to use on a timeshare basis as ‘a real property right or any other right relating to the use of one or more immovable properties for a specified or specifiable period of the year, which may not be less than one week’.

46 – Kelp, U., cited above in footnote 16, p. 118 et seq., points out that a central element of timesharing under the law of obligations is the provision of residential accommodation, because, without it, timesharing in holiday homes would be inconceivable. For that reason, the predominant view expressed in the legal literature is that the centre of gravity of the contractual relationship is in the law of tenancy. In the author’s view, that is the case where the supplies of services are confined to the upkeep, cleaning and management of the timeshare property, particularly since, even under pure tenancy agreements, upkeep of the leased property is one of the landlord’s responsibilities. Cleaning and property management also constitute subordinate ancillary services in comparison with the provision of residential accommodation.

47 – See Vanbrabant, B., cited above in footnote 16, p. 48, who points out that, in the context of an exchange, no transmission of usage rights takes place. The exchange merely gives rise to entitlements under the law of obligations between the users and/or the undertaking which operates the exchange club. Kelp, U., cited above in footnote 15, p. 26, views the possibility of making

usage rights available to third parties as the cause of the present success enjoyed by exchange clubs. In fact, owners of timeshare interests who do not wish to make use of their right personally, must in principle make the arrangements for letting out their weeks themselves. Timesharing only becomes flexible once and for all, and thus of interest to a wider clientele, when the property is placed with an exchange organisation which coordinates the exchange requests of those holding usage rights.