OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 17 June 2010 (1)

Case C?97/09

Ingrid Schmelz

(Reference for a preliminary ruling from the Unabhängiger Finanzsenat, Außenstelle Wien (Austria))

(Value added tax – Special scheme for small undertakings – Tax exemption for turnover of small undertakings – Restriction of exemption to established small undertakings)

I – **Introduction**

1. *De minimis non curat lex* is the message both of a Latin legal maxim and of the Sixth VAT Directive (2) and Directive 2006/112/EC, (3) which has now replaced the Sixth Directive. The directives permit the Member States to grant a VAT exemption to small undertakings whose turnover does not exceed a certain volume per year.

2. That exemption is not available, however, if the turnover is not generated by established economic operators. Secondary Community law thus expressly provides for a difference in treatment of taxable persons which is linked to the place of establishment.

3. Ms Schmelz, the appellant in the main proceedings, generates turnover in Austria from the letting of an apartment which falls below the threshold for the small undertakings exemption. However, she is being refused exemption from tax in Austria because she does not live in that country. The Unabhängiger Finanzsenat, Außenstelle Wien (Independent Tax Tribunal, Vienna) asks whether the relevant provisions of the directives and the national implementing provisions are compatible with the fundamental freedoms and with the general principle of equality of treatment. The Member States participating in the proceedings before the Court, the Council and the Commission consider the difference in treatment to be lawful in principle. Any resulting encroachment upon the fundamental freedoms is justified in order to ensure effective fiscal supervision and to counter the risk of abuse.

II – **Legislative framework**

A – *Community law*

– Tax treatment of rental income

4. Under Article 13B(b) of the Sixth Directive, the leasing or letting of immovable property is exempt from value added tax. However, in the Act of Accession, (4) the Republic of Austria was

authorised to apply a reduced rate to the letting of immovable property for residential use until 31 December 1998. That provision was extended indefinitely by Article 28(2)(j) of the Sixth Directive as amended by Directive 2000/17/EC (5) and has now been incorporated into Article 117(2) of Directive 2006/112.

– Special scheme for small undertakings

5. Linking to the Second VAT Directive, (6) Article 24 of the Sixth Directive permitted the Member States to apply a special scheme for small undertakings ('the small undertakings scheme'). The provision reads as follows:

'1. Member States which might encounter difficulties in applying the normal tax scheme to small undertakings by reason of their activities or structure shall have the option, under such conditions and within such limits as they may set but subject to the consultation provided for in Article 29, of applying simplified procedures such as flat-rate schemes for charging and collecting the tax provided they do not lead to a reduction thereof.

2. Until a date to be fixed by the Council acting unanimously on a proposal from the Commission, but which shall not be later than that on which the charging of tax on imports and the remission of tax on exports in trade between the Member States are abolished:

(a) Member States which have made use of the option under Article 14 of the Second Council Directive of 11 April 1967 to introduce exemptions or graduated tax relief may retain them and the arrangements for applying them if they conform with the value added tax system.

Those Member States which apply an exemption from tax to taxable persons whose annual turnover is less than the equivalent in national currency of 5 000 European units of account at the conversion rate of the day on which this Directive is adopted may increase this exemption up to 5 000 European units of account.

Member States which apply graduated tax relief may neither increase the ceiling of the graduated tax reliefs nor render the conditions for the granting of it more favourable.

(b) Member States which have not made use of this option may grant an exemption from tax to taxable persons whose annual turnover is at the maximum equal to the equivalent in national currency of 5 000 European units of account at the conversion rate of the day on which this Directive is adopted; where appropriate, they may grant graduated tax relief to taxable persons whose annual turnover exceeds the ceiling fixed by the Member States for the application of exemption.

(c) Member States which apply an exemption from tax to taxable persons whose annual turnover is equal to or higher than the equivalent in national currency of 5 000 European units of account at the conversion rate of the day on which this Directive is adopted may increase it in order to maintain its value in real terms.

3. The concepts of exemption and graduated tax relief shall apply to the supply of goods and services by small undertakings.

Member States may exclude certain transactions from the arrangements provided for in paragraph 2. The provisions of paragraph 2 shall not, in any case, apply to the transactions referred to in Article 4(3).

4. The turnover which shall serve as a reference for the purposes of applying the provisions of paragraph 2 shall consist of the amount, exclusive of value added tax, of goods and services

supplied as defined in Articles 5 and 6, to the extent that they are taxed, including transactions exempted with refund of tax previously paid in accordance with Article 28(2), and the amount of the transactions exempted pursuant to Article 15, the amount of real property transactions, the financial transactions referred to in Article 13B(d), and insurance services, unless these transactions are ancillary transactions.

However, disposals of tangible or intangible capital assets of an undertaking shall not be taken into account for the purposes of calculating turnover.

5. Taxable persons exempt from tax shall not be entitled to deduct tax in accordance with the provisions of Article 17, nor to show the tax on their invoices or on any other documents serving as invoices.

6. Taxable persons eligible for exemption from tax may opt either for the normal value added tax scheme or for the simplified procedures referred to in paragraph 1. In this case they shall be entitled to any graduated tax relief which may be laid down by national legislation.

…'

6. Under Directive 92/111/EEC, (7) Article 28i was incorporated into the Sixth Directive. That provision added the following subparagraph to Article 24(3) of the Sixth Directive:

'In all circumstances supplies of new means of transport effected under the conditions laid down in Article 28c(A) as well as supplies of goods and services effected by a taxable person who is not established in the territory of the country shall be excluded from the exemption from tax under paragraph 2.'

7. Under Annex XV – List provided for in Article 151 of the Act of Accession – IX. Taxation, point 2(c) of the Act of Accession, (8) the following provision applies to the Republic of Austria:

'In implementation of Article 24(2) to (6) and pending the adoption of Community provisions in this field, the Republic of Austria may apply an exemption from value added tax to taxable persons whose annual turnover is less than the equivalent in national currency of ECU 35 000.'

8. The provisions of Article 24 and of Article 24a, which introduced the turnover threshold into the Sixth Directive, were incorporated, with a few drafting changes, into Directive 2006/112 as Articles 281 to 294. The relevant provisions of those directives provide:

'Article 282

The exemptions and graduated tax relief provided for in this Section shall apply to the supply of goods and services by small enterprises.

Article 283

1. The arrangements provided for in this Section shall not apply to the following transactions:

…

(c) supplies of goods or services carried out by a taxable person who is not established in the Member State in which the VAT is due.

[Articles 284 to 286 concern the States which belonged to the European Community before 1 January 1978 and are essentially identical to Article 24(2) of the Sixth Directive]

Article 287

Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession:

…

(4) Austria: ECU 35 000;

…

Article 288

The turnover serving as a reference for the purposes of applying the arrangements provided for in this Section shall consist of the following amounts, exclusive of VAT:

(1) the value of supplies of goods and services, in so far as they are taxed;

(2) the value of transactions which are exempt, with deductibility of the VAT paid at the preceding stage, pursuant to Articles 110 or 111, Article 125(1), Article 127 or Article 128(1);

(3) the value of transactions which are exempt pursuant to Articles 146 to 149 and Articles 151, 152 or 153;

(4) the value of real estate transactions, financial transactions as referred to in points (b) to (g) of Article 135(1), and insurance services, unless those transactions are ancillary transactions.

However, disposals of the tangible or intangible capital assets of an enterprise shall not be taken into account for the purposes of calculating turnover.

Article 289

Taxable persons exempt from VAT shall not be entitled to deduct VAT in accordance with Articles 167 to 171 and Articles 173 to 177, and may not show the VAT on their invoices.

Article 290

Taxable persons who are entitled to exemption from VAT may opt either for the normal VAT arrangements or for the simplified procedures provided for in Article 281. In this case, they shall be entitled to any graduated tax relief provided for under national legislation.’

B – *National law*

9. Under Paragraph 6(1)(16) of the Umsatzsteuergesetz 1994 (Law on Turnover Tax, UStG 1994) in the version applicable in the main proceedings, the letting and leasing of immovable property are exempt from turnover tax in principle. However, the letting (grant of use) of immovable property for residential use is not exempt.

10. Under Paragraph 6(1)(27) of the UStG 1994, the following is also exempt:

‘the turnover of small undertakings. A small undertaking is an undertaking resident or established in Austria whose turnover under Paragraph 1(1)(1) and (2) in the period of assessment does not exceed EUR 22 000 [version up to 2006, from 2007: EUR 30 000]. In respect of that turnover limit, turnover from ancillary transactions including disposals of businesses shall not be taken into account. If the turnover limit is exceeded on a single occasion by no more than 15% within a period of five calendar years, this shall be immaterial …’

11. Paragraph 6(3) of the UStG 1994 states:

‘An undertaking whose transactions are exempt under Paragraph 6(1)(27) may declare in writing to the tax authorities, until the decision is final, that it waives application of Paragraph 6(1)(27). The declaration shall be binding on the undertaking for a period of at least five calendar years. It may be revoked only with effect from the beginning of a calendar year. Such revocation shall be declared at the latest by the end of the first calendar month after the beginning of that calendar year.’

III – **Facts and questions referred for a preliminary ruling**

12. Ms Schmelz is a German national and is resident in Germany. She is the owner of an apartment in Austria which she lets at a monthly rental of EUR 330 plus reimbursement of operating costs. She does not charge any turnover tax on the rental.

13. The Austrian financial authorities assessed turnover tax on the rental income, after deducting input tax, in a sum of EUR 334.93 for 2006 and EUR 316.15 for 2007. In the years in question, according to Ms Schmelz, she did not receive any other turnover in the territory of the Community. (9)

14. Because Ms Schmelz believed that she was not required to pay any turnover tax on the basis of the small undertakings scheme, she appealed against the notices of assessment at the Unabhängiger Finanzsenat which, by order of 4 March 2009, referred the following questions to the Court for a preliminary ruling:

‘(1) Does the wording “as well as supplies of goods and services effected by a taxable person who is not established in the territory of the country” in Article 24(3) and in Article 28i 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, in the version of No 21 [of Article 1] of Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax, and a scheme transposing this provision into national law infringe the Treaty establishing the European Community, in particular the principle of non-discrimination (Article 12 EC), the freedom of establishment (Article 43 EC et seq.), the freedom to provide services (Article 49 EC et seq.), or fundamental rights under Community law (the Community law principle of equal treatment), because the provision has the effect that Union citizens who are not established in the territory of the relevant country are excluded from the exemption under Article 24(2) of the Sixth Directive (special scheme for small undertakings), whilst Union citizens who are established in the territory of the relevant country are able to claim this exemption where the relevant Member State grants an exemption for small undertakings in accordance with the directive?

(2) Does the wording “supplies of goods or services carried out by a taxable person who is not established in the Member State in which the VAT is due” in Article 283(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and that of a scheme transposing this provision into national law infringe the Treaty establishing the European

Community, in particular the principle of non-discrimination (Article 12 EC), the freedom of establishment (Article 43 EC et seq.), the freedom to provide services (Article 49 EC et seq.), or fundamental rights under Community law (the Community law principle of equal treatment), because the provision has the effect that Union citizens who are not established in the relevant Member State are excluded from the exemption under Article 282 et seq. of Directive 2006/112/EC (special scheme for small enterprises), whilst Union citizens who are established in the territory of the relevant country are able to claim this exemption where the relevant Member State grants an exemption for small enterprises in accordance with the directive?

(3) If the answer to the first question is in the affirmative: is the wording “as well as supplies of goods and services effected by a taxable person who is not established in the territory of the country” in Article 24(3) and in Article 28i of the Sixth Directive invalid within the meaning of Article 234(b) EC?

(4) If the answer to the second question is in the affirmative: is the wording “supplies of goods or services carried out by a taxable person who is not established in the Member State in which the VAT is due” in Article 283(1)(c) of Directive 2006/112/EC invalid within the meaning of Article 234(b) EC?

(5) If the answer to the third question is in the affirmative: should “turnover” within the meaning of Annex XV of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Kingdom of Norway, the Republic of Austria, the Republic of Finland, the Kingdom of Sweden, concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union together with the Final Act (the Treaty of Accession), IX. Taxation, [point] 2(c) and of Article 24 of the Sixth Directive respectively be understood to mean the turnover generated in one year in the particular Member State for which the small undertakings scheme is utilised or the undertaking’s turnover generated in one year throughout the Community?

(6) If the answer to the fourth question is in the affirmative: should “annual turnover” within the meaning of Article 287 of Directive 2006/112/EC be understood to mean the turnover generated in one year in the particular Member State for which the small undertakings scheme is utilised or the undertaking’s turnover generated in one year throughout the Community?’

15. The Austrian, German and Greek Governments, the Council of the European Union and the European Commission took part in the procedure; the Greek Government submitted only written observations and the German Government presented only oral argument.

IV – **Legal assessment**

A – *Admissibility of the reference for a preliminary ruling*

16. The Council raises the question whether the order for reference is admissible. The referring court established only belatedly that Ms Schmelz does not generate any turnover in the territory of the Community other than the contested turnover from letting her apartment in Austria. The Council claims that if the referring court had been in possession of that information when the order referring the case was made, it could possibly have refrained from making a reference, since under those circumstances Ms Schmelz is to be regarded as a taxable person established in Austria.

17. In this regard, it should be borne in mind that, in proceedings under Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling. (10)

18. Thus, the Court may reject a request for a preliminary ruling submitted by a national court only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (11)

19. As far as the present case is concerned, it must be stated that the referring court merely forwarded to the Court a letter from Ms Schmelz. It is not clear whether it had already made definitive factual findings with regard to that statement. This does not preclude the admissibility of the reference for a preliminary ruling, however, because it is in principle incumbent on the referring court to decide at which stage of the procedure it considers it appropriate to refer the matter to the Court. (12)

20. Even assuming the information provided by Ms Schmelz to be correct, this does not mean that the answers to the questions referred are manifestly unnecessary for the decision in the main proceedings. It is far from clear that Ms Schmelz is to be regarded as established in Austria on account of her transactions, which are limited to the letting of the apartment there, with the result that she is undoubtedly subject to the exemption.

21. Consequently, it is necessary to answer the questions referred.

B – *Answers to the questions referred*

22. The first and second, the third and fourth, and the fifth and sixth questions each concern the same set of problems. They differ solely in that they refer to the provisions of the Sixth Directive (Questions 1, 3 and 5) or the corresponding provisions of Directive 2006/112 (Questions 2, 4 and 6).

23. According to its third recital, Directive 2006/112 recasts the Sixth Directive and would not, in principle, bring about material changes in the existing legislation. That recital states that the provisions which were nevertheless substantively amended in the recasting exercise are listed exhaustively in the provisions governing transposition and entry into force (Article 412). The small undertakings scheme (Article 281 et seq.) is not mentioned there. It is not therefore necessary to conduct a separate examination of the question on the basis of the Sixth Directive and Directive 2006/112.

24. The three sets of questions are also closely interrelated from a substantive point of view. The referring court brings the compatibility of the rules with the fundamental freedoms to the fore (first and second questions).

25. The third and fourth questions are raised only in the event that the provisions of the directives are *incompatible* with the fundamental freedoms and are intended to clarify the ensuing consequences.

26. The referring court asks the fifth and sixth questions on the premiss that the restriction of the small undertakings scheme to residents is *compatible* with the fundamental freedoms. The questions are directed at the interpretation of the rules, more specifically the notion of ‘annual turnover’ used therein which is relevant for recognition of status as a small undertaking. In this regard, the Unabhängiger Finanzsenat mentions the alternative of using only turnover generated in the State of residence/establishment or turnover generated in the entire territory of the Community.

27. Before examining more closely the specific questions, I would like to make a few points regarding the character of the small undertakings scheme as a special scheme and regarding the aims pursued by that scheme. In particular, it is uncertain to what extent the Union legislature and the Member States are bound by the fundamental freedoms and the general principles of European Union law in organising the tax exemption for small undertakings.

1. Preliminary remarks

a) The small undertakings scheme as a special scheme

28. In principle, all transactions listed in Article 2 of Directive 2006/112 by a taxable person within the meaning of Article 9 of the directive are subject to VAT. However, the directive itself provides for a considerable number of exemptions for specific services, often on grounds of sociopolitical concerns.

29. Furthermore, the directive gives the Member States the option to apply special schemes (Title XII) and derogations (Title XIII) which depart from the harmonised system. One of the special schemes is the small undertakings scheme.

30. The Court has consistently held that this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is therefore still only partial. (13) Thus, the harmonisation envisaged has not yet been achieved in so far as the Member States are authorised to retain or adopt certain national legal provisions which would, without that authorisation, be incompatible with the directive. (14)

31. Article 14 of the Second Directive (15) permitted the Member States to maintain the VAT exemption for small undertakings and thus did not fully harmonise the national provisions. (16) That special scheme – supplemented by certain more precise provisions – was incorporated into Article 24 of the Sixth Directive and lastly into Article 281 et seq. of Directive 2006/112. (17) In its proposal for the Sixth Directive, (18) the Commission stated:

‘Exemption and graduated tax relief are liable to play a part in overcoming difficulties which may be encountered by the smallest undertakings when applying value added tax. In addition, they may simplify the task of tax authorities. Nevertheless, a system of exemption and graduated tax relief cannot be considered as normal within the framework of a general tax on consumption such as value added tax. In addition, the coexistence of different special national systems could hinder the suppression of fiscal borders. This is the main reason why the proposed provisions are of a transitional nature.’

32. Because the small undertakings scheme therefore constitutes a partially harmonised special scheme which derogates from the general system of value added tax, it is to be interpreted strictly and must be applied only to the extent necessary to achieve its objective. (19)

33. The aim of the exemption for small undertakings is to strengthen the competitiveness of

that group of economic operators. It is also intended to save them the expenditure which would be connected with the payment of VAT and which would affect them disproportionately because of the small scale of their activities. At the same time, the scheme serves to simplify administration, since the tax authorities do not have to concern themselves with levying very small amounts of tax for a large number of small undertakings.

34. European Union law leaves the Member States scope to define the turnover limit for classification as a small undertaking. This allows the Member States to take account of the relevant national economic and administrative structures.

35. The small undertakings scheme is intended to benefit only undertakings which are actually economically active on a small scale. In the opinion of the parties, this is guaranteed by restricting the exemption to domestically established small undertakings. It prevents undertakings from benefiting abusively from the exemption in several States at the same time and the concession therefore being enjoyed by undertakings which are not actually small undertakings. Furthermore, the restriction to resident taxable persons ensures that the tax authorities are able to verify unreservedly at any time whether the conditions for the grant of that concession are actually met.

b) Consequences of partial harmonisation for the binding effect of higher-ranking European Union law

36. It is uncertain whether the Member States and the Union legislature are also bound by the fundamental freedoms and the general principles of law in legislative areas which are not fully harmonised.

37. The Commission takes the view, with reference to the judgment in *Idéal tourisme*, (20) that the Member States do not act in contravention of Community law if they adopt provisions derogating from the common system of value added tax in a partially harmonised area. However, if they avail themselves of an option laid down in the directive, they must take account of the fundamental rules of primary European Union law. Their measures are compatible with those rules if they satisfy the requirements of the directive and any restrictions of the fundamental freedoms are justified by overriding reasons of public interest.

38. The Commission argues that if there are infringements of European Union law, they cannot be attributed to the directive, but to the fact that the Member State in question has availed itself of the exemption option in a way that is not necessary for overriding reasons of public interest.

39. I can concur with the Commission’s view only to a limited extent.

40. It is true that taxable persons are treated differently, as a result of the partial harmonisation, depending on the national rules applicable to them. For example, undertakings in Spain enjoy the small undertakings exemption if their turnover does not exceed the equivalent of ECU 10 000 per year, whilst the limit for Austrian taxable persons is ECU 35 000. (21) This does not constitute discrimination on grounds of nationality, however, because the difference in treatment cannot be attributed to a public authority and does not take place within the same regulatory system, but results from the coexistence of non-harmonised rules in different Member States. (22) The Court dealt with a similar situation in *Idéal tourisme*. (23)

41. It is also correct that the Member States remain within the scope of European Union law where they exercise the power granted under the directive and apply a special scheme derogating from the common system of value added tax. (24) Whilst it is true that, in a sector which has not been subject to full harmonisation at Union level, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their

powers, respect the fundamental freedoms. (25)

42. In the present case, however, the difference in treatment of taxable persons cannot be attributed specifically to the coexistence of non-harmonised national provisions or an exercise by national law of the discretion granted under European Union law. Rather, Article 24(3) of the Sixth Directive and Article 283(1)(c) of Directive 2006/112 prescribe that the exemption is not possible for services provided by non-established taxable persons.

43. If this difference in treatment, laid down in the directives, based on the residence or place of establishment of the taxable person is not compatible with the Treaty on the Functioning of the European Union or with the general principles of law applicable in its implementation, the Member States would not have any margin of discretion for implementing the directives in conformity with European Union law. In particular, they could not extend the small undertakings scheme to services provided by non-resident taxable persons. Rather, they could guarantee the equal treatment of established and non- established small undertakings only by abolishing the small undertakings scheme.

44. A provision of a directive which gives the Member States an option to act in contravention of European Union law and does not allow scope to exercise that option in conformity with European Union law would be just as unlawful as a national provision under which a Member State availed itself of such an option. (26)

45. In answering the first and second questions, it must therefore be examined, first and foremost, whether the abovementioned provisions of the directives infringe higher-ranking rules of European Union law. Should this be the case, national rules transposing those provisions into national law are contrary to primary European Union law in exactly the same way as the provisions of the directives themselves. (27)

46. However, the validity of the relevant provisions of the directives cannot be assessed, if their meaning is not clear. I will therefore consider the fifth and sixth questions before I look at the first and second questions.

2. The fifth and sixth questions

47. The parties to the proceedings which have made observations take different views on the answer to the fifth and sixth questions. The Commission considers that in determining status as a small undertaking the sum of all turnover in the territory of the Community must be taken into account. The Austrian and German Governments, on the other hand, take the view that only turnover generated in the State of establishment is relevant.

48. As there is no clear indication of the correct interpretation from the wording, the meaning of the rules must be investigated having regard to their spirit and purpose.

49. For its interpretation the Commission relies above all on the scheme’s aim of easing the burden on undertakings which are actually economically active only on a small scale. According to the principle of corporate unity enshrined in the directive, the scale of the activity in the entire territory of the European Union must be included. If, in determining the annual turnover relevant for the application of the small undertakings scheme, account were taken only of turnover generated in the State of residence or establishment, the concession could theoretically also be enjoyed by undertakings which exceed the turnover threshold if their foreign activities are included. (28)

50. The Austrian and German Governments, on the other hand, focus on the aim of administrative simplification.

51. It should be borne in mind in this regard that the exemption for small undertakings is based on partially harmonised provisions which benefit only domestically established taxable persons. The first reason for restricting the exemption to resident taxable persons is that the tax authorities can only verify the activity of small undertakings resident in Austria without excessive expenditure.

52. If, in determining the annual turnover, account must also be taken of turnover generated in other Member States by domestically established small undertakings, the tax authorities of the State of establishment would be required to conduct expensive investigations involving the tax authorities of other Member States in order to verify the relevant statements made by the undertakings. Determining turnover alone would not be sufficient, as the German Government rightly argues. Rather, it would also have to be established, for example, whether the turnover had to be included in the determination of the turnover threshold under Article 288 of Directive 2006/112.

53. Even if the State of establishment is able to use the instrument provided for in Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (29) in order to obtain information in other Member States, the need to make such findings would largely detract from the simplification effect of the small undertakings scheme.

54. In addition to simplification, the directive also has the further aim of promoting small undertakings. That aim could be achieved only to a limited extent if turnover generated outside the State of establishment is disregarded. In individual cases, this could mean that undertakings would enjoy the exemption even though the sum of their turnover generated throughout the European Union exceeds the threshold for small undertakings.

55. However, it must be taken into consideration in this regard that small undertakings typically limit their economic activity on a local level to their place of establishment or residence. Where they also generate turnover in other Member States which – if added to the domestic turnover – results in the turnover threshold being exceeded, this would probably constitute an exception in view of the corporate structure of that taxable person. In order to achieve the intended simplification effect, it would therefore seem appropriate to adopt a generalised approach and to disregard any foreign turnover in determining the turnover threshold for the small undertakings scheme. The ensuing failure to meet the aim of promoting undertakings in a few rare exceptional cases must be accepted, otherwise the aim of simplification would, to a large extent, not be met.

56. If, however, undertakings generate turnover outside their State of establishment in individual cases, under this interpretation they do not benefit from the exemption as regards that turnover. The exemption does not apply in the Member State in which the turnover in question is generated, because it constitutes turnover generated by a non-resident taxable person there.

57. The principle of corporate unity, which the Commission derives from Article 9(1) of Directive 2006/112, does not run counter to that interpretation. Under that provision, taxable person means ‘any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity’.

58. If such a principle can actually be inferred from the rule, however, that principle would, as regards VAT, be in conflict with the territorial allocation of the power of taxation among the Member States. That allocation is not generally linked to the taxable person and his place of

establishment, but frequently to the place at which a taxable service is provided or the place at which supplied goods are intended for private consumption. Consequently, it is not unknown in the system of value added tax to consider an undertaking's turnover separately, depending on the Member State in which it is subject to tax.

59. The answer to the fifth and sixth questions is therefore that annual turnover within the meaning of Article 24 of the Sixth Directive in conjunction with Annex XV – List provided for in Article 151 of the Act of Accession – IX. Taxation, point 2(c) of the 1994 Act of Accession and within the meaning of Article 287 of Directive 2006/112 means the sum of the turnover generated by a taxable person in one year in the Member State in which he is established.

3. The first and second questions

60. By the first two questions, the Unabhängiger Finanzsenat asks the Court whether Article 24(3) of the Sixth Directive and Article 283(1)(c) of Directive 2006/112 and the relevant national implementing provisions are to be assessed having regard to the general principle of non-discrimination (Article 12 EC), the freedom of establishment (Article 43 EC) and the freedom to provide services (Article 49 EC). It also mentions the general principle of equal treatment. It must first be explored which of these higher-ranking norms is applicable.

a) The applicable fundamental freedoms

61. The reason for the reference is the levying of VAT on turnover generated by the appellant in the main proceedings, who is resident in Germany, through the letting of an apartment in Austria. The doubts as to the lawfulness of the abovementioned provisions of the directives and the Austrian implementing measures stem from the fact that only small undertakings established in Austria are entitled to an exemption.

62. With regard to the classification of letting of a property within the scope of one of the three fundamental freedoms mentioned by the referring court, I would like to briefly recall their main characteristics.

63. The freedom of establishment and the freedom to provide services are forms of the free movement of persons. They guarantee that citizens of the European Union can carry on economic activity as self-employed persons without impediment in another Member State, either by setting up a permanent establishment in the host State from which they operate or by providing cross-border services without becoming established in another Member State. These must be distinguished from the free movement of capital, which is generally characterised by the fact that the investor does not exercise his freedom of movement as a person, and only uses his capital in another Member State, but does not participate actively in economic life there himself.

64. Accordingly, in *Centro di Musicologia Walter Stauffer* (30) the Court identified the dividing line between freedom of establishment and free movement of capital.

65. It stated that the notion of establishment is a very broad one, allowing a Union citizen to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Union in the sphere of activities as self-employed persons. (31)

66. In order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured a permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed. (32)

67. Because those conditions were not satisfied in *Centro di Musicologia Walter Stauffer*, the Court rejected the application of freedom of establishment. (33) It stressed that the foundation bearing the same name does not have any premises in the host State for the purposes of pursuing its activities and that the services ancillary to the rental of the commercial property are provided by a German property management agent. (34)

68. In the present case too, it is not clear that Ms Schmelz herself or staff permanently engaged by her have a permanent presence in Austria in order to be economically active there. The let property cannot be regarded per se as a permanent establishment or branch if it does not form the base for persons who carry on an activity as a self-employed person in the host Member State. (35) The application of freedom of establishment is therefore ruled out in the present case.

69. The activity could instead fall within the scope of free movement of capital, as the Austrian and German Governments argue with reference to the judgment in *Centro di Musicologia Walter Stauffer*.

70. As is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam), (36) the free movement of capital guaranteed under Article 56 EC includes investments in real estate on the territory of a Member State by non-residents. That nomenclature still has the same indicative value for the purposes of defining the notion of capital movements. (37)

71. In its reference, the Unabhängiger Finanzsenat did not mention the free movement of capital. However, the Court is not thereby precluded from examining that fundamental freedom in order to provide the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions. (38)

72. However, at the hearing the Council and the Commission rightly suggested that letting activity in this case should not, as in *Centro di Musicologia Walter Stauffer*, be classified under the free movement of capital, but under the freedom to provide services within the meaning of Article 49 EC. That case had concerned the taxation of *income* from letting, with the result that there was a specific link to the proceeds from the capital investment. In the present case, on the other hand, tax was imposed on the *turnover* connected with the letting and thus the activity per se.

73. This is consistent with the approach adopted by the Court in consistent case-law where it has regard to the object of a provision in order to establish on which of several freedoms of movement its assessment should be based. (39)

74. The letting activity subject to VAT may be regarded as a service provided by a non-established person even if it is provided for a certain duration and using a fixed infrastructure in the host Member State, in this case an apartment. (40)

75. As regards the applicability of Article 12 EC, which lays down a general prohibition of all discrimination on grounds of nationality, it should be noted, lastly, that that provision applies independently only to situations governed by European Union law for which the Treaty lays down no specific rules of non-discrimination. (41) In addition to the freedom to provide services, there is therefore no scope in the present case for recourse to the general principle of non-discrimination. This applies *mutatis mutandis* to the principle of equal treatment, which is recognised as a general principle of law.

76. As an interim conclusion, it can thus be stated that the requirements of the Sixth Directive and of Directive 2006/112 regarding the small undertakings exemption and the relevant national implementing rules are to be assessed having regard to the freedom to provide services under Article 49 EC.

b) Restriction of freedom to provide services

77. As the Court has held on many occasions, Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies to national providers of services and to those of other Member States alike, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services. (42)

78. In this connection, Community law prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result. (43) That is true, in particular, of a measure under which a distinction is drawn on the basis of residence, in that that requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners. (44)

79. The prohibition on preventing nationals of a Member State from exercising the freedom to provide services through discrimination linked to nationality or to place of establishment, or through other restrictions, is addressed not only to the Member States, but also to the Union legislature itself, where it adopts measures to harmonise turnover taxes on the basis of Article 93 EC. Harmonisation of indirect taxation is intended to serve the establishment and functioning of the internal market, which includes the removal of obstacles to the exercise of the fundamental freedoms.

80. Under Article 24(2) and (3) of the Sixth Directive and Article 287(4) in conjunction with Article 283(1)(c) of Directive 2006/112, the Republic of Austria may exempt from VAT small undertakings with an annual turnover not greater than ECU 35 000 which are established in that Member State. The Austrian legislature availed itself of that option in Paragraph 6(1)(27) of the UStG 1994. Non-resident taxable persons, on the other hand, must pay VAT on their turnover generated in Austria, even if that turnover does not exceed the turnover threshold applicable in Austria.

81. In this regard, the Commission rightly observes that small undertakings generally generate turnover which is liable to taxation at their place of establishment or residence. In the case of certain services, such as the turnover from letting in the present case (see Article 45 of Directive 2006/112), however, the place of performance and the place of establishment or residence of the provider may be different. The same problem may arise with services when their place of performance is regarded as the place at which the service is actually provided or the place at which the recipient of the service is established. (45)

82. In such cases, the non-application of the exemption to non-resident service providers constitutes unequal treatment which is linked to the place of establishment and thus indirectly to nationality, because the vast majority of the country’s own nationals satisfy the establishment criterion. Alongside this, there is a restriction of the freedom to provide services. The non-availability of the tax exemption renders the provision of services in another Member State less attractive, since small undertakings established at the place of performance can offer a comparable service free of tax, and thus either at a lower price or with a higher profit margin than

non-resident undertakings.

83. Contrary to the arguments put forward by the Commission, non-resident undertakings are not completely relieved of the burden as a result of the fact that they may deduct input tax, whilst established small undertakings whose services are exempt from tax do not have the right to deduct input tax (Article 24(5) of the Sixth Directive and Article 289 of Directive 2006/112). Because the inputs generally have a lower value than the outputs, VAT continues to be incurred in the case of non-resident taxable persons in respect of the difference between those amounts. Domestic small undertakings, on the other hand, are fully exempt from the tax. There may also be situations where taxable turnover is not really incurred upstream, with the result that there is no deductible input tax credit.

84. Should it nevertheless be more attractive for certain forms of business to deduct input tax and, to that end, to waive the tax exemption on outputs, domestic small undertakings may opt for the application of the normal VAT system (see Article 24(6) of the Sixth Directive and Article 290 of Directive 2006/112). (46) Non-residents, on the other hand, do not have that option. Rather, they are in any case subject to the normal system.

c) Comparability of residents and non-residents

85. According to well-established case-law, discrimination is defined as treating differently situations which are identical, or as treating in the same way situations which are different. (47)

86. In its rulings on direct taxation, the Court has recognised that there are objective differences between the situation of residents and that of non-residents. It is not therefore discriminatory, as a rule, if a Member State denies non-residents certain tax concessions which it grants to residents. (48)

87. In this connection, the Court has stated that income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence. Moreover, a non-resident’s personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. In general, that is the place where he has his usual abode. (49)

88. These findings can be applied to the situation in the present case. The VAT exemption for small undertakings pursues, at least to some extent, similar aims to certain concessions linked to personal circumstances and ability to pay tax which are granted to natural persons in the context of taxation of their income. In both cases, the aim is to exempt income or turnover below a certain threshold from tax in order to ease the burden on taxable persons and to improve their economic situation.

89. As has already been stated, the turnover of small undertakings and the income of natural persons are, as a rule, concentrated at the place at which they are established. The State of establishment of a small undertaking is therefore in the best position to determine its overall turnover and, if necessary, to conduct the necessary on-the-spot checks if there are doubts whether the turnover limit has been respected.

90. It should be borne in mind in this regard that the limit relates to turnover generated domestically in the entire tax year. It is therefore necessary to give a forecast for the current year on the basis of previous periods. A definitive assessment to establish whether the turnover limit was not actually exceeded can only be conducted *ex post*. The State of establishment is in the best position to make such a turnover forecast and – should it subsequently prove to be inaccurate

– to take the necessary steps to adjust the taxation.

91. The information available to the tax authorities in the context of taxation of the income of a resident taxable person may be useful in determining the taxable turnover. There is no need to determine here the extent to which it allows precise inferences to be drawn as to the amount and composition of the turnover, a point on which the Austrian and German Governments expressed doubts at the hearing. However, the Council rightly pointed out that the declaration of a certain amount of income from activity as a self-employed person can in any case give cause for a review of status as a small undertaking.

92. On the other hand, a Member State in which a non-resident small undertaking generates turnover which is liable for VAT has only a selective insight into that taxable person's economic activity, in so far as it is carried on in the territory of that Member State. The tax authorities of that State cannot therefore estimate themselves whether the overall turnover of the non-resident service provider in a certain tax year will remain below the threshold for recognition as a small undertaking.

93. The Commission did refer to Regulation No 1798/2003, which provides the Member States with various means of exchanging information. However, it also stated that the database to be set up by the Member States pursuant to Chapter V of that regulation does not in any case contain all the information to elucidate an economic operator's status as a small undertaking. Consequently, it would be necessary, in many cases, to make costly requests for information to the State of establishment.

94. Even though there are means by which the host State can find out whether a non-resident service provider is regarded as a small undertaking in his State of establishment, the exemption of the turnover of non-residents would, in general, run counter to the spirit and purpose of the small undertakings scheme.

95. The exemption is intended to be a concession available to any small undertaking – similar to a basic income tax allowance – only once in a certain amount. Taking turnover generated throughout the European Union into consideration in determining status as a small undertaking would be the best way to take account of this character of the concession, but this is ruled out on the grounds set out in the answer to the fifth and sixth questions.

96. If the host State also exempted the turnover generated by non-residents without taking into consideration the turnover generated in the State of establishment, the sum of the turnover generated throughout the European Union could exceed the threshold for small undertakings. A taxable person could therefore, in theory, generate exempt turnover in any other Member State except his State of establishment. This extension of the concession would run counter to the aim of exempting turnover in a limited amount only once.

97. Because resident and non-resident taxable persons are not therefore normally in a comparable situation, having regard to the aim of the scheme, it does not constitute discrimination if the small undertakings exemption is granted only to the former group.

98. In its case-law, however, the Court has also ruled with regard to direct taxes that the situation of residents and non-residents is exceptionally comparable, namely in a case where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment. The State of his residence is not then in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances. (50)

99. In the case of a non-resident who receives the major part of his income in a Member State other than that of his residence, discrimination arises in such a case from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment. (51)

100. Ms Schmelz is also in this kind of situation. She does not carry on any activity liable for VAT in her State of residence and thus does not benefit from the exemption there. Instead, she generates taxable turnover only in Austria through the letting of the apartment situated there. However, the Austrian tax authorities do not regard her as a resident small undertaking and therefore subject that turnover to VAT.

101. This leads to unequal treatment compared with typical small undertakings which mainly generate their turnover in their State of residence or establishment and can therefore be economically active there on a certain scale without having to pay turnover tax. Ms Schmelz, on the other hand, does not benefit from the small undertakings scheme anywhere, even though her turnover is also concentrated in one Member State and remains below the relevant threshold there. This unequal treatment results in a restriction of the exercise of the freedom to provide services.

d) Justification

102. A restriction on the freedom to provide services is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. (52)

103. The restriction of the exemption to resident small undertakings is intended to ensure that each small undertaking benefits from the concession only once, where its economic activity is centred. It is intended, without excessive administrative expenditure, to prevent undertakings from benefiting from the exemption more than once.

104. The Court has already held that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty. (53)

105. However, it should be borne in mind that, according to settled case-law, irrespective of the existence of a legitimate objective under European Union law, a restriction on the fundamental freedoms enshrined in the Treaty may be justified only if the relevant measure is appropriate to ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective. (54)

106. Furthermore, national legislation is appropriate to ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. (55)

107. The small undertakings scheme will not satisfy those conditions if an economic operator in the particular situation of Ms Schmelz could not benefit from the exemption in any Member State, even though he generates turnover in only one Member State, through the letting of a property located there, and that turnover does not exceed the threshold for recognition as a small undertaking.

108. It would go beyond what is necessary for reasons of fiscal supervision to exclude the exemption also in a case where the concession should clearly apply, according to its spirit and purpose, and the taxable person is not given an opportunity to show that he generates taxable

turnover only in the Member State in question.

e) Possibility of an interpretation which maintains validity

109. It is settled case-law that a Union act must be interpreted, as far as possible, in such a way as not to affect its validity. (56) In that regard, all Community acts must be interpreted in accordance with primary law as a whole, including the fundamental freedoms, which prohibit less favourable treatment of cross-border situations compared with purely national situations, unless such treatment is objectively justified. (57)

110. It must therefore be examined whether the less favourable tax treatment of a taxable person in the position of Ms Schmelz necessarily follows from the directives or whether an interpretation of the third subparagraph of Article 24(3) of the Sixth Directive and Article 283(1)(c) of Directive 2006/112 which maintains validity would be possible.

111. In this connection, the German Government took the view that Ms Schmelz could, on a broad interpretation of the notion of establishment, be regarded as a taxable person established in Austria.

112. It should be stated that the notion of establishment within the meaning of the third subparagraph of Article 24(3) of the Sixth Directive and Article 283(1)(c) of Directive 2006/112 is a European Union law notion which must be given an autonomous interpretation.

113. According to the meaning of the term, ‘establishment’ requires that a person has a permanent, fixed point of contact in the State in question. An interpretation based on the wording would therefore certainly allow the owner of a property to be regarded as an established taxable person, even if he does not use that property himself for residential purposes. It should be stressed in this connection that the directives do not employ the notions of ‘residence’ or ‘registered office’, but ‘establishment’, which permits a broader interpretation than the abovementioned *termini technici*.

114. This interpretation of the notion of establishment is not precluded by the abovementioned finding that the letting of an apartment in another Member State is not, in the present case, to be regarded as an exercise of the freedom of establishment. The notions of establishment within the meaning of Article 43 EC and establishment in the third subparagraph of Article 24(3) of the Sixth Directive and Article 283(1)(c) of Directive 2006/112 exist in a completely different legislative context.

f) Interim conclusion

115. The directive can thus be interpreted to the effect that the tax treatment of the turnover of an economic operator in the position of Ms Schmelz does not result in a breach of the freedom to provide services. It is for the referring court to examine whether the Austrian implementing provisions also allow such an interpretation in conformity with European Union law. If that is not possible, they must be disapplied in so far as they exclude a taxable person in the position of Ms Schmelz from the small undertakings exemption.

116. The answer to the first and second questions must therefore be that the notion of taxable person not established domestically for the purposes of the third subparagraph of Article 24(3) of the Sixth Directive and for the purposes of Article 283(1)(c) of Directive 2006/112 is to be interpreted as not covering an economic operator who generates turnover liable for value added tax exclusively in the State in question, namely through the letting of an apartment owned by him, and that turnover falls below the threshold applicable for the exemption for small undertakings in

that State. If the abovementioned provisions are interpreted in this way, the examination of the questions referred has not revealed anything which could call into question the validity of the provisions.

4. The third and fourth questions

117. In the light of the answer to the first and second questions, there is no need to answer the third and fourth questions.

V – **Conclusion**

118. I therefore propose that the questions referred by the Unabhängiger Finanzsenat, Außenstelle Wien be answered as follows:

(1) Annual turnover

– within the meaning of Article 24 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 in the version of Council Directive 92/111/EEC of 14 December 1992 in conjunction with Annex XV – List provided for in Article 151 of the Act of Accession – IX. Taxation, point 2(c) of the 1994 Act of Accession and

– within the meaning of Article 287 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

means the sum of the turnover generated by a taxable person in one year in the Member State in which he is established.

(2) The notion of taxable person not established domestically for the purposes of the third subparagraph of Article 24(3) of the Sixth Directive and for the purposes of Article 283(1)(c) of Directive 2006/112 is to be interpreted as not covering an economic operator who generates turnover liable for value added tax exclusively in the State in question, namely through the letting of an apartment owned by him, and that turnover falls below the threshold applicable to the exemption for small undertakings in that State.

If the abovementioned provisions are interpreted in this way, the examination of the questions referred has not revealed anything which could call into question the validity of the provisions.

1 – Original language: German.

2 – 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 (OJ 1977 L 145, p. 1; ‘the Sixth Directive’).

3 – Council directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘Directive 2006/112’).

4 – Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Annex XV – List provided for in Article 151 of the Act of Accession – IX. Taxation, point 2(e) (OJ 1994 C 241, p. 21).

5 – Council directive of 30 March 2000 amending Directive 77/388/EEC on the common system of value added tax – transitional provisions granted to the Republic of Austria and the Portuguese

Republic (OJ 2000 L 84, p. 24).

6 – Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16).

7 – Council directive of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47).

8 – Cited in footnote 4.

9 – This is stated in a subsequent letter from the referring court dated 17 March 2009.

10 – See, inter alia, Case C-119/05 *Lucchini* [2007] ECR I?6199, paragraph 43; Case C?414/07 *Magoora* [2008] ECR I?10921, paragraph 22; and Joined Cases C?317/08 to C?320/08 *Alassini and Others* [2010] ECR I?0000, paragraph 25.

11 – See, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I?2099, paragraph 39; *Magoora*, cited in footnote 10, paragraph 23; and *Alassini and Others*, cited in footnote 10, paragraph 26.

12 – See, in this regard, Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 5, and Case C?116/02 *Gasser* [2003] ECR I?14693, paragraph 27.

13 – Case C-165/88 *ORO Amsterdam Beheer and Concerto* [1989] ECR 4081, paragraph 21; Case C-240/05 *Eurodental* [2006] ECR I?11479, paragraph 50; and Case C?462/05 *Commission* v *Portugal* [2008] ECR I?4183, paragraph 51.

14 – See, with regard to the special rules under Article 28 of the Sixth Directive, Case C-36/99 *Idéal tourisme* [2000] ECR I?6049, paragraph 38; *Eurodental*, cited in footnote 13, paragraph 51; and *Commission* v *Portugal*, cited in footnote 13, paragraph 52.

15 – Cited in footnote 6.

16 – See the sixth recital in the preamble to the Second Directive.

17 – See, with regard to the character of the small undertakings scheme as a national special scheme, the second sentence of the 15th recital in the preamble to the Sixth Directive and the identical recital 49 in the preamble to Directive 2006/112: ‘Member States should nevertheless be able to retain their special schemes for small undertakings, in accordance with common provisions, and with a view to closer harmonisation.’

18 – Commission proposal of 29 June 1973 for a Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, *Bulletin of the European Communities*, Supplement 11/73, p. 25.

19 – Case C?128/05 *Commission* v *Austria* [2006] ECR I?9265, paragraph 22, with reference to Joined Cases C?308/96 and C?94/97 *Madgett and Baldwin* [1998] ECR I?6229, paragraph 34, and Case C?280/04 *Jyske Finans* [2005] ECR I?10683, paragraph 35. See also Case C?251/05 *Talacre Beach Caravan Sales* [2006] ECR I?6269, paragraph 23.

20 – Cited in footnote 14, paragraph 38.

21 – See Article 287(2) and (4) of Directive 2006/112.

22 – Case C?513/04 *Kerckhaert and Morres* [2006] ECR I?10967, paragraph 20; Case C?67/08 *Block*

[2009] ECR I?883, paragraph 28; and Case C?96/08 *CIBA* [2010] ECR I?0000, paragraph 25.

23 – See also my Opinion in Case C?309/06 *Marks & Spencer* [2008] ECR I?2283, point 32 et seq.

24 – See, in this respect, Case C?309/06 *Marks & Spencer* [2008] ECR I?2283, paragraphs 33 and 34, and point 28 et seq. of my Opinion in that case.

25 – Case C?393/05 *Commission* v *Austria* [2007] ECR I?10195, paragraph 29; Case C?404/05 *Commission* v *Germany* [2007] ECR I?10239, paragraph 31; and Case C?438/08 *Commission* v *Portugal* [2009] ECR I?10219, paragraph 27.

26 – See, in this connection, Case C?540/03 *Parliament* v *Council* [2006] ECR I?5769 (‘*Family reunification*’), in which the Court also examined whether the provisions of the contested directive authorise the Member States to act unlawfully or allow them a sufficient margin for an implementation in conformity with Community law (see, in particular, paragraphs 76, 90, 103 and 104 of the judgment).

27 – It should be pointed out, however, that, in preliminary ruling proceedings, the Court does not have the power to rule upon the compatibility of a specific national rule with Community law. Rather, it is for the national courts and tribunals to draw the consequences from the interpretation of Community law given by the Court and, if necessary, to disapply a national rule (settled case-law; see, inter alia, Case C?380/05 *Centro Europa 7* [2008] ECR I?349, paragraphs 49 and 50, and Case C?118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I?0000, paragraph 23.

28 – The statements made by Advocate General Sharpston in her Opinion in Case C?128/05 *Commission* v *Austria* [2006] ECR I?9265, point 39, could also be understood in this way. However, that case did not concern the determination of the turnover by the undertaking’s State of establishment, but by a State in which the taxable person is not established.

29 – OJ 2003 L 264, p. 1.

30 – Case C?386/04 [2006] ECR I?8203, paragraph 16 et seq.

31 – *Centro di Musicologia Walter Stauffer*, cited in footnote 30, paragraph 18, with reference to Case 2/74 *Reyners* [1974] ECR 631, paragraph 21, and Case C-55/94 *Gebhard* [1995] ECR I?4165, paragraph 25. See also Case C?451/05 *ELISA* [2007] ECR I?8251, paragraph 63

32 – *Centro di Musicologia Walter Stauffer*, cited in footnote 30, paragraph 19, and *ELISA*, cited in footnote 31, paragraph 64.

33 – *Centro di Musicologia Walter Stauffer*, cited in footnote 30, paragraph 20.

34 – See, with regard to the notion of permanent establishment, the Opinion of Advocate General Stix-Hackl in Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, points 50 to 55.

35 – With regard to the minimum requirements for an establishment within the meaning of Article 43, see also Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraphs 67 and 68.

36 – OJ 1988 L 178, p. 5.

37 – Case C-370/05 *Festersen* [2007] ECR I?1129, paragraph 23, and *ELISA*, cited in footnote 31, paragraph 59.

38 – See, in this regard, Case C-241/89 *SARPP* [1990] ECR I?4695, paragraph 8; Case C-387/01 *Weigel* [2004] ECR I?4981, paragraph 44; Case C?152/03 *Ritter-Coulais* [2006] ECR I?1711, paragraph 29; and Case C?506/06 *Mayr* [2008] ECR I?1017, paragraph 43.

39 – See, in this regard, *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 35, paragraphs 31 to 33; Case C-452/04 *Fidium Finanz* [2006] ECR I?9521, paragraphs 34 and 44 to 49; and Case C?311/08 *SGI* [2010] ECR I?0000, paragraph 25.

40 – See *Gebhard*, cited in footnote 31, paragraphs 26 and 27, and Case C?215/01 *Schnitzer* [2003] ECR I?14847, paragraphs 28 to 32.

41 – See, in this regard, Joined Cases C?397/98 and C?410/9 *Metallgesellschaft and Others* [2001] ECR I?1727, paragraphs 38 and 39; Case C?443/06 *Hollmann* [2007] ECR I?8491, paragraphs 28 and 29; and *SGI*, cited in footnote 39, paragraph 31.

42 – See, inter alia, Case C-58/98 *Corsten* [2000] ECR I?7919, paragraph 33; Case C?131/01 *Commission* v *Italy* [2003] ECR I?1659, paragraph 26; and Case C?42/07 *Liga Portuguesa de Futebol Profissional and Baw International* [2009] ECR I?7633, paragraph 51.

43 – See, inter alia, Case C?80/94 *Wielockx* [1995] ECR I?2493, paragraph 16; Case C?385/00 *de Groot* [2002] ECR I?11819, paragraph 75; Case C?346/04 *Conijn* [2006] ECR I?6137, paragraph 15; and Case C?103/08 *Gottwald* [2009] ECR I?9117, paragraph 27.

44 – Case C-224/97 *Ciola* [1999] ECR I?2517, paragraph 14; Case C?388/01 *Commission* v *Italy* [2003] ECR I?721, paragraph 14; and *Gottwald*, cited in footnote 43, paragraph 28.

45 – See Articles 44 and 46 to 56 of Directive 2006/112.

46 – At the hearing, the Austrian Government pointed out that VAT on building services for the construction of a property can be deducted as input tax from the tax on turnover from letting. Because the letting would only be taxed at a reduced rate, there could even be an input tax surplus. On the acquisition of an older, used property, however, there would probably not be any deductible input tax credit.

47 – See, inter alia, Case C-279/93 *Schumacker* [1995] ECR I?225, paragraph 30; *Wielockx*, cited in footnote 43, paragraph 17; and Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I?11673, paragraph 46; and Case C-282/07 *Truck Center* [2008] ECR I?10767, paragraph 37.

48 – *Schumacker*, cited in footnote 47, paragraphs 31 and 34; *Wielockx*, cited in footnote 43, paragraphs 17 and 18; Case C-234/01 *Gerritse* [2003] ECR I?5933, paragraph 43; Case C-169/03 *Wallentin* [2004] ECR I?6443, paragraphs 15 and 16; and Case C?329/05 *Meindl* [2007] ECR I?1107, paragraph 23.

49 – *Schumacker*, cited in footnote 47, paragraph 32; *Gerritse*, cited in footnote 48, paragraph 43; *Wallentin*, cited in footnote 48, paragraph 16; and *Meindl*, cited in footnote 48, paragraph 23.

50 – See *Schumacker*, cited in footnote 47, paragraph 36; *de Groot*, cited in footnote 43, paragraph 89; and *Wallentin*, cited in footnote 48, paragraph 17.

51 – See *Schumacker*, cited in footnote 47, paragraph 38; *Wielockx*, cited in footnote 43, paragraphs 20 to 22; and *Wallentin*, cited in footnote 48, paragraph 17.

52 – See Case C-398/95 *SETTG* [1997] ECR I?3091, paragraph 21; Case C-341/05 *Laval un Partneri* [2007] ECR I?11767, paragraph 101; and Case C-330/07 *Jobra* [2008] ECR I?9099, paragraph 27.

53 – See Case C-101/05 *A* [2007] ECR I?11531, paragraph 55, and Joined Cases C-155/08 and C?157/08 *X* [2009] ECR I?5093, paragraph 45.

54 – See *X*, cited in footnote 53, paragraph 47; Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I?10821, paragraph 42; and Case C?384/08 *Attanasio Group* [2010] ECR I?0000, paragraph 51.

55 – See Case C-169/07 *Hartlauer* [2009] ECR I?1721, paragraph 55; *Presidente del Consiglio dei Ministri*, cited in footnote 54, paragraph 42; and *Attanasio Group*, cited in footnote 54, paragraph 51.

56 – See Case C-403/99 *Italy* v *Commission* [2001] ECR I?6883, paragraph 37; Case C?305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I?5305, paragraph 28; and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I?10923, paragraph 47.

57 – See, with regard to the general principle of equal treatment, Case C-210/03 *Swedish Match* [2004] ECR I?11893, paragraph 70; Case C-344/04 *IATA and ELFAA* [2006] ECR I?403, paragraph 95; and *Sturgeon and Others*, cited in footnote 56, paragraph 48.