OPINION OF ADVOCATE GENERAL

TRSTENJAK

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Case C?270/09

Macdonald Resorts Limited

v

The Commissioners for Her Majesty’s Revenue & Customs

(Reference for a preliminary ruling from the Court of Session of Scotland (United Kingdom))

(Tax legislation – Harmonisation – Turnover taxes – Interpretation of Articles 9(2) and 13B(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment – Definition of the exemption applicable to the leasing or letting of immovable property – Exceptions – Sale through a holiday club of Points Rights which grant entitlement to use timeshare holiday accommodation in a specific year)

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I – **Introduction**

1. By its reference for a preliminary ruling under Article 234 EC, (2) the Scottish Court of Session (‘the referring court’) submits to the Court of Justice of the European Union a number of questions concerning the interpretation of Articles 9(2) and 13B(b) of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (‘the Sixth Directive’). (3)

2. The questions referred concern both the correct classification for VAT purposes of certain services provided in the context of the acquisition of timeshare usage rights, and the determination of the decisive criteria for determining the relevant place of supply for tax purposes. The reference for a preliminary ruling has its origin in a dispute between Macdonald Resorts Limited (‘MRL’), an undertaking established in the United Kingdom whose business consists inter alia in the sale of timeshare usage rights, and the Commissioners for Her Majesty’s Revenue & Customs (the UK tax authorities; ‘HMRC’) concerning the taxation of a line of income arising from a specific offer made by that undertaking, under which timeshare usage rights are secured for consideration in accordance with a specific points system.

3. This case has certain parallels with *RCI Europe*, in which the Court gave judgment on 3 September 2009. (4) This is due not least to the fact that the treatment for VAT purposes of business transactions connected with the acquisition of timeshare usage rights forms the subject-matter of this case too. Nevertheless, the differences between them, which relate primarily to the structure of MRL’s offer, are readily apparent. Consequently, the Court’s findings in *RCI Europe* may at most serve as the starting point for the legal examination of this case.

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 on the common system of value added tax, (5) 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 (6) 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 (7) 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’.

Article 10(2) of the Sixth Directive (8) provides as follows:

‘1.

(a) “Chargeable event” shall mean the occurrence by virtue of which the legal conditions for tax to become chargeable are fulfilled.

(b) The tax becomes “chargeable” when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire. Member States may provide that, in certain cases, the continuous supply of goods or services over a period of time is to be regarded as being completed at least at intervals of one year.

However, where a payment is to be made on account before the goods are delivered or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.

By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either:

– no later than the issue of the invoice, or

– no later than the receipt of the price, or

– where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.’

7. Article 13B of the Sixth Directive (9) contains the following provision:

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

…

(b) the leasing or letting of immovable property excluding

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

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

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

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

III – **Facts**

8. MRL is a private company which has its registered office in Scotland (United Kingdom). Its business consists in selling timeshare usage rights in properties situated in the United Kingdom and in Spain together with the supply of property maintenance and other related services. MRL operates several resorts in both countries as well as a hotel chain in the United Kingdom. HMRC is the authority responsible for the collection of VAT in the United Kingdom.

9. Until 2003, the timeshare usage rights sold by MRL comprised usage rights for fixed weeks ('fixed timeshare weeks'): MRL's customers paid MRL for the right to occupy a specific property for a specified period of time – usually one or two particular weeks in each year – for a lengthy or indefinite period. Customers were responsible for the annual maintenance charges. MRL accounted for VAT on the consideration received from customers purchasing fixed timeshare weeks on the basis of the location and age of the relevant property. Accordingly, where the property was located in the United Kingdom and less than three years old, VAT was paid at the standard rate. Where the property was in the United Kingdom and at least three years old, the transaction was treated as exempt. This treatment was in accordance with HMRC's understanding of the application of VAT law to the supply of fixed timeshare weeks. Where the property was located in Spain, the transaction was treated as falling outside the scope of UK VAT and the appropriate Spanish tax treatment applied. VAT on maintenance charges was accounted for in the UK or Spain as appropriate.

10. In October 2003, MRL introduced a new timeshare product, 'Options by Macdonald Hotels and Resorts' ('the Options Scheme'). To set up the Options Scheme, MRL established a club called 'Options by Macdonald Hotels and Resorts' ('the Club'), a non profit-making unincorporated body governed by a written Constitution, with the following principal object: 'to secure for the Members rights to reserve holiday accommodation and other ancillary benefits for specified periods in each year during the period of 30 years hereinafter mentioned in terms of the Scheme as defined by this Constitution'.

11. It is clear from the order for reference that the Constitution of the Club, and the contracts associated with it, are complex documents. Their main features are as follows:

(i) The Club was constituted for 30 years from 3 October 2003, that is until 2 October 2033.

(ii) The Constitution, the rights of the parties thereunder and the associated contracts are governed by the laws of Scotland.

(iii) MRL is the Founder Member under the Constitution with the power and responsibility to conduct the business and affairs of the Club, administer the Scheme and perform such acts as it considers necessary for that purpose.

(iv) Each Member has one vote for each Points Right to which he is entitled.

(v) As Founder Member, MRL appointed a Trustee and transferred to it, in or about October 2003, its right and title to all unsold timeshare weeks in its inventory of timeshare accommodation. Under the Constitution MRL became entitled to the 'Points Rights' accruing to that accommodation. These Points Rights (together with Rights in respect of any accommodation subsequently transferred by MRL to the Trustee) are available for sale by MRL to Ordinary Members. The concept of 'Points Rights' is explained in sub-paragraph (vii) below.

(vi) MRL's customers who apply to join, and who comply with the relevant conditions for membership, become Ordinary Members of the Options Scheme. They acquire Points Rights either by purchase from MRL (as mentioned above) or by depositing rights to fixed timeshare weeks with the Trustee (as explained in sub-paragraph (viii) below).

(vii) The Constitution provides for MRL to attribute a value to all timeshare weeks available for use by Members. The values are expressed as a certain number of Points determined according to the location, standard and type of accommodation and the time of year. Members are credited each year with a number of Points according to their Points Rights. They may redeem these in that year by occupying accommodation of their choice and for a chosen period, up to the value of their Points. The expression 'Points Rights' means the entitlement of Members to be credited each year with Points so that they can exercise their rights to occupy accommodation during that year. The Members' right of redemption is subject to the availability of accommodation at the time and in the resort in which they would like to stay.

(viii) There is no joining fee payable on first becoming a Member of the Options Scheme, but, on applying to join the Scheme, a new Ordinary Member must acquire Points Rights. He may do so in one of two ways. First, he may purchase Points Rights from MRL (currently at GBP 2.50 per Points Right, subject to promotional discounts from time to time). The purchase is effected by the customer entering a Points Sales Contract with MRL. Secondly, he may receive Points Rights in return for (1) depositing with the Trustee timeshare weeks which he has previously acquired from MRL and (2) payment of an 'enhancement fee'. The second of those methods of acquiring Points Rights can be effected in one of two ways. A pre-existing MRL timeshare owner may bring his property within the Options Scheme by entering into an 'Enhancement Contract' with MRL, thereby receiving Points Rights referable to that timeshare usage right. Alternatively, an intending Member who does not already own timeshare weeks may enter into a 'Resale and Enhancement Contract' with MRL, whereby he simultaneously purchases timeshare weeks and brings them within the Options Scheme. Members who have entered either of those contracts are referred to as 'Enhanced Members'. Such persons are a particular kind of Ordinary Member. An Enhanced Member retains the right, exercisable within the first two months of each year, to elect to use his timeshare weeks in that year. If he does not so elect, he is credited with an appropriate number of Points which he may use on other Options accommodation of equivalent value and his timeshare weeks, having been deposited with the Trustee, become available for use by any other Members who might choose to redeem their Points to secure the use of the accommodation for those weeks.

(ix) In addition, Ordinary Members agree to pay annual Management Charges appropriate to their holding of Points Rights, and transaction fees for reserving accommodation when redeeming Points. Payment is made to MRL in Scotland.

(x) Additional Points Rights may be purchased from MRL by Ordinary Members at any time.

(xi) The Constitution provides that MRL may make arrangements for Members to exchange Points for accommodation in hotels operated by MRL or for other benefits. In practice MRL has arranged that instead of redeeming Points for occupancy of timeshare accommodation members are entitled to request, up to 10 months in advance, the exchange of Points for accommodation for periods of three, four or seven nights in one of over 70 hotels, subject to availability. The number of Points required for a booking varies according to a specified classification into which the participating hotels are ordered. Upon accepting the booking MRL becomes responsible to the hotel for the accommodation cost.

(xii) The Constitution provides that Members can, upon request, save up Points unused in one year to be used in the next following year. Their whole Points entitlement may be saved if the request is made not later than nine months before the end of the then current year, and up to 50% may be saved if the request is made between nine and three months before the year end.

(xiii) The Constitution provides that Members can, up until three months before the end of the year, borrow Points from their following year's entitlement when making a reservation that calls for Points exceeding their Points Rights for the current year. To do so they must pay the next year's estimated Management Charges at the time of making the reservation.

(xiv) The Constitution also provides that MRL may arrange for Members to have access to and membership of an external (i.e. run by a third party) timeshare exchange programme. MRL has established links with one such programme, known as Interval International. On joining the Options Scheme, Members acquire, for no separate payment, two years' membership of Interval International. Thereafter Members may continue as members of Interval International by separate arrangement and at their own expense. Membership of Interval International entitles Members of the Club to exchange timeshare weeks within the Options Scheme, for which they have redeemed their Points in any given year, for accommodation made available by other members of Interval International. Under the Constitution MRL is entitled to terminate or to change any affiliation to an external timeshare programme which it has arranged.

(xv) MRL has the power at any time to remove from the Options Scheme any of the timeshare weeks which it has transferred to the Trustee (see sub-paragraph (v) above). However MRL is obliged to ensure that there is always sufficient accommodation available to satisfy the total of the Points Rights held by itself and by Ordinary Members. MRL has power also to determine and vary the Points grading of Accommodation, and to re-denominate Points and Points Rights by increasing or decreasing their number in line with each other whilst maintaining their value.

IV – **Main proceedings and questions referred**

12. The dispute in the main proceedings concerns the correct classification, for the purposes of determining liability to VAT, of the services provided by MRL in the course of its timeshare usage rights business. The place of supply of those services is also at issue.

13. The dispute arises from a decision by HMRC in March 2004 to the effect that the supply of Points Rights was to be treated as a taxable transaction in the form of the supply of benefits derived from membership of a club. HMRC also stated in its decision that the place of supply was

the United Kingdom.

14. MRL lodged an appeal against HMRC's decision with the Value Added Tax Tribunal in Edinburgh ('the VAT Tribunal'). On 24 April 2006, the VAT Tribunal heard evidence, considered a Statement of Agreed Facts presented by the parties and received the parties' oral submissions. On 16 June 2006, it gave its final judgment dismissing MRL's appeal.

15. MRL subsequently lodged an appeal with the referring court. After hearing the parties, the referring court decided to seek a ruling from the Court of Justice on the following questions:

1. Where MRL, in accordance with the provisions of the Constitution of the Club and the contracts associated therewith, makes supplies of contractual rights ('Points Rights') which entitle the purchaser to Points redeemable annually for the occupation and use of timeshare accommodation in MRL's resorts, is that supply to be characterised

(a) as the leasing or letting of immovable property within the meaning of Article 13B(b) of the Sixth VAT Directive (now Article 135(1)(l) of Directive 2006/112); or

(b) as membership of a club; or

(c) in some other manner?

2. Does it affect the answer to question 1 that:

(a) in some cases the contractual rights are acquired in return for the customer depositing with MRL pre-existing rights of occupation held by the customer in timeshare accommodation at a particular place for one or more fixed weeks;

(b) the customer may in any year decide not to redeem his or her Points entitlement for that year in whole or in part for any rights of occupation and may instead elect to augment his or her entitlement in the following year, or, subject to the contractual conditions of the scheme in any year, may augment that year's entitlement by 'borrowing' from his or her entitlement to points in the following year;

(c) the properties comprising the pool of accommodation may change between the time when Points Rights are acquired and the time when Points are redeemed for the right to occupy a property;

(d) the number of points to which the customer is entitled each year may be varied by the supplier in accordance with the contractual obligations of the scheme;

(e) the appellant may from time to time arrange for persons holding Points Rights to have access to an external timeshare programme;

(f) the appellant may from time to time make arrangements for persons holding Points Rights to exchange their Points for accommodation in hotels operated by the appellant or for other benefits provided by the appellant;

3. Where a taxable person makes supplies of the services described in questions 1 and 2 above,

(a) are these 'services connected with immovable property' within the meaning of Article 9(2)(a) of the Sixth VAT Directive (now Article 45 of Directive 2006/112)?

(b) If the answer to question 3(a) is 'Yes': in circumstances where Members of the Club may exercise their contractual rights by occupying timeshare accommodation in more than one Member State, and it is not known at the time of supply which accommodation will be so occupied, how is the place of supply to be determined?

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

16. The order for reference of 10 July 2009 was received at the Court Registry on 14 July 2009.

17. MRL, the Governments of the United Kingdom, the Portuguese Republic and the Hellenic Republic, and the Commission submitted written observations within the period laid down in Article 23 of the Statute of the Court of Justice.

18. Oral argument was presented by the agents for MRL, the Governments of the United Kingdom and the Hellenic Republic, and the Commission at the hearing which took place on 10 June 2010.

VI – **Main arguments of the parties**

19. A judicious appraisal of the reference for a preliminary ruling, shows that the questions referred can in principle be divided into two subject areas. The first area concerns the correct classification of the services provided by MRL and the identification of the relevant assessment criteria. The second area relates to the applicability or otherwise of the tax exemption for the leasing of immovable property.

A – *Classification of the services in question*

20. In the view of *MRL*, the services which it provides under the Points Scheme, under which customers have the possibility of exchanging Points Rights for timeshare usage rights, must be regarded as leasing or letting within the meaning of Article 13B(b) of the Sixth Directive. In the alternative, they may be classified as services connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive, but under no circumstances as a service provided by a club.

21. The *Portuguese Government* is of the opinion that, in so far as a member of a holiday club remits to that club a specific sum of money or transfers to it a timeshare usage right which he already holds in return for a specific number of Points, that sum of money or that timeshare usage right constitutes consideration for a service, supplied for value, consisting in the provision of accommodation in a resort, regardless of whether the owner of the resort is the club itself or a third party who invoices the club for the provision of accommodation.

22. The *Greek Government* takes the view that the services in question under the Points Scheme, under which customers have the possibility of exchanging Points Rights for timeshare usage rights, must be classified as the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, in accordance with Article 13B(b)(1) of the Sixth Directive. However, they cannot be classified as the tax-exempt activities of leasing and letting.

23. In the view of the *Government of the United Kingdom*, Article 13B(b) of the Sixth Directive does not apply to the service in question. The Government of the United Kingdom considers it necessary to start from a strict interpretation in accordance with the principles developed in case-law and the requirements of the VAT system. Such principles must be applied in particular to the concept of the leasing or letting of immovable property. With regard to letting, the Court has held

that that service essentially involves the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it. As far as the principles laid down in case-law are concerned, the United Kingdom points out that regard must be had to all the circumstances in which the service in question takes place in order to determine the nature of a taxable supply. With respect to the dispute in the main proceedings, the Government of the United Kingdom doubts that MRL's business model can be regarded as the leasing or letting of immovable property. In support of that view, the United Kingdom points out that, at the time when the Points are acquired, there is no identifiable accommodation, no period of accommodation and no timeshare usage right even. The nature of the accommodation is at that time not yet known to the contracting parties, with the result that the acquisition of Points bears no relation to a specific immovable property.

24. The Government of the United Kingdom therefore concludes that question 1(a) must be answered in the negative. The supply in question is a service liable to VAT which is provided in the context of membership of a club.

25. In the view of the *Commission*, the money paid for a service consisting in the procuring of timeshare usage rights in exchange for Points Rights cannot be regarded as consideration for membership of a club. The customer is not paying to become a member of the club, but rather to obtain the right to use MRL's timeshare properties each year. Accordingly, the place of supply of the service in question must be determined in the light of those benefits.

26. The Commission is of the opinion that, in so far as the Points Rights are exchanged for timeshare usage rights, those Points Rights clearly have a sufficiently direct connection with immovable property. Under Article 9(2)(a) of the Sixth Directive, turnover arising from the supply of such a service is to be subject to VAT in the place where the property is situated. It is therefore the geographical location of the immovable property made available to the holder of Points Rights which determines the place of supply.

27. The Commission concludes that the provision of Points Rights under a scheme such as that operated by MRL is to be treated for VAT purposes in the same way as a service involving the redemption of Points. The redemption of Points Rights in return for the use of a particular timeshare property or for hotel accommodation constitutes a service connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive.

B – *The place of taxation and the possibility of exemption from tax*

28. *MRL* claims that the services described in the first and second questions are services 'connected with immovable property' within the meaning of Article 9(2)(a) of the Sixth Directive. With regard to question 3(b), MRL takes the view that the place of supply must be determined differently depending on whether the supply relates to services in exchange for payment of enhancement fees or to the purchase of Points Rights.

29. MRL proposes that, in the first case, the place of supply, in much the same way as in *RCI Europe*, must be the place where the property in which the member in question has a timeshare usage right is situated. MRL submits that, in the second case, the immovable property with which the service is connected is the entire property portfolio which is held by MRL at the time when the Points Rights are purchased and which has been transferred to the Trustee for the purposes of administering the timeshare weeks deposited.

30. Since MRL's property portfolio is split between two Member States (Spain and the United Kingdom), an apportionment between them is required. MRL therefore proposes that a method of apportionment be introduced which would be based on the combined holdings of assets in the

form of properties in the two Member States at the time when the Points Rights are sold. This method of apportionment is not new and the situation is comparable to that of an estate agent established in the United Kingdom who sells a portfolio of properties some of which are situated in the United Kingdom and some in Spain. He may sell the whole portfolio to a single buyer for an all-inclusive price. In that event, the estate agent must submit a tax return based on a balanced apportionment of the consideration received.

31. The *Portuguese Government* is of the view that the fact that payments are made or rights are transferred even before the customer has chosen the resort in question cannot influence the place of taxation. The relevant information concerning the chargeable event, that is to say concerning the future service, will not be known until the resort in which the customer will be staying is determined. Only then will MRL be in a position to effect full classification of the service in question for tax purposes and calculate the tax due. Since the service is not to be regarded as having been supplied until determination of the resort in which the accommodation services are to be provided, there can be no doubt as to the place of supply.

32. Assessing the services in question by reference both to their legal nature and to their place of taxation ensures that they are actually taxed where they are consumed. An alternative form of assessment, however, particularly that operated by the UK authorities, would prevent income from such accommodation services from being taxed in the Member State in which they are actually supplied and used.

33. The Portuguese Government therefore concludes that the answer to question 3(a) and (b) must be that the place of supply for the services provided by MRL is the place where the resort in question is situated, in accordance with Article 9(2)(a) of the Sixth Directive, notwithstanding that the place of taxation is not determined and the tax does not become chargeable until all the relevant information concerning the chargeable event, that is to say the specific resort in which the customer will be accommodated, is known.

34. In the view of the *Greek Government*, there is no doubt that, as the Court held in paragraph 39 of *RCI Europe*, timeshare usage rights are rights connected with immovable property and that procuring and granting the possibility of exchanging them are services connected with immovable property. Accordingly, question 3(a) must be answered in the affirmative, that is to say to the effect that the services provided by a taxable person which are described in questions 1 and 2 constitute services connected with immovable property within the meaning of Article 9(2) of the Sixth Directive.

35. The Greek Government proposes that question 3(b) should be answered to the effect that, in cases where members of a club may exercise their contractual rights by occupying timeshare holiday accommodation and it is not known at the time when the service is supplied which holiday accommodation will be so occupied, the place of supply of the services mentioned in questions 1 and 2 will be, in accordance with Article 9(1) of the Sixth Directive, the place where the supplier has established his business or has a fixed establishment from which those services are 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.

36. The *Government of the United Kingdom* takes the view that the grant of Points Rights is not sufficiently connected to a particular immovable property to support the conclusion that Article 9(2) of the Sixth Directive is applicable. The mere fact that the immovable property in question is not known, and may not be part of MRL's portfolio at the time when the Points Rights are granted, demonstrates that there is not a sufficient connection between the supply of that service and the property which is ultimately to be occupied. That view is reinforced by the fact that the holder of Points Rights retains the right to decide to use those Points Rights or to exchange them for other

benefits. It is not irrational to conclude that Article 9(2) of the Sixth Directive is not applicable, particularly since there is not a sufficient connection between the grant of Points Rights and the subsequent occupation of a property. Question 3(a) should therefore be answered in the negative.

37. It is not possible to draw a parallel between this case and *RCI Europe*. Unlike in the latter case, it is not MRL's aim in providing its services to create a mechanism for exchanging existing timeshare usage rights. Access to the pool of holiday accommodation is offered not as an ancillary element, as it was in *RCI Europe*. Indeed the opposite is true, access to the pool being the sole object of MRL's business.

38. The Government of the United Kingdom proposes that question 3(a) be answered in the negative, with the result that there is no further need to consider question 3(b). It nevertheless points out that the difficulties set out in that question highlight the disconnect between the grant of Points Rights, on the one hand, and any subsequent occupation of property, on the other, thus demonstrating that, while the application of Article 9(1) of the Sixth Directive produces a straightforward and rational result, this is not the case if Article 9(2) is applied.

39. The *Commission* supports the application of Article 9(2)(a) of the Sixth Directive, since it considers there to be a sufficiently close connection between the grant of Points Rights and a specific immovable property. Moreover, it submits that, if the general rule in Article 9(1) of the Sixth Directive were to be applied, it would be easy for economic operators to avoid the obligation to pay VAT by structuring their business in the form of a club and establishing themselves outside Community VAT territory.

40. The Commission considers that there is no real case for exemption from tax on the basis of Article 13B(b). Furthermore, Member States enjoy considerable discretion in determining the scope of the rules governing exclusion, since the last sentence of that provision states that Member States may apply further exclusions to the scope of that exemption. The Court has held that that provision allows Member States to lay down a general rule making lettings of immovable property subject to VAT but to provide for an exception to that rule under which only lettings of immovable property to be used for dwelling purposes are exempt from VAT.

41. The Commission therefore concludes that Article 13B(b) of the Sixth Directive does not prevent a Member State from excluding a service from the exemption from tax, provided that that service consists in the short-term provision of holiday accommodation.

VII – **Legal assessment**

A – *Introductory remarks*

1. Need for a uniform determination of the place of supply

42. The dispute between MRL and the Commissioners is sparked by the question regarding the place where the taxable transaction is carried out. Hinging on the answer to that question is the further question whether the turnover generated by MRL in the course of its business is subject to the jurisdiction of the United Kingdom or the Spanish tax authorities.

43. 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 it is those provisions which determine the applicability of national VAT legislation. (10) Since the scope of the VAT system covers supplies of goods and services which a trader makes for consideration in the course of his business in national territory, national VAT legislation is applicable only if the place of supply is in national territory.

44. If each national tax jurisdiction were to determine the place of supply by reference to different criteria, this would lead not only to double taxation but also to non?taxation. It is from that very perspective that a uniform basis for determining the place of supply within the common market is particularly important. (11) 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 define the respective powers of taxation of the individual Member States so as to avoid such conflicts of jurisdiction. (12) The uniform determination, across the European Union, of the point of reference for establishing the applicable tax legislation is intended to secure a rational definition of the respective fields of application of the national schemes of rules on VAT. (13)

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

45. Conflicting classifications between Member States can be avoided by rules which are as uncomplicated and clear as possible, it being feasible to use different points of reference for determining the legislation applicable 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.

46. 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 (14) 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 creates numerous mandatory exceptions to that principle which considerably restrict the scope of Article 9(1) and make the principle of the place of business, which is the prevailing principle in the Sixth Directive, itself the exception. (15) In addition, it lays down special rules to take into account the particular features of certain economic activities.

3. Need to rearrange the questions referred

47. The questions referred are framed in such a way that they essentially specify the order in which they are to be examined. However, as I made clear at the outset, their primary aim is to obtain clarification on three main points of law, which can in turn be divided into two different subject areas. The first concerns the correct classification for tax purposes of the service in question and the determination of the place of its supply. The second relates to whether the exception provided for in Article 13B(b) of the Sixth Directive is applicable in the main proceedings. In the interests of clarity, the questions referred must therefore be rearranged in accordance with the scheme of the VAT legislation and answered in the order which I have proposed. (16)

48. Accordingly, I shall first identify the relevant supply which makes up the service at issue and therefore forms the basis for the assessment to tax of the turnover so generated. Next, I shall determine the place of supply by reference to the provisions of the Sixth Directive. Finally, I shall address the question whether the service provided by MRL is exempt from the obligation to pay

value added tax.

B – *Classification of the services in question and the place of supply*

1. Need for a synallagmatic relationship

49. Under Article 2(1) of the Sixth Directive, ‘services effected for consideration within the territory of the country by a taxable person acting as such’ are to be subject to value added tax. As the Court has previously held, a supply of services is effected ‘for consideration’ within the meaning of Article 2(1) of the Sixth Directive 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. (17)

50. The first stage in classifying the service in question is to examine the relevant supply by placing it in a synallagmatic relationship with the consideration to be provided. According to the order for reference, the service in question provided by MRL is the ‘[supply] of contractual rights (“Points Rights”) which entitle the purchaser to Points redeemable annually for the occupation and use of timeshare accommodation in MRL’s resorts’. However, that general description does not make clear the relationship between supply and service.

2. The different types of fees

51. It therefore seems most effective to analyse MRL’s supplies, through a form of converse reasoning, by reference to the various fees which it charges its customers.

52. It is clear from the order for reference that, although MRL does not charge its customers a joining fee, it does require the payment of various types of fees depending on the particular category of membership in question. In any event, all three categories have in common the fact that Ordinary Members have to pay (1) an annual ‘Management Charge’ corresponding to the Points Rights which they hold and (2) a ‘transaction fee’ to reserve accommodation when redeeming Points.

53. In addition, there are also (3) the fees they pay to acquire Points Rights, which they can obtain either (a) by purchasing them (‘purchase fees’) or (b) by depositing their own timeshare weeks and paying an ‘enhancement fee’. According to the information supplied by the referring court, the second of those methods of acquiring Points Rights can be effected in one of two ways. A pre-existing holder of timeshare usage rights may bring his property within the Options Scheme by entering into an ‘Enhancement Contract’ with MRL, thereby receiving Points Rights corresponding to that timeshare usage right. Alternatively, an intending Member who does not already own timeshare weeks may enter into a ‘Resale and Enhancement Contract’ with MRL, whereby he simultaneously purchases timeshare weeks and brings them within the Options Scheme.

54. It is clear from its question that the referring court seeks an assessment for VAT purposes only in relation to those supplies which consist in the grant of Points Rights. Since only the enhancement and purchase fees exhibit a connection with the grant of such Points Rights, I shall confine my examination hereafter to those two types of fee.

3. Assessment for VAT purposes of the individual supplies

a) Enhancement fees

i) Classification of the relevant supply

55. The enhancement fees charged by MRL must be regarded as consideration for participation in a scheme which first of all allows MRL's customers to exchange timeshare weeks with each other. Those fees are characterised by the fact that, first, they are not connected to the success of a particular exchange transaction and, secondly, that they are charged as a condition of entry to a virtual exchange platform. Accordingly, the actual supply cannot be regarded as consisting in the exchange itself, but must necessarily be connected to a prior event. That event can only be the grant by MRL of the possibility of exchanging timeshare weeks. As far as the enhancement fees are concerned, the actual supply therefore consists in the facilitation of the exchange of customers' own timeshare weeks. In this respect, certain parallels can be drawn with the scheme at issue in *RCI Europe*. The fees in question are, as MRL rightly points out, (18) comparable with the enrolment fees and annual subscription fees charged by RCI Europe.

56. In this connection, we should recall the Court's findings in paragraph 34 of *RCI Europe*, where it addresses the classification of fees paid to the operator of an exchange platform. In that paragraph, it held that the enrolment fees and annual subscription fees in question 'must be regarded as constituting consideration for participation in a system originally conceived to enable each member of RCI Europe to exchange his timeshare usage right'. The Court concluded from this that the 'service supplied by RCI Europe consists in facilitating the exchange and the enrolment and annual subscription fees represent the consideration paid by members for that service'. The circumstances in this case are similar.

57. The parallels between the two schemes are in no way altered by the fact that, in this case, there is no direct exchange between two customers, the exchange being instead effected indirectly through the acquisition of Points Rights and the redemption of Points. The objective of the scheme – to facilitate the exchange of timeshare weeks by means of a common platform operated by a third party – is essentially the same. The only difference between the scheme set up by MRL and that in *RCI Europe* is that the former offers the possibility of integrating timeshare weeks – by converting them into Points – into an abstract points system, in order then to make them accessible to all other customers. The Points to which each holder of Points Rights is entitled reflect the value of a particular property and at the same time represent to some extent a common currency used by customers to pay for the use of a property.

ii) Determination of the place of supply

58. In view of the abovementioned parallels with *RCI Europe*, in terms of both the objective of the business models used by the respective operators and the purpose of the individual supplies, the approach adopted in that case could in principle also be taken in relation to enhancement fees.

59. Article 9(2) of the Sixth Directive presupposes from the start, for the purposes of its applicability, that there is a sufficiently close connection between the service and the immovable property in question. In circumstances such as those in *RCI Europe*, the Court found that such a connection did exist. In this regard, it held in paragraph 37 of the judgment in that case that 'timeshare usage rights are rights in immovable property and their transfer in exchange for the enjoyment of similar rights constitutes a transaction connected with immovable property'.

60. With regard to the question of which particular immovable property is to serve as the point of reference in the case of the exchange of timeshare usage rights, the Court held that 'Article 9(2)(a) of the Sixth Directive is to be interpreted as meaning that the place where services are supplied by an association whose business consists in organising the exchange between its members of their timeshare usage rights in holiday accommodation, in return for which that

association receives from its members enrolment, annual subscription and exchange fees, is the place where the property in respect of which the member concerned holds timeshare usage rights is situated'.

61. One of the factors in support of the application, *mutatis mutandis*, of that approach to the dispute in the main proceedings is MRL's role as an agent in the relations between its customers. Much as in the case of the business model examined in *RCI Europe*, a customer who would like to exchange his timeshare week for that of another customer contacts not that customer but MRL. A further factor in favour of that approach is the actual purpose of the supply for which the enhancement fee is paid. A customer who pays an enhancement fee to MRL is paying not for the supply of a holiday service but first and foremost for the service provided by MRL of facilitating the exchange of his right in a particular property. It follows that the property to which the service provided by MRL relates is that in which the timeshare week holder who wishes to exchange has a right. In accordance with the approach taken by the Court in *RCI Europe*, for the purposes of applying Article 9(2)(a) of the Sixth Directive, the enhancement fee is to be taxed by reference to the place where the property deposited by the customer is situated.

b) Purchase fees

i) Classification of the relevant supply

62. Purchase fees for the acquisition of Points Rights, on the other hand, are charged only in cases where the customer does not deposit his own timeshare weeks. As MRL explains, (19) they are paid for a specific or future acquisition of timeshare weeks in properties in which other persons have rights. Accordingly, it must be assumed that the corresponding service provided by MRL consists in the grant of Points Rights and the procuring of properties for use.

ii) Determination of the place of supply

63. Application of the same approach as was taken in respect of enhancement fees is precluded from the outset here because, of course, the customer does not *have* any timeshare weeks of his own to offer for exchange. It is not therefore possible to take as the point of reference an immovably property in which the purchaser himself has rights, in accordance with Article 9(2)(a) of the Sixth Directive.

64. However, that provision of the Sixth Directive could conceivably be applied if the point of reference were the immovable property which the customer selects and, after redeeming his Points, also receives. That approach would be consistent with the principles of VAT law, primarily the 'country of destination' principle. After all, in accordance with the underlying logic of the provisions in Article 9 of the Sixth Directive concerning the place where a service is supplied, VAT is to be charged as far as possible in the place where the goods are consumed or the services used. The service provided by MRL is by definition used, which is to say that the property in question is occupied, at the place where that property is situated.

65. Inherent in the application of the general rule laid down in Article 9(1) of the Sixth Directive, on the other hand, is the risk that economic operators will avoid VAT on their supplies of services by establishing their businesses outside the scope of application of Community VAT. It is clear from paragraphs 39 and 40 of *RCI Europe* that such considerations underlay the Court's judgment in that case. (20)

66. Since Article 9(2) of the Sixth Directive contains the more specific rules, those rules, in accordance with the principle of *lex specialis derogat legi generali*, must be examined and, if the conditions governing their application are fulfilled, applied first. (21) Consequently, Article 9(1) is to

be relied on only if there is no ultimate immovable property to serve as the point of reference.

– First approach: Determination by reference to a particular portfolio of property

Requirement of a direct connection with an immovable property

67. One of the difficulties in applying Article 9(2)(a) of the Sixth Directive arises from the fact that, at the time when he acquires Points Rights, the customer will generally still not know which properties are going to be available in a particular year or what their Points value is going to be. Several of the parties to the proceedings make reference to this fact. (22) One way of overcoming this difficulty in a pragmatic and objective manner, as MRL has proposed, (23) would be to determine the place of supply by reference to the portfolio of accommodation available at the time when the Points Rights are acquired. Given that MRL has properties in both Spain and the United Kingdom, VAT could in principle be charged on the basis of the prevailing share of available properties in the two Member States and then paid to the tax authorities of those Member States. The advantage of this approach would be the predictability of the tax liability and, ultimately, greater legal certainty for undertakings which provide services similar to those provided by MRL. Legal certainty implies that the application of Community law must be foreseeable by those subject to it (24) and, as pointed out by Advocate General Poiares Maduro in his Opinion in *Optigen and Others*, (25) represents, particularly in the field of tax, as the specific expression of fiscal neutrality, (26) a fundamental principle of which appropriate account must be taken.

68. That approach would at the same time satisfy the legal requirement of a ‘connection with immovable property’ laid down in Article 9(2)(a) of the Sixth Directive, since the desired property to which the service provided by MRL is connected will in any event come from a pool of available holiday properties which is relatively easy to define. MRL’s submissions also make reference to this fact and point out that, unlike in the case of the business model operated by RCI Europe, MRL does have a core stock of available holiday properties in order to ensure that all customers are actually able to redeem their Points. If that statement is correct, a connection with immovable property would be guaranteed in any event. The fact that the immovable property may not yet be more specifically identified at the time when the Points Rights are acquired must not in my view be regarded as detrimental, even in the light of the requirement for VAT purposes of a ‘direct connection’ between the service and an immovable property.

69. It must be pointed out that, to date, the Court has refrained from setting out in greater detail the conditions applicable to the nature and directness of that connection. In *Heger*, (27) it held merely 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 since such a connection is characteristic of all the supplies of services listed in that provision. This was the Court’s response to the concerns raised by Advocate General Sharpston, (28) who, in her Opinion in that case, voiced misgivings about an exclusively literal interpretation of that provision. In that connection, she rightly 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, the closeness or distinctiveness of the connection with immovable property may vary depending on the service in question. In the dispute in the main proceedings, however, such concerns are unjustified since there is no question that MRL’s business consists in procuring immovable property for use.

Direct connection between the supply and the consideration

70. Furthermore, this approach would take account of the criterion of a ‘direct link’ (29) recognised by the Court in its case-law. According to that case-law, a provision of services is taxable only if there is a direct link between the service provided and the consideration received.

On closer examination, the supply of service described in the first question referred can be divided into two transactions: (1) the sale of Points Rights and (2) the procuring of timeshare properties which the customer is entitled to use only on redeeming previously acquired Points Rights. This inevitably raises the question of which transaction is to serve as the point of reference. The fact that, in the dispute in the main proceedings, the turnover is effected upon the sale of the Points Rights, not when they are redeemed, suggests that there is a direct link to the first transaction.

Conclusion

71. It is therefore conceivable that, in a situation where the services supplied take the form of the grant of Points Rights in exchange for purchase fees, the place of supply is in those Member States in which the service provider holds properties at the time when the customer acquires Points Rights. VAT would thus be chargeable on the basis of the prevailing share of available properties in each of the Member States.

– Second approach: Determination by reference to the time when the Points are redeemed

72. Alternatively, there is another approach, which involves taking as the point of reference not the sale but the second transaction, the redemption of Points. This approach does, however, have advantages and disadvantages which must be weighed against each another.

Arguments in favour of this approach

73. The principal advantage of this approach is that it establishes a clearer connection between the service provided by MRL and a specific immovable property. There is therefore no need to rely as a point of reference on an abstract, unspecified immovable property in the operator’s pool of property.

74. It could in turn be argued that the first approach does not take into account the fact that the customer completes the first transaction not for the sake of the Points but rather with the intention of being able to use the property which he will choose at a later date. It seems reasonable to assume that, from the point of view of the customer, the purchase of Points Rights cannot in itself have any intrinsic value. (30) It could be said that, realistically, the purchase and the redemption of Points Rights are to be regarded rather as interim stages which have to be completed in order to be able to exercise the timeshare usage right in the property in question. In those circumstances, the service would not actually be provided until the customer redeemed his previously acquired Points Rights in exchange for another customer’s timeshare usage right. Only at that point, therefore, would the chargeable event occur and the VAT become chargeable, in accordance with the first subparagraph of Article 10(2) of the Sixth Directive. For, under that general rule, the chargeable event is to occur and the tax is to become chargeable when the goods are delivered or the services are performed.

75. If that approach were to be favoured, it could further be argued that exclusive reliance on the first transaction would not only have the effect of artificially splitting the service in question, thus complicating the application of the VAT provisions unnecessarily. In addition, taxation of turnover generated from the sale of Points Rights to be taxed at the time of the first transaction could not be based on the second subparagraph of Article 10(2) of the Sixth Directive. That provision contains a derogation from the aforementioned general rule contained in the first subparagraph of Article 10(2) and provides that, where a payment is to be made on account, the VAT is to become chargeable without the supply having yet taken place. However, as the Court correctly held in *BUPA*, (31) in order for the tax to become chargeable in such a situation, ‘all the relevant information concerning the chargeable event, namely the future delivery or future performance, must already be known and therefore, in particular, when the payment on account is

made the goods or services must be precisely identified'. (32) The Court concluded from this that 'payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT'. (33)

76. If those findings were applied to the dispute in the main proceedings, it would have to be concluded that, at the time when he acquires Points Rights, the customer is faced with just such a situation since, as mentioned above, he cannot yet know which properties will be available in a particular year or what their Points value will be. Moreover, there is also uncertainty in the situation where the customer deposits his own timeshare usage right, particularly since it is MRL which determines the classification of the accommodation for the purposes of Points allocation, meaning that the choice available to the customer is limited from the outset to those properties for which he has a sufficient number of Points. In those circumstances, it could not be said that the relevant information concerning the chargeable event is available at the time of the first transaction. Accordingly, the second subparagraph of Article 10(2) of the Sixth Directive would have to be considered inapplicable in this case.

77. On an objective assessment of all aspects of the service provided by MRL, it would have to be assumed, from the point of view of this approach, that the relevant transaction which forms the main feature of the service consists in the redemption of the Points Rights previously acquired by the customer. It would thus have to be concluded that the place of supply is the place where the property which the customer obtains after redeeming his Points is situated.

Arguments against this approach

78. This approach none the less entails certain disadvantages which, as will be shown, stem essentially from the difficulty of calculating VAT in individual cases.

79. The basis for the calculation of VAT, irrespective of the approach to be taken, is always the turnover generated from the sale of Points Rights. If, however, in line with the second approach, the point of reference is taken to be the redemption of the Points rather than the sale of Points Rights, for the purposes of calculating VAT, the Points redeemed by the customer will on each occasion have to be converted into Points Rights and then into the monetary value represented by the individual Points Rights. The sum of those amounts will constitute the taxable turnover. However, on closer examination, this process proves to be extremely complex, particularly since the conversion process is influenced by a variety of factors.

80. One factor, for example, is the varying monetary value of the individual Points Rights. Thus, the purchase price of individual Points Rights is indeed given in the order for reference as GBP 2.50 per Point Right; however, the order also states that promotional discounts are offered from time to time. This means that the purchase price is not constant but very much subject to change.

81. A further factor is the lack of clarity surrounding the rate of conversion between Points Rights and Points. Points Rights and Points are not conceptually equivalent. Rather, Points Rights create only an entitlement on the part of customers to have a certain number of Points credited to them each year on the basis of their Points Rights. Only Points are redeemed. In the absence of more detailed factual information, it remains unclear what method is used for crediting Points each year. In particular, it is unclear exactly how many Points a customer can expect to be credited for each Points Right.

82. One significant disadvantage of this approach is the potential non-taxation of turnover over long periods of time. Customers who acquire Points Rights will not always redeem all their Points, choosing rather to save up Points unused in one year for use in the following year. The Constitution drawn up by MRL expressly grants them that right. In other words, between the

purchase and the redemption of Points, there will not infrequently be a considerable period of time during which, if this approach is followed, VAT will not be charged even though the customer has already paid for his Points Rights and, therefore, a not insignificant transaction has effectively already been completed for tax purposes. Under this approach, of course, the transaction will be taxed only when the Points are redeemed.

83. The relevance of the first transaction is apparent not least from the fact that the process of conversion from purchase fee to Points Rights and finally to Points must ultimately be retraced, by means of a back calculation, in order to identify the taxable transaction. That back calculation would, however, require some complex accounting on the part of MRL in order to make the system as transparent as possible for both taxpaying customers and the tax authorities. The customer will generally have an interest in ensuring that he is taxed only on the amount corresponding to the Points he has actually redeemed. For their part, the tax authorities will have an interest in ensuring that an abstract Points system such as that operated by MRL is not abused for the purposes of tax evasion. Such considerations must be taken into account when deciding which of all the possible approaches is to be adopted.

84. At the hearing, MRL warned of the practical problems that would be associated with this approach. In that connection, it convincingly explained by way of example that, in view of the long terms of the contracts, it cannot be ruled out that the rates of VAT may change in the period between the acquisition of Points Rights and the redemption of Points, which would further complicate the calculation of VAT for each individual customer.

85. A further problem connected with this approach is the as yet unresolved question of the assessment for VAT purposes of the situation where the customer does not redeem his Points but simply allows them to expire. Although the order for reference does not make express reference to the possibility of Points expiring, implicit provision for such a possibility appears to have been made in the Constitution, as is clear from an interpretation of the rules on carrying over unused Points to the following year.

Conclusion

86. In the light of the foregoing, I conclude that the second approach, under which the point of reference is taken to be the time at which Points are redeemed, only at first sight appears to provide a meaningful solution. On the one hand, it has the advantage of making it easy to establish a direct connection with immovable property and therefore to determine unequivocally the place of supply. On the other hand, its implementation may well entail administrative difficulties. The first approach, on the other hand, which applies Article 9(2)(a) of the Sixth Directive with the point of reference being a specific portfolio of property, seems to me to be pragmatic and easy to implement. For that reason, I would recommend that the first approach be followed.

c) The possibility of accommodation in hotels

87. The foregoing considerations must also apply in the situation, referred to in question 2(f), where the holder of Points Rights ultimately exchanges his Points for accommodation in hotels operated by MRL, provided that those hotels also form part of the portfolio of available accommodation at the time when the Points Rights are acquired.

88. After all, accommodation in the hotel sector also constitutes a service ‘connected with immovable property’ within the meaning of that provision. Confirmation of that view can be found in the clarification provided by the Community legislature in the form of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112 (34) as regards the place of supply of services.

(35) Directive 2008/8 amends Article 47 of Directive 2006/112 – the successor provision to Article 9(2)(a) of the Sixth Directive – to the effect that ‘accommodation in the hotel sector or in sectors with a similar function’ and ‘the granting of rights to use immovable property and services’ are also to be regarded as services connected with immovable property.

89. Accordingly, the legal assessment is in no way affected by the fact that, under the provisions of the Constitution, customers are entitled to exchange their Points for accommodation in hotels operated by MRL. Rather, the point of reference each time must always be the nature of the acquisition of Points Rights by the customer. (36)

d) Service not classifiable as membership of a club

90. I do not, however, share the view taken by the Government of the United Kingdom that the relevant supply must be classified as membership of a club and that Article 9(1) of the Sixth Directive must apply.

91. As the Commission rightly states, the customer in the main proceedings is not paying to be a member of a club. The payments he makes are not, for example, regular membership fees paid in fixed amounts in exchange for a multitude of services. Unlike in *Kennemer Golf*, (37) which did concern such a situation, (38) the payments in question in the main proceedings can indeed be attributed to individual supplies. This notwithstanding, a classification such as that carried out by the Government of the United Kingdom seems to be legally untenable since *RCI Europe*. In that case, which concerned the assessment for VAT purposes of a business concept similar to membership of a club, the Court was able, on the basis of a careful examination of all the facts, to establish a synallagmatic relationship between the individual types of contribution and the corresponding services provided by the association. (39)

92. Article 9(2)(a) was applicable in that case because the Court went on to find that access to an exchange pool for timeshare usage rights was only ancillary to the actual aim, the exchange or the possibility of participating in such an exchange. (40) In view of the fact that the Court held timeshare usage rights to be rights in immovable property and their transfer in exchange for the enjoyment of similar rights to be a transaction connected with immovable property, (41) the application of that provision in that case appears conclusive.

93. It is not therefore possible in the dispute in the main proceedings to rely on Article 9(1) of the Sixth Directive by arguing that the service in question is to be classified as membership of a club.

e) Interim conclusion

94. The answer to question 3(a) must therefore be that the services provided by MRL are services ‘connected with immovable property’ within the meaning of Article 9(2)(a) of the Sixth Directive (now Article 45 of Directive 2006/112), it being necessary to bear in mind the following when determining the place of supply.

95. In the case of enhancement fees, the place of supply is the place where the property in which the member concerned has a timeshare usage right is situated.

96. In the case of purchase fees, the place of supply is determined by reference to the Member States in which the service provider holds properties at the time when Points Rights are acquired by the customer. VAT is chargeable on the basis of the respective share of available properties in the Member States concerned.

C – *The possibility of exemption from tax*

1. The securing of accommodation in hotels operated by MRL

97. The answer to the question whether the service provided by MRL is exempt from VAT must – in so far as the sale of Points Rights and the securing of accommodation in hotels operated by MRL are concerned – clearly be in the negative, since Article 13B(b)(1) of the Sixth Directive expressly excludes the provision of accommodation in the hotel sector from exemption from tax.

2. The securing of accommodation in properties in which third parties hold timeshare usage rights

98. By contrast, the question whether MRL's activity of securing, for consideration, accommodation in properties in which third parties hold timeshare usage rights is liable to VAT requires detailed discussion. The answer to that question turns on whether that activity is to be classified as the 'letting of immovable property' within the meaning of Article 13B(b) and on whether any exceptions apply.

a) General comments concerning tax exemptions and the exclusions laid down in Article 13B(b) of the Sixth Directive

99. The Directive provides that the letting of immovable property is in principle exempt from VAT. As Advocate General Jacobs explained in detail in his Opinion in *Blasi*, (42) that exemption reflects the particular difficulties in applying VAT to it. Unlike ordinary goods, land is not the result of a production process. The letting of property is rather a comparatively passive activity not entailing significant added value. Although an economic activity for the purposes of Article 4 of the Directive, it is therefore in principle exempt from VAT. The situation is different in the case of the transactions mentioned in Article 13B(b)(1), since those transactions entail more active exploitation of the immovable property and therefore justify taxation. (43)

100. The relationship between the rule and the exception in that provision ultimately affects the interpretation of the individual criteria governing its application. The requirement, dictated by the principle of fiscal neutrality referred to in the fifth recital in the preamble to the First Directive, (44) to levy tax in as general a manner as possible means that the criteria determining the scope of VAT must be interpreted extensively. Conversely, it follows that exceptions, that is to say exemptions from tax, must be interpreted restrictively. (45) This was given further expression in the fourth recital in the preamble to the now repealed Second Directive: (46) 'Whereas in order to enable the system to be applied in a simple and neutral manner, and to keep the standard rate of tax within reasonable limits, it is necessary to limit special systems and exceptional measures.'

101. The Court always interprets tax exemptions under the Sixth Directive narrowly – even though the Directive makes no provision to that effect – and by reference to its settled case-law. In application, *mutatis mutandis*, of the abovementioned principle, the Court has held that 'terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person'. (47)

b) Definition of 'letting of immovable property'

102. Furthermore, the Court proceeds on the premiss that the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition. (48) This applies not least to the term 'letting', the

fundamental characteristic of which, in the view of the Court, lies in ‘conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right’. (49) For the purposes of assessing whether a particular agreement satisfies that definition, account must be taken of all the characteristics of the transaction and the circumstances in which it takes place. (50) The decisive factor in this regard is the objective substance of the transaction, (51) irrespective of the designation given to that transaction by the parties. (52)

103. In my view, those conditions are met in relation to the usage right which the customer receives in exchange for his Points. First, that right – as MRL convincingly explains (53) and the majority of the parties to the proceedings at least implicitly acknowledge – exhibits characteristics which correspond to those of a ‘letting’ under Article 13B(b) within the meaning of the above definition. Second, it must be pointed out that, notwithstanding its legal nature, which is to be determined in each case according to the laws of the Member States, (54) a timeshare usage right confers on the owner a right of use which is in any case comparable with residential tenancy. (55) This is a point which I have made previously in my Opinion in *RCI Europe*. (56)

104. It is true that the activity of securing holiday properties, as pursued commercially by MRL, clearly does not involve any transmission of rights from one member to the other. According to the order for reference, usage rights in respect of fixed weeks are deposited with the Trustee, so that the customer does not receive the timeshare usage right itself. It must, however, be pointed out that timeshare contracts regularly provide for the possibility, whether free of charge or against payment, of transferring usage rights to third parties, with the result that the latter can also rely on those rights. (57) It must be assumed in this connection that a customer who is granted the use of such a holiday property acquires a legal status comparable to that of the owner of the timeshare usage right.

105. The classification as ‘letting’ within the meaning of Article 13B(b) advocated here is opposed only by the view taken by the Government of the United Kingdom, which, however, I find far from convincing since it takes as its point of reference only the first transaction, the sale of Points Rights. Thus, it gives as grounds for that view first the fact that that transaction does not involve the transfer of a sufficiently identified immovable property and, secondly, the fact that, in some cases, Points Rights are never redeemed. That view is, however, too formalistic since, first, it takes account of only one element of MRL’s business model and, secondly, it disregards completely the real purpose of the first transaction. After all, a customer acquires Points Rights with the ultimate intention of acquiring a timeshare week in a holiday property. (58) For the purposes of classifying the legal status of the transfer of usage rights as ‘letting’, it is therefore irrelevant that, at the time of the first transaction, there may be insufficient knowledge of the individual characteristics of the immovable property, since the conditions of use are in any event known to the contracting parties. As we have seen above, (59) those conditions of use are consistent with the definition of letting developed by the Court for the purposes of VAT law. Consequently, the view taken by the Government of the United Kingdom must be rejected.

106. The dispute in the main proceedings therefore concerns a ‘letting of immovable property’ within the meaning of that provision. The question, however, is whether an exception applies.

c) Applicability of the exception contained in Article 13B(b)(1)

107. That exception, which states that ‘the provision of accommodation … in the hotel sector or sectors with a similar function’ is excluded from the tax exemption, may be applicable in this case. The accommodation in third-party timeshare properties at issue here could after all be ‘accommodation in a sector with a similar function’. It must be borne in mind in this regard that, as an exception to the tax exemption itself, Article 13B(b)(1) of the Sixth Directive must not in

principle be interpreted narrowly, in order thus to give effect to the rule concerning the general taxation of all taxable transactions. (60)

108. From the point of view of tax policy, the application of that provision would operate first and foremost to ensure a consistent application of the VAT provisions to the dispute in the main proceedings, since there is no apparent reason why short-term stays in holiday properties should be treated differently for tax purposes from the provision of accommodation in the hotel sector. As the order for reference makes clear, the customer is in principle free to choose between the two alternatives. Linking the taxation of MRL's turnover to any right of choice on the part of the customer would not be compatible with the principle of fiscal neutrality, which requires that all transactions should generally be liable to tax and treated equally for tax purposes. (61) It would impair the predictability of the application of the VAT provisions. In addition, in the absence of any information to the contrary, there is little difference between the two supplies of services and, therefore, there is no justification for their being treated differently for tax purposes.

109. The terms of Article 13B(b)(1) of the Sixth Directive shows that, in addition to accommodation in the hotel sector, there may well be other sectors with a similar function which may be liable to VAT, it being important to point out in this regard that, according to that provision, Member States may apply further exclusions to the scope of that exemption. As the Court held in *Blasi*, (62) in defining the classes of provision of accommodation which are to be taxed by derogation from the exemption for the leasing or letting of immovable property, in accordance with Article 13B(b)(1) of the Sixth Directive, the Member States enjoy a margin of discretion. (63) That discretion is, however, circumscribed by the purpose of the derogation, which, in regard to making dwelling accommodation available, is that the – taxable – provision of accommodation in the hotel sector or in sectors with a similar function must be distinguished from the exempted transactions of the leasing and letting of immovable property. In that judgment, the Court held that the Member States had the power, when transposing Article 13B(b)(1) of the Sixth Directive, to introduce those criteria which seem to them appropriate in order to draw that distinction. (64) In that connection, it held the duration of the accommodation to be an appropriate criterion to distinguish between the provision of accommodation in the hotel sector (a taxable transaction) and the letting of dwelling accommodation (an exempted transaction). (65)

110. Given that the supplies in question – accommodation in holiday properties and the provision of accommodation in the hotel sector – essentially have the same function and are distinguished from other forms of letting by the short duration of the accommodation, it is at least arguable that that case-law should be applied *mutatis mutandis* to the dispute in the main proceedings.

d) Applicability of the power provided for in the second subparagraph of Article 13B(b)

111. However, even in the not unlikely event that, in the light of the specific circumstances of the dispute in the main proceedings, the legal requirement of a 'similar function' were to be considered unsatisfied, for example because accommodation in MRL's holiday properties does not entail the same type of services as a customer would otherwise receive in a hotel, (66) the Member States would in any event, as the Commission rightly points out, (67) have the power, by virtue of the enabling provision contained in the second subparagraph of Article 13B(b) and the discretion conferred on them there, to exclude that type of short-term holiday accommodation from the tax exemption also. After all, that provision allows the Member States to apply further exclusions to the exemption for the letting of immovable property. (68) Its scope is therefore independent of the situations listed by the legislature in Article 13B(b)(1) to (4) of the Sixth Directive.

112. It is clear from the foregoing considerations that Article 13B(b) of the Sixth Directive does not prevent a Member State from subjecting to VAT the procuring for consideration of accommodation in third-party timeshare properties, provided that such an economic activity has as its object the

provision of accommodation on a short-term basis.

D – *Summary*

113. In summary, the conclusion may be drawn that a supply, such as that performed by MRL, in the form of the grant of Points Rights which entitle the Purchaser to Points redeemable annually for the occupation and use of timeshare accommodation in MRL's resorts, is to be regarded as forming part of a 'service connected with immovable property' within the meaning of Article 9(2)(a) of the Sixth Directive (now Article 45 of Directive 2006/112).

114. With regard to the determination of the place of supply, however, it is necessary to distinguish between supplies which are performed in exchange for enhancement fees and those performed in exchange for purchase fees.

115. The place of supply of a service provided by an association whose business consists in facilitating the exchange of timeshare weeks, for which that association charges its customers an enhancement fee by way of consideration, is the place where the property in which the relevant customer has a timeshare usage right is situated.

116. The place of supply of a service consisting in the sale of Points Rights is determined by reference to the Member States in which the service provider holds properties at the time when the Points Rights are acquired. VAT is chargeable on the basis of the respective share of available properties in the Member States concerned.

117. Exemption from tax is possible in the light of the fact that the service described above is to be characterised as a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive (now Article 135(1)(l) of Directive 2006/112). None the less, that provision does not prevent the Member States from excluding that service from the exemption from tax.

VIII – **Conclusion**

118. In the light of the foregoing, I propose that the Court answer the questions referred by the Court of Session as follows:

1. A supply, such as that performed by MRL, in the form of the grant of contractual rights (Points Rights) which entitle the purchaser to Points redeemable annually for the occupation and use of timeshare accommodation in MRL's resorts is to be regarded as forming part of a 'service connected with immovable property' within the meaning of Article 9(2)(a) 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 (now Article 45 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax).

2. With regard to enhancement fees, the place of supply is the place where the property in which the member concerned has a timeshare usage right is situated. With regard to purchase fees, the place of supply is determined by reference to the Member States in which the service provider has properties at the time when the Points Rights are acquired by the customer. VAT is chargeable on the basis of the respective share of available properties in the Member States concerned.

3. The service described above is to be characterised as a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive (now Article 135(1)(l) of Directive 2006/112/EC). None the less, that provision does not prevent the Member States from excluding

that service from the exemption from tax.

1 – Original language: German.

Language of the case: English.

2 – In accordance with the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2000 C 306, p. 1), the preliminary ruling procedure is now governed by Article 267 of the Treaty on the Functioning of the European Union.

3 – OJ 1977 L 145, p. 1.

4 – Case C?37/08 *RCI Europe* [2009] ECR I?00000.

5 – OJ 2006 L 347, p. 1.

6 – Corresponds to Article 43 of Directive 2006/112.

7 – Corresponds to Article 45 of Directive 2006/112.

8 – Corresponds to Articles 62 to 66 of Directive 2006/112.

9 – Corresponds to Article 135(1) and (2) of Directive 2006/112.

10 – See also 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 – Introduction to the European VAT 2008*, 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.

11 – 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.

12 – 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.

13 – 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 establish a clear definition of the respective powers of taxation of the Member States in order to avoid both double taxation and untaxed consumption.

14 – 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.

15 – 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 the point of reference 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.

16 – The Court is entitled, where appropriate, to reformulate the questions referred to it in order to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. See Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, paragraph 32; Case C?88/99 *Roquette Frères* [2000] ECR I?10465, paragraphs 18 and 19; and Case C?87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I?1301, paragraph 16.

17 – See in this connection Case C?16/93 *Tolsma* [1994] ECR I?743, paragraph 14; Case C?172/96 *First National Bank of Chicago* [1998] ECR I?4387, paragraphs 26 to 29; and Case C?174/00 *Kennemer Golf* [2002] ECR I?3293, paragraph 39.

18 – See p. 14, paragraph 3.32, of MRL's written observations.

19 – See p. 14, paragraph 3.33, of MRL's written observations.

20 – *RCI Europe*, cited in footnote 4 above, paragraphs 39 and 40.

21 – See also to that effect Weiermayer, R., cited above in footnote 11, p. 134.

22 – See pages 7, 9 and 22 of MRL's written observations as well as p. 8, paragraph 20, of the written observations of the Government of the United Kingdom and paragraph 23 of the written observations of the Greek Government.

23 – See p. 11, paragraph 3.22, and p. 22, paragraph 5.10, of MRL's written observations.

24 – See inter alia Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11; Case 348/85 *Denmark* v *Commission* [1987] ECR 5225, paragraph 19; Case C?209/96 *United Kingdom* v *Commission* [1998] ECR I?5655, paragraph 35; Case C?301/97 *Netherlands* v *Council* [2001] ECR I?8853, paragraph 43; and Case C?17/01 *Sudholz* [2004] ECR I?4243, paragraph 34.

25 – Opinion of Advocate General Poiares Maduro in Joined Cases C?354/03, C?355/03 and C?484/03 *Optigen and Others* [2005] ECR I?483, point 30.

26 – See to that effect Ridsdale, M., 'Abuse of rights, fiscal neutrality and VAT', *EC Tax Review*, 2005, Vol. 2, p. 87. See also Terra, B. and Kajus, J., cited above in footnote 10, p. 36, who make reference to the particular significance of the principle of legal certainty in tax law.

27 – Case C?166/05 *Heger* [2006] ECR I-7749, paragraph 24.

28 – Opinion of Advocate General Sharpston in *Heger*, cited above in footnote 14, points 31 and 33.

29 – Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11 and 12, and *Tolsma*, cited above in footnote 17, paragraph 13.

30 – See in this connection *RCI Europe*, which is clearly based on a similar logic. The Court rightly stated in paragraph 28, for example, with regard to the business model at issue, that 'in return for payment of the enrolment fee, a member initially receives only access to the RCI Weeks exchange scheme, [but] … that, for the owner of timeshare usage rights, membership of such a scheme would be pointless if he had no intention of exchanging his right for those of other members'. It further held in paragraph 29 that 'even if the various stages of the RCI Weeks system are taken into account, the fact remains that, if there was no intention to exchange timeshare usage rights through the market created by RCI Europe, the enrolment and annual subscription fees would lack any point'.

31 – Case C?419/02 *BUPA* [2006] ECR I?1685.

32 – Ibid., paragraph 48.

33 – Ibid., paragraph 50.

34 – OJ 2008 L 44, p. 11.

35 – Terra, B. and Kajus, J., cited above in footnote 10, p. 514, consider the amendment of the wording of that provision to be a mere clarification of the existing legal position. That view, they say, is also supported by the sixth recital in the preamble to Directive 2008/8, which states that specified exclusions which seek to guarantee the principle of taxation at the place of consumption are to be largely based on 'existing criteria'.

36 – With regard to the arrangements for acquiring Points Rights, see point 53 of this Opinion.

37 – *Kennemer Golf*, cited above in footnote 17.

38 – Ibid.

39 – *RCI Europe*, cited above in footnote 4, paragraphs 34 and 35.

40 – Ibid., paragraph 35.

41 – Ibid., paragraph 37.

42 – Opinion of Advocate General Jacobs in Case C-346/95 *Blasi* [1998] ECR I-481, points 15 and 16.

43 – See to similar effect the findings of Advocate General La Pergola in his Opinion in Case C?12/98 *Amengual* [2000] ECR I-527, point 9, and of Advocate General Ruiz-Jarabo Colomer in his Opinion in Case C?284/03 *Temco Europe* [2004] ECR I?11237, point 24.

44 – First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, OJ, English Special Edition: Series I Chapter 1967, p. 14.

45 – See to that effect Lohse, C., 'Der Neutralitätsgrundsatz im Mehrwertsteuerrecht', in: *EuGH-Rechtsprechung und Umsatzsteuerpraxis*, cited above in footnote 11, p. 62.

46 – 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). Repealed by Article 37 of the Sixth Directive.

47 – Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13; Case C?453/93 *Bulthuis-Griffioen* [1995] ECR I?2341, paragraph 19; Case C?2/95 *SDC* [1997] ECR I?3017, paragraph 20; Case C?346/95 *Blasi* [1998] ECR I?481, paragraph 18; Case C?216/97 *Gregg* [1999] ECR I?4947, paragraph 12; Case C?359/97 *Commission* v *United Kingdom* [2000] ECR I?6355, paragraph 64; Case C?358/97 *Commission* v *Ireland* [2000] ECR I?6301, paragraphs 52 and 55; Case C?150/99 *Stockholm Lindöpark* [2001] ECR I?493, paragraph 25; Case C?275/01 *Sinclair Collis* [2003] ECR I?5965, paragraph 23; Case C?284/03 *Temco Europe* [2004] ECR I?11237, paragraph 17; and Case C?428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I?1527, paragraph 29.

48 – See Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 18; *Stichting Uitvoering Financiële Acties*, cited above in footnote 47, paragraph 11; *SDC*, cited above in footnote 47, paragraph 21; Case C?149/97 *Institute of the Motor Industry* [1998] ECR I?7053, paragraph 17; *Commission* v *Ireland*, cited above in footnote 47, paragraph 51; Case C?240/99 *Försäkringsaktiebolaget Skandia* [2001] ECR I?1951, paragraph 32; Case C?141/00 *Ambulanter Pflegedienst Kügler* [2002] ECR I?6833, paragraph 25; Case C?315/00 *Maierhofer* [2003] ECR I?563, paragraph 25; *Sinclair Collis*, cited above in footnote 47, paragraph 22; *Temco Europe*, cited above in footnote 47, paragraph 16; *Fonden Marselisborg Lystbådehavn*, cited above in footnote 47, paragraph 27; Case C?455/05 *Velvet & Steel Immobilien* [2007] ECR I?3225, paragraph 15; and Case C?451/06 *Walderdorff* [2007] ECR I?10637, paragraph 16.

49 – Case C?326/99 *Goed Wonen* [2001] ECR I?6831, paragraph 55; Case C?108/99 *Cantor Fitzgerald International* [2001] ECR I?7257, paragraph 21; and *Sinclair Collis*, cited above in footnote 47, paragraph 25.

50 – See *Stockholm Lindöpark*, cited above in footnote 47, paragraph 26.

51 – *Cantor Fitzgerald International*, cited above in footnote 49, paragraph 33.

52 – *Maierhofer*, cited above in footnote 48, paragraph 39.

53 – See p. 9, paragraph 3.18, of MRL’s written observations.

54 – 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 (OJ 1994 L 280, p. 83) 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’.

55 – Kelp, U., *Time-Sharing-Verträge*, Baden-Baden 2005, 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 consensus among legal commentators 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 services supplied 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. The cleaning and property management also constitute subordinate ancillary services in comparison with the provision of the residential accommodation.

56 – See point 123 of my Opinion in Case C?37/08 *RCI Europe* [2009] ECR I?0000.

57 – Vanbrabant, B., *Time-Sharing*, Brussels 2006, p. 48 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 55, p. 26, views the possibility of transferring usage rights to third parties as the cause of the present success enjoyed by exchange clubs. Owners of timeshare usage rights who do not wish to exercise their right themselves would have to make their own arrangements for subletting their weeks. Timesharing only becomes permanently flexible, 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.

58 – See point 74 of this Opinion.

59 – See point 103 of this Opinion.

60 – See *Blasi*, cited in footnote 47 above, paragraph 19, and point 18 of the Opinion of Advocate General Jacobs in that case. In the Advocate General's view, the words 'sectors with a similar function' should be given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax.

61 – See point 100 of this Opinion.

62 – See *Blasi*, cited above in footnote 47.

63 – Ibid., paragraph 21.

64 – Ibid., paragraph 22.

65 – Ibid., paragraph 23.

66 – The specific terms of the contract are decisive in this regard. In his Opinion in *Blasi*, Advocate General Jacobs assumed that a taxable person offering, for example, short-term holiday lets of residential property fulfils essentially the same function as – and is in a competitive relationship with – a taxable person in the hotel sector. The essential distinction between such lettings and exempt lettings of residential property is the temporary nature of the accommodation. In any event, short-term lets are more likely to involve additional services such as provision of linen and cleaning of common parts of buildings or even of the accommodation itself; moreover, they involve more active exploitation of the property than long-term lets in so far as greater supervision and management is required.

67 – See paragraph 46 of the Commission's written observations.

68 – See Case C?63/92 *Lubbock Fine* [1993] ECR I?6665, paragraph 13, and Case C?12/98 *Amengual* [2000] ECR I?527, paragraph 10.