OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 17 July 1997 *

I — The question referred for a preliminary ruling and its legislative background

1. By this question, the Bundesfinanzhof (Federal Finance Court) asks the Court to provide such guidance to interpretation as is necessary in order to decide how, for the purposes of VAT, the total consideration paid by the final consumer for provision of road passenger transport on an all-inclusive basis should properly be apportioned between the various Member States in whose territory such a service is supplied.

To be precise, the Bundesfinanzhof is asking whether, in the case of cross-frontier passenger transport,

(a) Article 9(2)(b) of Directive 77/388/EEC must be interpreted as meaning that, in order to determine the taxable amount for that part of the transport which takes place within the territory of the country, the total consideration must always be apportioned according to the distances covered, so that stopping and waiting periods between the various stages of the transport operation — on the occasion of educational trips, for example — are not taken into account, or

(b) the aforesaid provision contains no more than rules concerning the place where the transport service is supplied, providing that solely the place of supply is to be determined having regard to the distances covered, which means that the Member States are free to determine the criterion according to which the total consideration is to be allocated between the taxable and non-taxable parts of the transport operation.

2. Under Paragraph 1(1) and (2) of the Gesetz zur Neufassung des Umsatzsteuergesetzes of 26 November 1979 (the new version of the German law on VAT; hereinafter 'the 1980 Law'), turnover tax attaches to supplies of goods or services effected for consideration in the relevant tax collection area by a trader in the course of his business. The relevant tax collection area is defined as the area of application of the 1980 Law, with the exception of free zones and areas exempt from national customs legislation.

Paragraph 3a(2), second subparagraph, of the 1980 Law defines the place where transport

* Original language: Italian.

services are supplied (by way of exception to the general rule on the place of supply, laid down in the first paragraph) as the place where the transport takes place. However, where transport is not confined to the tax collection area, the 1980 Law applies only to that part of the service which is supplied within that area.

The legislative background is completed by Paragraph 10(1) of the 1980 Law, which provides that in respect of the supply of goods and services, the taxable amount is the recipient's total outlay, net of VAT.

3. The above provisions of the 1980 Law essentially transpose into German domestic law Articles 2, 3(1), [1] 9, 2(b) and 11A(1)(a) of Directive 77/388/EEC, the Sixth VAT Directive (hereinafter 'the Sixth Directive'). [2] [3]

Article 2 of the Sixth Directive lays down the so-called principle of territoriality, in accordance with which 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to VAT. In principle, therefore, if transactions are effected outside the territory of the country, they are not subject to VAT, even when effected by taxable persons established in that country; they are subject to VAT, however, if they are effected within the territory, irrespective of the nationality of the undertaking concerned.

Article 3(1) (currently, Article 3(2)) [4] of the Sixth Directive provides that 'for the purposes of this Directive, the "territory of the country" shall be the area of application of the Treaty establishing the European Economic Community as stipulated in respect of each Member State in Article 227'.

Since, by contrast with the importation of goods, the 'importation of services' is not a taxable transaction under the fiscal systems of the various Member States, the Sixth Directive — in order to forestall anomalies in cases where cross-frontier services are supplied — contains complex arrangements for apportionment in terms of the place where services are supplied. [5] In derogation

1 — Subsequently Article 2(1) of Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

2 — Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

3 — Reference should also be made, albeit for quite a different purpose (that of ruling out its application to the present case), to Article 26 of the Sixth Directive (transposed by Paragraph 25 of the 1980 Law), which establishes a special scheme for travel agents and tour operators who, in the provision of travel facilities, use the supplies and services of other taxable persons (as distinct from Binder, which provides the transport component of its tourist 'packages' directly, using its own vehicles). See footnote 22 below.

4 — See footnote 1 above.

5 — See B. J. M. Terra and J. Kajus, *A Guide to the European VAT Directives, Commentary on the Value Added Tax of the European Community*, Vol. 1, Amsterdam, 1993, Part 2, Chapter VI, p. 23.

from the strict principle of territoriality, Article 9(1) of the Sixth Directive (under Title VI concerning the 'place of taxable transactions') provides — for reasons of simplicity and to avoid difficulties of interpretation arising from the use of concepts such as the place of utilization or exploitation [6] — that services are deemed to be supplied at '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'.

However, Article 9(2) provides for 'certain derogations from that general rule for specific services where the fiction that the services are supplied at the supplier's place of business is inappropriate and it lays down other criteria defining the place at which those services are deemed to be supplied'. [7] In particular, pursuant to Article 9(2)(b), 'the place where transport services are supplied shall be the place where transport takes place, *having regard to the distances covered*'. [8]

Lastly, Article 11 of the Sixth Directive introduced the common Community concept of the 'taxable amount', without which full standardization of the VAT rate [9] and its use in determining the 'own resources' [10] would not lead to comparable results in all

6 — See C. Amand-J. van Besien, 'Value Added Tax, *sub* Article 99 of the Treaty', in *European Union Law Reporter (CCH Editions Limited)*, Vol. 2, Bicester, 1962-(loose-leaf edition; March 1996), pp. 2351-62. The levying of VAT on supplies of services which are actually offered to customers, in respect of which the purpose of Article 9(2) is identified, seems to be the criterion most in keeping with the logic of a tax which is charged on the consumer spending of individual consumers: see M.-C. Boutard-Labarde, 'La localisation des services au regard de la TVA: l'article 9 de la sixième directive', in B. Neel-B. Plagnet (Editors), *La fiscalité du commerce extérieur*, Paris, 1992, p. 97, in particular p. 98.

7 — See Case 283/84 *Trans Tirreno Express* [1986] ECR 231, paragraph 16.

8 — Emphasis added. Incidentally, it should be noted that Article 9(2)(b) of the Directive has been considered 'capable of applying [as well as to the transport of persons] to the carriage of goods as an independent transaction, although not to the transport of goods which is an integral part of the supply of the goods': see the Opinion of Advocate General Sir Gordon Slynn in Case 283/84, cited in footnote 7 above, p. 232, at p. 235. Furthermore, I would point out that, at the end of the transitional period, it will be possible to tax passenger transport in the country of departure in respect of any part of the journey which takes place within the Community: see Article 28(5) of the Sixth Directive and the Proposal for a Council Directive amending Directive 77/388/EEC as regards the value added tax arrangements applicable to passenger transport, submitted by the Commission on 5 November 1992 (OJ 1992 C 307, p. 11).

9 — In fact, only the adoption of a uniform rate (whether comprising only a standard rate and a reduced rate) will permit the achievement of a system in which 'taxation of trade between Member States [will] be based on the principle of the taxation in the Member State of origin of goods and services supplied without prejudice, as regards Community trade between taxable persons, to the principle that tax revenue from the imposition of tax at the final consumption stage should accrue to the benefit of the Member Sate in which that final consumption takes place': Directive 91/680/EEC, cited in footnote 1 above, seventh recital in the preamble. See J. Meurant, 'Taxe sur la valeur ajoutée', in C. Gavalda-R. Kovar (dir.), *Répertoire de droit communautaire*, Dalloz, Paris, 1992-(loose-leaf edition, March 1996), Vol. III, paragraphs 132-134.
The standard and reduced VAT rates applicable from 1 January 1997 to 31 December 1998 are set out in Article 12(3)(a) of the Sixth Directive, in the text inserted by Article 1 of Council Directive 96/95/EC of 20 December 1996 amending, with regard to the level of the standard rate of value added tax, Directive 77/338/EEC on the common system of value added tax (OJ 1996 L 338, p. 89).

10 — Under Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 on the Replacement of Financial Contributions from Member Sates by the Communities' own Resources (OJ, English Special Edition 1970 (I), p. 224), the own resources by which the Community budget is entirely funded include a percentage of the VAT levied within the Member States. See also Council Decision 94/728/EC of 31 October 1994 on the system of the European Communities' own resources (OJ 1994 L 293, p. 9).

the Member States, and would therefore be unjust. In particular, so far as is material for our purposes, Article 11A(1)(a) provides that, within the territory of the country, the taxable amount in respect of 'normal' supplies of services [11] is 'everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies'.

II — Purpose of the main action

4. The question before the Court was raised in proceedings before the Bundesfinanzhof in which Reisebüro Binder GmbH (hereinafter 'Binder') appealed on a point of law against the decision of the Finanzamt Stuttgart-Körperschaften (the Stuttgart-Körperschaft Tax Office; hereinafter 'the Finanzamt') determining Binder's liability for VAT purposes in respect of the year 1983.

5. According to the order for reference, Binder organizes coach 'package tours'. In other words, it offers a service comprising transport, meals, accommodation and courier facilities in return for a single all-inclusive consideration, which exceeds by far the market prices for 'transport-only' services involving comparable distances.

6. In the case of *cross-frontier* trips made during 1983, Binder deducted the non-transport services from the total consideration to find the figure representing *transport* services only, [12] which it then broke down into services supplied within the country and those supplied abroad, that is to say, into the taxable and non-taxable elements respectively. In apportioning the transport-only consideration between the various States in whose territory the company's tourist transport services had been supplied, Binder had regard not only to the distances covered in each such State, but also to the length of time involved in each case.

7. Binder maintains that, in the case of educational or tourist trips abroad, the stage spent in the country of departure — where

11 — That is to say, in respect of services other than those listed in subparagraph (c) (the private use of goods forming part of the assets of a business or supplies of services carried out free of charge) and (d) (the supply by a taxable person of a service where the value added tax on such a service, had it been supplied by another taxable person, would not be wholly deductible) of Article 11A(1) of the Sixth Directive.

12 — The reason being, as the Bundesfinanzhof has consistently held, that from the fiscal point of view package tour operators supply not a single service but *a bundle of separate services* (including transport, which is the only service relevant here). The order for reference explains that Binder's computation of the transport component of the all-inclusive price is not in issue.

the operator has his place of business — usually entails short spells of travel over relatively long distances (especially on the motorway), whereas the foreign stage of such a trip typically entails a higher number of stop-overs as opposed to time spent in the vehicle.

Moreover, according to Binder, in determining the total price, account is specifically taken of the greater convenience for participants of always having the same means of transport to hand throughout the trip.

Binder therefore concluded that apportionment between the various Member States concerned of the total consideration paid by the final consumer should be made in accordance with the principles of business management and having due regard for factual circumstances. In other words, the calculation should take into account not only the *cost factors* related to the distances covered (for example, fuel and general wear and tear on the vehicle), but also those linked to the periods of time involved (for example, the driver's insurance and pay).

8. This was rejected, however, by the German tax authorities, who preferred to base apportionment *exclusively* on a pro rata calculation of the actual mileage covered in the territory of the States concerned, in accordance with Paragraph 3a(2)(2) of the 1980 Law.

Consequently, the Finanzamt decided — in a ruling later upheld by the Finanzgericht (Finance Court) — to rectify the amount payable by Binder. The figure subsequently set was higher than that previously arrived at by the company's calculations.

The Finanzamt held that Binder could not possibly, using its preferred method of apportionment, have arrived at a correct estimation of all the cost factors entailed by its package transport services. By contrast with Binder's method, which it regarded as arbitrary and difficult to monitor, the Finanzamt held the mileage criterion to be more reliable and to represent the only method capable of preventing double taxation or a tax loophole in respect of the services supplied abroad.

9. Similarly, according to the judgment at first instance given by the Finanzgericht (against which Binder appealed to the Bundesfinanzhof), apportionment on the basis of mileage ensures — by contrast with the method suggested by Binder — respect for the principle of neutrality of competition and, in the majority of cases, for the principle of fair taxation.

10. It is not clear from the observations submitted by Binder to this Court whether the substance of its complaint in the main proceedings is that (a) owing to use of an apportionment method based exclusively on mileage, it was subject to double taxation, or that (b) it was thereby precluded from the VAT exemptions for cross-frontier passenger transport in motor-coaches, which may be available in one or more of the Member

States through which Binder's own coaches pass in the course of the educational and tourist trips organized by it.

11. According to the Bundesfinanzhof, there is good reason to question whether Paragraph 3a(2)(2) of the 1980 Law — or, for that matter, Article 9(2)(b) of the Sixth Directive, which the former provision mirrors and in the light of which it must be interpreted — does really govern the apportionment of the consideration between its taxable and non-taxable components.

12. In fact, the Bundesfinanzhof maintains that the last-mentioned provisions are open to two interpretations.

On the one hand, it is possible to construe them (as the Finanzamt did) as prescribing apportionment based solely on mileage, thereby dismissing stop-over and waiting periods abroad as irrelevant.

13. On the other hand, however, it could also be argued that Article 9(2)(b) of the Sixth Directive and Paragraph 3a(2)(2) of the 1980 Law merely lay down — consistently with their title and content — a rule for determining the place of supply of transport services, the sole effect of which is to restrict tax liability in Germany to services carried out in the German tax collection area.

Consequently, Member States are free to fix criteria for apportioning the total consideration between the taxable and the non-taxable components of the transport operation, one of which may be the time spent, respectively, at the various ports of call.

III — The answer to the question following its reformulation

14. Let me confess at once that, in the light of the title and function of Article 9 of the Sixth Directive, it is hard to share the German Government's view in this case that Article 9(2)(b) lays down a criterion for determination of the amount taxable by the Member States concerned in the case of cross-frontier transport services of the kind in question.

As the Court has had occasion to confirm in earlier cases, Article 9(2)(b) merely lays down a criterion for establishing *territorial jurisdiction* for tax purposes, delimiting it in accordance with the principle of territorial-

ity [13] for each Member State in whose territory the service is supplied. [14]

15. However, on considering this provisional conclusion, I must admit to being puzzled as to the precise meaning of the closing words of Article 9(2)(b), 'having regard to the distances covered'.

16. No light is shed on this point by the preamble to the Sixth Directive (or, specifically, by the fourth and seventh recitals therein, cited by Binder [15]), or by the report accompanying the Commission's 1973 proposal for a directive. [16]

17. Nor are my doubts laid to rest by the Commission's argument at the hearing that the phrase in question refers to a 'place which changes location', so that 'in order to determine the place of supply, it is necessary to trace the route followed'.

18. However, I am inclined to agree with the Commission that the phrase 'having regard to the distances covered' is essentially superfluous, because it simply refers to the dynamic nature (in the spatial sense) of transport services as opposed to the static character of the other services mentioned in Article 9(2). [17]

That does not, however, dispel the reservations to which such an imprecisely drafted provision gives rise. The Court has already emphasized on a number of occasions that certainty and predictability are requirements which must be observed all the more strictly in the case of legislation, such as that on VAT, which is liable to entail financial consequences, so that interested parties can know the precise scope of their obligations. [18]

13 — See above, paragraph 3.

14 — See *Trans Tirreno Express*, cited in footnote 7 above, paragraph 17.

15 — So far as is material for our purposes, the fourth recital in the preamble to the Sixth Directive provides that 'it should be ensured that the common system of turnover taxes is non-discriminatory as regards the origin of goods and services, so that a common market permitting fair competition and resembling a real internal market may ultimately be achieved'. The seventh recital states that 'the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards ... the supply of services; ... although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, *in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods*' (emphasis added). To my mind, the recital in question is of doubtful relevance to the question referred for a preliminary ruling, if for no other reason than that a transport service of the kind supplied by Binder, normally to final consumers, does not constitute a supply between taxable persons and is not reflected, as a cost factor, in the price of goods offered at the same or the following stage in the marketing process.

16 — In order to account for the adoption of a different criterion in the case of transport services, the Commission stated tautologically that in order to take into account the special nature of such services, it seemed preferable to regard the place of supply as the place where the transport service is effected, having regard to the distances covered, and that in application of that principle, all transport effected in the territory of a Member State is subject to VAT: EC Bulletin, Supplement No 11/73, p. 12.

17 — The Commission's last remark seems, however, to echo Advocate General Sir Gordon Slynn's Opinion in Case 283/84 (cited in footnote 7 above, p. 232 at p. 235): 'if a person is transported through two or more Member States at the present time, tax is payable in each Member State on the part of the transport which occurs there, each part being respectively a place of supply'.

18 — See, *ex multis*, Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23.

19. In the light of the foregoing, I believe it necessary, in order to provide the national court with the assistance by way of interpretation which it seeks, to examine the rules for determining the taxable amount, even if this compels the Court to look beyond the wording of the question referred by the Bundesfinanzhof. [19]

20. The rules for determining the taxable amount are laid down by Paragraph 10(1) of the 1980 Law and by Article 11A(1)(a) of the Sixth Directive (see paragraphs 2 and 3 above).

Article 11A(1)(a) provides that, in respect of transport services effected within the territory of the country — including, presumably, those effected immediately before or after crossing the national frontier, and the services supplied abroad — the taxable amount consists of everything which has been obtained by the supplier by way of consideration for the operation in question, including all taxes (excluding VAT), incidental expenses, payment in kind or subsidies directly linked to the price of such supplies.

21. Let us look at the circumstances underlying the main action. The fact that the German tax authorities were called on to determine the taxable amount solely in respect of the domestic component, so to speak, of the international transport service supplied by Binder is not in issue.

22. On the other hand, it is not quite so simple to define correctly the *consideration paid for the domestic component of the operation in question*, which constitutes the taxable amount.

The difficulty, therefore, lies in identifying the criterion which is most rational and most consistent with the aims of the Sixth Directive, for the purpose of breaking down the all-inclusive consideration received by the supplier of transport services of the kind in question. It is precisely this that is at the heart of the dispute in the main action.

23. According to the German Government, Article 11A(1)(a) of the Sixth Directive gives no *express* guidance on this point — a statement with which I agree — and, specifically, does not enable any relationship to be estab-

19 — However, the Court has consistently recognized that its jurisdiction under Article 177 of the Treaty includes the power, when confronted with imprecisely formulated questions, to distil from the information provided by the national court and from the documents produced the points of Community law which need to be interpreted, having regard to the purpose of the dispute and taking into account also rules to which the questions do not refer, but which appear relevant for the purposes of the decision in the main action. See *ex multis* Joined Cases 73/63 and 74/63 *Handelsvereniging Rotterdam* v *Minister van Landbouw* [1964] ECR 1; Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453; Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207; Joined Cases C-153/88 to C-157/88 *Fauque and Others* [1990] ECR I-649; Case C-241/89 *SARPP* [1990] ECR I-4695; Case C-187/91 *Belovo* [1992] ECR I-4937; Case C-114/91 *Claeys* [1992] ECR I-6559; Case C-168/95 *Arcaro* [1996] ECR I-4705.

lished between the price received and the costs of the taxable person supplying the service.

The only option, therefore, is to break down the all-inclusive consideration on a pro rata basis in relation to the distances covered in the national territory, as should be apparent from Article 9(2)(b) of the Sixth Directive.

24. According to Binder, however, the simplest and most easily verified criterion is the vehicle's length of stay, respectively, in the various tax collection areas.

25. Lastly, the Commission maintains that Article 11A(1)(a) of the Sixth Directive does not preclude the part of the total consideration which corresponds to the domestic component of the service at issue from being calculated as a proportion of the overall cost of the transport.

According to the Commission, the notion of overall cost embraces other cost factors (*in addition to those related to the distances covered*), related to the vehicle and the driver's labour, the expense of which depends on the length of time spent. [20]

26. I have already set out the reasons for which, in my view, Article 9(2)(b) of the Sixth Directive cannot be construed in the way proposed by the German Government, even though pro rata apportionment according to the distance covered is undoubtedly the simplest rule for both tax authorities and businesses to apply.

I repeat this in order to emphasize the need to take account of the methodology of the harmonized VAT system, as provided for by the Sixth Directive. In respect of the supply of services, application of Article 11A(1), which I have cited on a number of occasions, presupposes that the tax authorities of the Member State concerned verify the existence of a business (i) engaged in by a taxable person (ii) with a view to profit (iii) within the

20 — Incidentally, contrary to the German Government's argument, the Commission's position is materially no different from that expressed in the proposal for a Council directive amending Directive 77/388/EEC as regards the value added tax arrangements applicable to passenger transport, cited in footnote 8 above.
Under Article 1 of that proposal, the place where passenger transport services are supplied is the place of departure, that is to say, the place where the journey actually starts, as indicated on the ticket, or, where a journey involves several successive transport services, the place where each of these services starts provided that these services are not separated by transit stops (technical stop-overs or stops of limited duration).
On the other hand, in cases where the same supplier provides a number of successive transport services for an all-in price, 'the taxable amount shall be determined on the basis of a flat-rate breakdown of the price *with reference to elements such as the distances relating to each service*'. In other words, even according to the proposal in question, the criterion of distances covered was only one of several appropriate criteria on the basis of which the Member States concerned could determine the taxable amount in respect of the domestic component of a given cross-frontier passenger service.

territory of the State in question (iv). Article 9(2)(b) of the Sixth Directive concerns solely the last point.

27. However, the rules for breaking down the all-inclusive price into domestic and foreign components must comply with the general principles laid down by the Court with regard to the term 'consideration'.

So far as is relevant for present purposes, the Court has affirmed — on the premiss that, pursuant to the Sixth Directive, the supply of goods or services is subject to VAT only if effected for consideration, and the taxable part of such transactions is anything received by way of consideration — that, for a given transaction to be classified as 'taxable', there must be *a direct link between the service supplied* (or the goods sold) *and the price received.* [21]

28. It is precisely because of the need for that direct link between the service supplied and the consideration received by the supplier that I consider the argument put forward by Binder and the Commission to be well founded: apportionment of the total consideration paid by passengers between the taxable and the non-taxable parts of the transport service cannot ignore *the costs of supplying the service.*

29. That said, it requires immediate qualification. By no means should costs incurred by the supplier be taken into account (and, for example, deducted in whole or in part) in determining the absolute value of the consideration. [22] The latter, as we are all aware, is a gross value which must exactly match the final consumer's total actual outlay, independently of the production and marketing costs of the goods or service in question. [23]

21 — In accordance with that principle, the Court ruled — with reference to a cooperative operating a warehouse, which refrained from making the storage charge to its members for two consecutive years — that the resulting reduction in the value of the members' shares in the association did not constitute a 'consideration' for the purposes of the Second VAT Directive: see Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12. See also Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs and Excise* [1988] ECR 1443, paragraphs 11 and 12, Case 230/87 *Naturally Yours Cosmetics* v *Commissioners of Customs and Excise* [1988] ECR 6365, paragraphs 10 and 12, and Case C-33/93 *Empire Stores* [1994] ECR I-2329, paragraphs 12 to 16.

22 — For the purposes of the Sixth Directive, the taxable person's *margin* — defined as the difference between the total amount to be paid by the traveller, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons — is taken to be the taxable amount for transactions performed by travel agents and tour operators, in the context of the special scheme established by Article 26. As pointed out (see footnote 3 above), however, that scheme does not apply to the supply of services of the kind offered by Binder.

23 — For example, the Court has ruled that, in the case of supplies of goods paid for by means of a credit card, the taxable amount for VAT purposes owed to the tax authorities by the seller includes the sum deducted by way of commission by the issuer of the card at the time of payment of the price to the seller: see Case C-18/92 *Bally* [1993] ECR I-2871. See also M. E. van Hilten, *Bancaire en financiële prestaties in de Europese BTW*, Deventer, 1992, p. 241.

It is not my intention, when advocating that reference to production costs (including those linked to distances covered) be permitted in the apportionment of the taxable amount between the various countries concerned, to cast any shadow of doubt on the established principle that the consideration constitutes a 'subjective' value (being the amount actually received) rather than a 'normal' value (assessed according to objective criteria). [24]

30. The approach which I propose to the Court is quite different: once the absolute and subjective value of the consideration has been determined, the costs incurred under various heads by the taxable person supplying the service may and must be taken into account for the quite separate purpose of determining the proportion of the all-inclusive price to be attributed to the domestic component of the transport operation, *without prejudice to the fact that VAT may be payable on the balance in the other tax territories concerned.*

31. In economic terms, the price represents the *subjective* measure of the benefit which the final consumer derives from the consideration. Accordingly, it can hardly be denied that the benefit will normally vary depending on the cost of the range of production factors employed by the supplier of the service. [25]

To remain with the example which concerns us here, the benefit derived by a student or tourist on a trip abroad from continuous travel along the motorway between the place of departure and the frontier (the taxable component of the transaction) is obviously quite different from that attributable to *the constant availability of the same motor-coach and driver throughout the remainder of the journey* (the non-taxable component) — including not only the travel, but also the stop-overs [26] — the latter involving cost factors which depend not only on the actual mileage covered, but also the time entailed in providing the service.

24 — See, *ex multis*, *Coöperatieve Aardappelenbewaarplaats*, cited in footnote 21 above, paragraph 13.

25 — The German Government stated at the hearing that, given the freedom of undertakings to fix their own prices according to market conditions, it would be unlawful to establish a link between an undertaking's cost structure and the prices which it charges, from which subsequently to infer — on the basis of Article 11 of the Sixth Directive — a criterion for the apportionment of the consideration between the Member States concerned. Although I have no intention of broaching the delicate subject of relationships between production costs and price, which I leave for students of micro-economics, it seems obvious to me that in any form of market — albeit in different measure, depending on how closely the economic structure in question approaches either the perfect competition model or the monopoly model — costs are inevitably reflected in selling prices (except, by definition, in the case of prices below cost or predatory pricing): see R. Cooter-T. Ulen, *Law and Economics*, 1988, in particular pp. 32-43. Moreover, this is also acknowledged in the Court's case-law applying Article 86 of the Treaty to cases of abuse of dominant position through the fixing of unfair or excessive prices (see Case 27/76 *United Brands* v *Commission* [1978] ECR 207), or predatory prices (see Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359 and Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951).

26 — It therefore surprises me somewhat that, according to the German Government, length of stay is not a significant factor in the context of transport services since *during stop-overs there is no consideration*. That may perhaps be true of stop-overs (brief and few) in the context of 'transport-only' services for passengers, but not of all-inclusive services, for the reasons indicated in the text.

32. We may therefore assume, at least for the sake of argument and simplicity of analysis, that the total consideration demanded of the final consumer by an undertaking like Binder constitutes, albeit approximatively, the sum obtained by adding the (ideal) price of the transport within the territory of the country to the (ideal) price of the transport abroad. Both those prices inevitably reflect the costs of supplying the service.

I admit that this observation has no practical importance, if — as appears to be the case with cross-frontier cargo transport services and transport-only services for passengers [27] — the cost structure for both (or more) components of a single service can be regarded as identical or very similar. [28]

However, if the content and manner of effecting the service — hence the costs —vary from one component to another, that will inevitably be reflected in the price of the various components of the all-inclusive price. This confirms that the components of the single consideration, which stand in direct correspondence to each separate component of the service provided, should be determined having regard to the relative costs of production.

33. Moreover, reference to the costs incurred by the taxable person in performing the taxable transaction is not without precedent in the Court's case-law on the interpretation of Article 11A(1)(a) of the Sixth Directive, albeit in a different context (determination of the taxable amount in respect of the supply of goods, where the consideration does not consist of money).

Specifically, in *Empire Stores*, [29] — concerning the supply of an article without extra charge on the part of a mail-order company, either to (a) a person who introduces himself as a potential new customer or (b) an existing customer who introduces a third person as a potential new customer — the Court held that the consideration for the goods supplied was the *service* supplied, respectively, by the new or existing customer.

Furthermore, the value of such consideration — that is to say, the taxable amount for the

27 — That is to say, which do not include other services (such as meals, accommodation and courier services, available in a single package for an all-inclusive price) in connection with the transfer of persons from one place to another.

28 — Indeed, it is not difficult to imagine that, starting with an all-inclusive price for the entire service, a rational and balanced determination of the taxable amount could be achieved in the case of the two examples given in the text, exclusively in terms of a proportion of the distances covered. However, use of that criterion is by no means obligatory under Article 9(2)(b) of the Directive, which if anything constitutes the application to a particular set of circumstances of the general criterion of reference (through the direct link with the consideration) to a service's production costs.
Accordingly, the fact that the criterion which I have proposed and the criterion based on mileage lead to the same results in the case of cross-frontier cargo transport and 'transport-only' passenger transport does not mean that the mileage criterion should be *exclusively and generally* applied — on application of Article 11A(1)(a) of the Directive — to *all* transport services. I think that, for present purposes, such an inference is especially to be ruled out in the case of complex transactions, like those in issue here, in respect of which, typically, the taxable and the non-taxable components of the operation are characterized by different temporal dimensions (duration and continuity).

29 — See footnote 21 above.

supply of the goods — is that attributed to it by the recipient of the service (*in casu*, by the mail-order company); it corresponds to the sum of money which he would be prepared to pay for that purpose. According to the Court, that value could only be the *cost* which the supplier is ready to incur in order to obtain the information regarding potential customers, that is to say, 'the price which the supplier has paid for the article which he is supplying without extra charge in consideration of the services in question'. [30]

34. I have already remarked that the German Government opposes the rule which I have proposed should govern determination of the taxable amount because it believes that this might both impair the neutrality of competition conditions under the harmonized VAT system and complicate the work of the tax authorities. Those objections should be briefly examined.

35. First and foremost, and on a realistic view, I do not consider that too much weight should be accorded to the possibility that the taxable persons concerned (such as Binder) would be encouraged to adjust their package tour itineraries so as to increase out of all proportion the length of time and the number of stop-overs (and the relative costs) involved in the service supplied abroad, simply to obtain the VAT exemptions for cross-frontier passenger transport services currently available in one or more of the other Member States, and to reduce proportionately the amount taxable in the State of departure.

Let us not lose sight of the fact that any changes made to tourist package tours solely in order to minimize fiscal liability would have to pass a rigorous and unavoidable test: that of commercial success with the final consumers to whom the 'rigged' services would be offered, often in competition with other package tour operators. Accordingly, not only would the price charged have to reflect to a great extent any changes in the cost structure, but at the same time rigging of the itineraries — in terms of the number and duration of stop-overs abroad — must not result in trips which tourists or students may find inconvenient or at any rate not very attractive.

Furthermore, if the German Government's reasoning were adopted, similar distortions of competition could not altogether be ruled out, even if the relevant legislation were based exclusively on reference to the mileage-only criterion: for example, if departures were organized from localities closer to the national frontier, the distances covered within the territory of the country would be reduced as a result of this device, and those covered in the territory of States where VAT exemptions applied would be correspondingly increased.

30 — Id., paragraph 19. The Court rejected the argument put forward by the United Kingdom and Portuguese Governments that in such cases the taxable amount of the transfer of goods was rather the retail price which would have been charged for the articles in question, if they had been included in the company's sales catalogue.

36. The German Government has, in addition, emphasized the fact that — owing to the 'asymmetrical exchange of information' between taxable persons and the tax authorities — if the taxable amount were to be determined as a proportion of the overall costs entailed in the organization of package tours such as those offered by Binder, it would be more difficult to determine correctly the charge to tax. To my mind, although complications of that kind may arise in this connection, they are unlikely to prove insurmountable.

On that point, it should be noted that responsibility for accurately determining, in relation to such costs, the proportion of the overall consideration — which constitutes the taxable amount in respect of each transaction — lies with the taxable person, to be discharged by means of the periodic declarations pursuant to Article 22(4) and (6) of the Sixth Directive. [31]

Moreover, the total duration, the stop-overs and the related costs — not to mention the mileage covered by the vehicles (and the related costs) — must be clearly and accurately indicated in the accounts which all taxable persons are required to keep, for the purposes of Article 22(2) of the Sixth Directive, 'to permit application of the value added tax and inspection by the tax authority'.

Nevertheless, cases may arise where all or some of the cost factors whose monetary equivalent depends on the duration and continuous nature of the service — including periods of stopping and waiting between the various stages of the operation — are not documented in a certain and objective manner in respect of one or more of the taxable transactions effected by the taxable person during the reference period. In such cases, verification of which is manifestly a matter for the national court, the national tax authorities will have no choice but to determine the taxable amount exclusively on the basis of the proportion of the overall consideration paid for the transaction in question, having regard to the distances covered in the territory of the State concerned and abroad.

The conclusion which I have reached is clearly without prejudice to the German authorities' right, pursuant to Article 27 of the Sixth Directive, to ask the Council for authorization to introduce simplification measures 'in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance'. [32]

31 — At the hearing, the Commission also referred to Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT) (OJ 1992 L 24, p. 1), which — in order to avoid tax revenue losses on the part of the Member States — established procedures for the electronic exchange of VAT-related information on 'intra-Community transactions' between the competent national authorities. Such information is gathered, filed and processed in special databanks by those authorities on the basis of the returns mentioned in Article 22(6)(b) of the Sixth Directive. However, I do not consider the regulation in question to have any bearing on services of the kind supplied by Binder. In fact, the intra-Community transactions contemplated by Regulation No 218/92 are confined, in respect of supplies of services, to those referred to in Article 28c of the Sixth Directive — C (intra-Community transport *of goods*), D (ancillary intra-Community transport *of goods*) and E (services carried out by intermediaries acting in the name of and on behalf of third parties) — which was inserted by Article 1(22) of Directive 91/680, cited in footnote 1 above.

32 — The Federal Republic of Germany availed itself of this possibility in connection only with cross-frontier passenger transport effected *by foreign carriers* for holiday trips in motor-coaches: see Paragraph 10(6) of the 1980 Law, under which VAT on such transactions is charged on the basis of the average consideration for the transport, per person and per kilometre, over the distances covered within the territory of the country, that average being calculated and fixed on the basis of the prices actually charged, so as not to have any appreciable impact on the amount of tax payable.

IV — Conclusion

In the light of the above, I propose that the Court answer as follows the question referred by the Bundesfinanzhof for a preliminary ruling:

In respect of cross-frontier passenger transport for an all-inclusive price, such as an educational or tourist trip, Article 9(2)(b) of Directive 77/388/EEC must be interpreted as merely laying down a criterion on the basis of which to establish territorial jurisdiction for tax purposes, defining the place where transport services are supplied — in accordance with the principle of territoriality — as the place in which the transport takes place.

In respect of such services, the relevant provision in Directive 77/388/EEC for the purposes of determining the taxable amount for the part of the transport operation taking place within the territory of the country is Article 11A(1)(a). That provision is to be interpreted as meaning that the Member States concerned must allocate the total consideration, directly linked to the service supplied, on a pro rata basis, by reference to the overall costs of the operation within their respective territories.

Those overall costs include both cost factors which are related to the distances covered and those whose monetary equivalent depends on the duration and continuous nature of the service, including periods of stopping and waiting between the various stages of the operation, provided that all those factors are documented by the taxable person in a certain and objective manner.

In the event of dispute in this regard, it is for the national court to ascertain whether (and, if so, in what measure) the cost factors entailed by a service of the kind described above — the monetary equivalent of which depends on the duration and continuous nature of the service — are documented in a certain and objective manner, for the purposes of determining the taxable amount for the transactions in question.