OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 10 October 2002 [1]

I — Introduction

1. In this case the Austrian Verwaltungsgerichtshof has referred to the Court a question concerning the interpretation 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 [2] (hereinafter: 'the Sixth Directive').

2. In particular, this question relates to the permissibility of an Austrian tax measure which regards as a taxable transaction the lease of a vehicle from a lessor established in another Member State. Moreover, this measure provides that no right to deduct VAT exists in respect of such leasing. Nor does such right exist where a vehicle is leased from a business established in Austria. The question is whether this exclusion from the right to deduct input tax is compatible with the Sixth Directive. In this connection Article 9 of the Sixth Directive, which relates to the place of taxable transactions, and Article 17, which governs the right to deduct input tax and the exemptions thereto, are of particular relevance.

3. This case bears a close relationship to *Metropol Treuhand and Stadler*, on which I delivered my opinion on 4 October 2001 and on which the Court gave judgment on 8 January 2002. [3] Both cases concern a national Austrian tax rule which contains a derogation from the principle of the deduction of VAT safeguarded by Community law and which did not become applicable until (shortly) after Austria's accession to the European Union. An important difference between the two cases is the cross-border element. The present case concerns a transaction between two undertakings established in different Member States and therefore raises the possibility of the double application of VAT.

1 — Original language: Dutch.

2 — OJ 1977 L 145, p. 1.

3 — Case C-409/99 [2002] ECR I-81.

II — Legal framework

A — *European law*

4. Goods and services are defined in Articles 5 and 6 of the Sixth Directive. In particular, Article 6(2) provides as follows: 'The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

Member States may derogate from the provisions of this paragraph provided that such derogation does not lead to distortion of competition.'

5. Article 9(1) of the Sixth Directive lays the principal rule governing the place where a service is supplied. Under this principal 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.' Article 9(2) provides for exceptions to this principal rule, *inter alia* also so as to allow, in special cases, the charging of VAT at the place where the customer of the service is established (paragraph (e)). Such a special case is the hiring out of movable tangible property which does not, however, cover forms of transport. [4]

6. Article 17(2) provides, in so far as is relevant, as follows,:

'In so far as the goods and services are used for the purposes of his taxable transactions,

4 — Added by Tenth Council Directive 84/386/EEC of 31 July 1984 on the harmonisation of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC — Application of value added tax to the hiring out of movable tangible property (OJ 1984 L 208, p. 58)

the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

(b) value added tax due or paid in respect of imported goods;

(c) value added tax due under Articles 5(7)(a) and 6(3).'

7. Article 17(6) is particularly relevant to these proceedings. It provides: 'Before a period of four years at the latest has elapsed from the date of entry into force of this Directive, the Council, acting unanimously on a proposal from the Commission, shall decide what expenditure shall not be eligible for a deduction of value added tax. Value added tax shall in no circumstances be deductible on expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment. Until the above rules come into force, Member States may retain all the exclusions provided for under their national laws when this Directive comes into force.'

8. A special power for the Member States to exclude the right to deduct VAT follows from Article 17(7): 'Subject to the consultation provided for in Article 29, each Member State may, for cyclical economic reasons, totally or partly exclude all or some capital goods or other goods from the system of deductions.'

9. The Eighth VAT Directive [5] lays down the rules governing the reimbursement of VAT to undertakings established in another Member State. Article 2 of this directive provides: 'Each Member State shall refund to any taxable person who is not established in the territory of the country but who is established in another Member State, subject to the conditions laid down below, any value added tax charged in respect of services or movable property supplied to him by other taxable persons in the territory of the country or charged in respect of the importation of goods into the country.' Article 5 of the Eighth Directive states: 'For the purposes of this Directive, goods and services in respect of which tax may be refundable shall satisfy the conditions laid down in Article 17 of Directive 77/388/EEC as applicable in the Member State of refund.'

5 — Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11).

B — *National law*

10. The Umsatzsteuergesetz 1972 (Law on Turnover Taxes 1972; hereinafter: 'the UStG 1972') was in force in Austria up until the accession of the Republic of Austria to the European Union on 1 January 1995.

11. Paragraph 3(11) of that law [6] provides:

'A service is supplied within the national territory where the trader operates exclusively or for the most part within the national territory or where the trader permits an act within the national territory or a state of affairs within the national territory or omits an act within the national territory.'

In the view of the national court, this provision meant that leasing transactions relating to a car were deemed to have been carried out in Austria where the vehicle was used predominantly in Austria.

12. Paragraph 12(2)(2) of the same law, [7] in so far as is relevant, provides as follows:

'Supplies of goods or supplies of services are not made for business purposes if... they are connected with the acquisition (manufacture), lease or use of cars, dual-purpose vehicles or motor-bicycles...'

13. As of 1 January 1995 — the date of accession to the European Union — the UStG 1972 was superseded by the Umsatzsteuergesetz 1994 (hereinafter: 'the UStG 1994').

14. Paragraph 3a(12) of the UStG 1994 provides:

'In any other case, a service is supplied at the place from which the trader operates his business. If the service is supplied from business premises, the place of the business premises shall constitute the place where the service is supplied.'

In the view of the national court, this provision means that leasing transactions

6 — In the version published in BGBl. No 636/1975.

7 — In the version published in BGBl. No 410/1988.

relating to a car are deemed to have been carried out in the Member State from which the lessor operates its business, even if the vehicle is used predominantly in Austria.

15. Paragraph 12(2)(2) of the UStG 1994 is — in so far as is relevant here — identical to Paragraph 12(2)(2) of the UStG 1972 as reproduced above.

16. As of 6 January 1995 Paragraph 1(1) of the UStG 1994 provides as follows: [8] 'The following transactions shall be subject to turnover tax:... Own consumption within the national territory. Own consumption shall be deemed to occur... to the extent that a trader incurs expenditure (expenses) relating to supplies abroad which, if they had been made to the trader within the national territory, would under Paragraph 12(2)(2) not have entitled the trader to a deduction of input tax; this applies only to the extent that the trader has a claim abroad to reimbursement of the foreign input tax....'

8 — BGBl. No 21/1995. To be more precise, what is meant here are the opening words of Paragraph 1(1), the opening words of Paragraph 1(1)(2) and Paragraph 1(1)(2)(d).

III — Factual and procedural background

17. Cookies World VertriebsgmbH iL. (hereinafter: 'Cookies World'), the claimant in the main proceedings, is a private limited company established in Austria which carries on a trading business. In the capacity of lessee, it leased a car from a German undertaking which it used in Austria for the purposes of its business.

18. By notice of 15 June 1996 the Finanzamt (Tax Office) Schwaz assessed the turnover tax of Cookies World in respect of 1997. The rent for the lease car was added to the taxable transactions. That addition was made under Paragraph 1(1) of the UStG 1994.

19. Cookies World lodged an appeal, applying for its turnover tax to be assessed without regard to the abovementioned provision. It claims that the transfer of use of vehicles is a service which in the context of turnover tax is supplied at the place from which the trader operates his business. In the case of the leasing of vehicles, the place in which the service is provided is in principle the State in which the lessor has established his business, which in the present case is therefore Germany. It is there that the event is taxable. Further chargeable events are not envisaged by Community law. However, Paragraph 1(1) of the UStG 1994 has created a second chargeable event for turnover tax in respect of the same transaction

(in addition to the taxation, in conformity with the Sixth Directive, in the State in which the lessor has established his business). As a result the same transaction is taxed twice. In the view of Cookies World, there is no possible justification for this under Article 17(6) of the Sixth Directive because that provision relates only to the exclusion of the right to deduct VAT. Furthermore, it merely allows existing laws to be retained. However, the chargeable event in Paragraph 1(1) of the UStG 1994 has been part of Austrian law only since 6 January 1995.

20. By decision of 20 July 2000 the Finanzlandesdirektion für Tirol (Tyrol Regional Tax Authority) dismissed the appeal brought by Cookies World. It considered that the Member States could — pending any amendment of the Sixth Directive — retain national exclusions from the right to deduct input tax. This power of the Member States also covered taxation of own consumption, as provided for in Austrian law. In the view of the Finanzlandesdirektion, this serves primarily, for reasons of competition neutrality, to cancel out the effect of deduction of VAT claimed abroad.

21. Cookies World appealed against that decision to the Verwaltungsgerichtshof. It claims the assessment of 1997 turnover tax was made under a national provision that is contrary to Community law.

22. By order of the Verwaltungsgerichtshof (Austria) of 29 March 2001, received at the Court Registry on 11 April 2001, a reference was then made to the Court of Justice for a preliminary ruling on the following question:

'Is it compatible with the Sixth Directive, in particular Articles 5 and 6 thereof, for a Member State to treat the following event as a taxable transaction: the incurring of expenditure relating to services supplied abroad that, if they had been supplied within the national territory to the trader, would not entitle the trader to a deduction of input tax?'

23. In these proceedings written observations were submitted to the Court by Cookies World, the Austrian Government and the Commission. There was no hearing.

IV — The essence of the question referred for a preliminary ruling

24. I infer from the question referred for a preliminary ruling and the facts in the main

proceedings, as set out in the order for reference, that the question referred by the national court essentially contains two parts. Firstly, can the Sixth Directive form the basis for charging VAT on a transaction which is concluded in another Member State and which in principle is also subject to VAT in that other Member State? Secondly, what is the scope of the power of the Member States to derogate from the principle of the deduction of VAT as set out in Article 17(2) of the Sixth Directive?

25. If it must be concluded that there is no power to charge VAT on an activity in respect of which VAT is already due in another Member State, the Court need not answer the second part of the question.

26. If it must be concluded that this power does exist — or at least if such possibility cannot be excluded — the second part of the question arises. Then the answer given by the Court will be determined to a large extent by recent case-law concerning Article 17(6) and (7). I referred to the judgment in *Metropol Treuhand and Stadler* earlier at paragraph 3 of this Opinion. Two judgments of 14 June 2001 in *Commission* v *France* are also relevant. [9]

9 — Cases C-345/99 [2001] ECR I-4493 and C-40/00 [2001] ECR I-4539.

V — The first part of the question: Charging of VAT on a transaction in another Member State

27. It is established that this case relates to a transaction with cross-border elements. An undertaking in Austria leases a car from an undertaking in Germany with the aim of using that car primarily in Austria.

28. The guiding principle of the Sixth Directive in respect of transactions with cross-border elements within the European Community means that both double application and non-application of VAT must be avoided.

29. This principle is one of the bases which the Community legislature chose when drawing up the Sixth Directive and which the Court has repeatedly confirmed. These principles are as follows:

— tax neutrality: ensuring that all economic activities, whatever their purpose or results, provided that they are them-

selves subject to VAT, are taxed in a wholly neutral way; [10]

— equality of tax treatment in order to counter distortion of competition. In this connection exceptions to harmonisation must be interpreted strictly. They apply only in the cases expressly provided for in the Sixth Directive. That is because each exception results in increased divergence in the tax burden in the Member States. [11]

30. In order to give specific definition to the abovementioned guiding principle, Articles 8 and 9 contain detailed rules on determination of the place of a taxable transaction. As regards supply of services, the principal rule is laid down in Article 9(1) of the Sixth Directive: it is the place where the supplier has established his business. There is an exception to this principal rule in respect of the hiring out of goods but this exception does not apply to vehicles. Reasons of control underlie this exception to the exception.

31. In the context as I have described it, it is the guiding principle which determines the answer to the first part of the question referred by the national court.

32. In this regard I would like to return to the facts of the main proceedings. If it is established that the leasing in Germany constitutes a taxable transaction, it follows from this principle that the leasing in Austria cannot be subject to VAT. This is also the view which Cookies World and the Commission take in the present proceedings.

33. The Austrian Government, however, takes a different view. In Austria it is own consumption resulting from the use of the car by the lessee that is taxed. The place of this own consumption must be determined by analogy with the rules applicable to goods and services laid down in the Sixth Directive. In respect of such own consumption there must be a connection with Austrian territory. There is such a connection since the expenses incurred by the lessee in this respect involve a reduction in assets and, moreover, the use of the service takes place in Austria. The Austrian Government refers to Articles 5(6) and 6(2) of the Sixth Directive under which the supply or use of business assets for private use can be regarded as a chargeable event. In this regard the Austrian Government also considers that it is important not to view the various provisions in isolation but — as I understand the Austrian Government — that it is the interrelationship between them that is decisive.

10 — See *inter alia* Case 268/83 *Rompelman* [1985] ECR 655, paragraph 19; Case 50/87 *Commission* v *France* [1988] ECR 4797, paragraph 15; and Case C-37/95 *Ghent Coal Terminal* [1998] ECR 1, paragraph 15.

11 — In this respect see *inter alia* my Opinion on Cases C-345/99 and C-40/00 *Commission* v *France*, cited above in footnote 9, paragraph 35 et seq.

34. The facts in the main proceedings do indeed show that there is own consumption in Austria. However, this own consumption is not therefore the relevant chargeable event as regards the application of the Sixth Directive. That chargeable event is the leasing which took place in Germany. As the Court held in its judgment in *ARO Lease*, [12] the leasing of vehicles constitutes a supply of services within the meaning of Article 9 of the Sixth Directive.

35. Furthermore, as regards the leasing of a car the Court held as follows in that judgment: [13]

— it is evident from the preamble to the directive [14] that, as regards the hiring out of forms of transport, Article 9(1) should, for reasons of control, be strictly applied, the place where the supplier has established his business being treated as the place of supply of such services;

— under Article 9(2)(e) of the directive, 'all forms of transport' are expressly excluded from the derogation whereby, for the 'hiring out of movable tangible property', the place where the services are supplied is the place where the customer has established his business or has a fixed establishment;

— since forms of transport may easily cross frontiers, it is difficult, if not impossible, to determine the place of their utilisation and in each case a practical criterion must therefore be laid down for charging VAT. Consequently, for the hiring out of all forms of transport, the directive provided that the service should be deemed to be supplied not at the place where the goods hired out are used but, with a view to simplification and in conformity with the general rule, at the place where the supplier has established his business.

36. To sum up, this case-law of the Court leaves no scope for the charging of VAT on leasing in the Member State of use. In this regard I also refer to the guiding principle governing the charging of VAT, as I have described it above, that is to say there must be no double taxation of the same event.

37. Nor does the judgment in the case of *Monte Dei Paschi Di Siena*, [15] to which Cookies World, the Commission and the

12 — Case C-190/95 [1997] ECR I-4383, paragraph 11.

13 — Paragraph 12 et seq.

14 — That is to say the Tenth Directive cited above in footnote 4.

15 — Case C-136/99 [2000] ECR I-6109, paragraph 23 et seq.

Austrian Government all refer, suggest otherwise. In that judgment the Court examines the situation in which a taxable person is liable for VAT both in the country in which he is established and in another Member State. However, in the present case Cookies World is not liable for VAT on the transaction at issue in the country of establishment.

38. It could be argued that the VAT in Austria was charged in respect of another event, that is to say the own consumption itself. In that case there would be no transaction with the leasing company but use of goods forming part of the assets of a business for the private use of the taxable person to be treated as supply of a service for consideration as laid down in Article 6(2) of the Sixth Directive. The final sentence of that provision allows the Member States the necessary scope. However, this argument does not bear scrutiny. The facts in the main proceedings show clearly that the taxable transaction concerns the leasing in Germany. The tax assessment of the Finanzamt Schwaz at issue relates to the rent for the leased vehicle. Paragraph 1(1) of the UStG 1994, which the Austrian Government takes as a basis, also shows that it is the same event that is taxed.

39. To a large extent the Austrian Government bases its reasons for the permissibility of the measure at issue on an appreciation of the provisions of the Sixth Directive in relation to one another. It puts forward economic arguments. It contends that the exclusion of the right to deduct input tax cannot be restricted to lease contracts concluded with an Austrian lessor. Otherwise competition would be distorted.

40. Although I generally attach great importance to the elimination of distortions of competition within the common market, I do not consider this argument to be a strong one. The taxable transaction takes place in another Member State which applies the Sixth Directive in full (including the right to deduct input tax). Austria makes use of an exception to the Sixth Directive. Naturally, use of this exception can in no way result in the taxable persons established in their own Member State having no entitlement to a benefit available to them under the law of the other Member State and which, it should be noted, is based on an EC directive. [16]

41. Cookies World also states that the national legislation at issue, which serves solely to protect Austrian suppliers, is contrary to Article 49 EC. I consider that this argument is not relevant to the present case. Only if it is established that the

16 — In this connection see, in particular, Articles 2 and 5 of the Eighth VAT Directive.

Austrian legislature has the power to regulate the charging of VAT in a case such as the present — if such charging has not (yet) been fully harmonised — does Article 49 EC come into play. Having regard to the above considerations, the Austrian legislature has no such power.

42. By way of illustration, I refer in this regard to the recent judgment in *Cura Anlagen*.[17] That judgment does not relate to turnover tax but to restrictions in Austrian legislation on leasing cars outside Austria. In this judgment the Court referred to its case-law according to which Article 49 EC also precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State. Such a restriction on freedom of movement can be justified only by a reason relating to the public interest recognised in EU law and, moreover, the principle of proportionality must be observed.[18] In my view, the Austrian measure at issue does not, by definition, have the effect of making the leasing of a vehicle in another Member State more difficult than within that Member State. It results precisely in more equal conditions. Therefore, if such an examination in the light of Article 49 EC were necessary — quod non — the question would still arise as to whether or not the Austrian provision at issue constitutes an infringement of that article of the Treaty.

17 — Case C-451/99 [2002] ECR I-3193.

18 — In particular paragraphs 30 and 32 of that judgment.

43. Finally, I should point out the following. Article 17(6) of the Sixth Directive grants the Member States the power, under certain circumstances, to retain an exemption to the right to deduct VAT. I will examine the content of this power below when considering the second part of the question. Prior to doing so, I should state in this regard that this power cannot be used to change the place of a chargeable event, as follows from the Sixth Directive. Therefore, Article 17(6) has no bearing on the answer to the first part of the question. In that sense I agree with Cookies World and the Commission in so far as they contend that the Member States can make use of Article 17(6) only to retain an exception to the right to deduct input tax which exists in their national law.

VI — The second part of the question: derogation from the principle of the deduction of VAT

44. I stated above that the Sixth Directive grants no power to charge VAT in the Member State in which a vehicle leased in another Member State is used. This being so, the second part of the question need not be answered. Therefore, my consideration

of this second part of the question is purely by way of an addition.

45. In my earlier opinions concerning Article 17 of the Sixth Directive, I pointed to the nature of the Sixth Directive and the role which the right to deduct input tax plays therein. The Court construes the principal rule of Article 17(2) as a right in principle. Therefore, it follows that the possible exceptions to the ability to deduct VAT are limited in nature. In *Lennartz* the Court held that the right to deduct input tax must be exercised in respect of all the taxes charged on transactions. Such limitations on the right of deduction must be applied in a similar manner in all the Member States and therefore derogations are permitted only in the cases expressly provided for in the Sixth Directive. Moreover, provisions which contain possible exceptions must be interpreted strictly. [19]

46. The second subparagraph of Article 17(6) constitutes an exception to this principle [20] and is applicable until the Council lays down the provisions referred to in the first paragraph of Article 17(6). It is a standstill clause in nature which permits the Member States to retain the national provisions actually applied until the Council lays down Community rules governing exemptions from the right to deduct VAT.

47. As regards Austria, this means that it may retain the exceptions to the ability to deduct input tax in so far as they existed at the time of accession to the European Union (1 January 1995). After that time it may no longer adopt measures which increase the extent of existing exclusions, thus diverging from the objective of the Sixth Directive. If an existing exclusion is withdrawn wholly or in part it cannot subsequently be reintroduced. [21]

48. It is established that the national measure at issue, namely Paragraph 1(1) of the UStG 1994, was not introduced until 6 January 1995, that is to say a few days after accession. The Austrian Government puts this down to a logistical reason connected with the national legislative procedure.

49. In my view, the fact that the relevant provision was incorporated into Austrian

19 — See, most recently, my Opinion in *Metropol Treuhand and Stadler* cited above in footnote 3, paragraph 32.

20 — See the judgment in *Metropol Treuhand and Stadler* cited above in footnote 3, paragraph 44 et seq.

21 — Case C-40/00 *Commission* v *France*, cited above in footnote 9, paragraph 17 et seq.

legislation a few days after accession — and not only after a longer period — is immaterial. The basis for this view is as follows. Firstly, the exceptions to the right to deduct input tax must be interpreted strictly. They apply only in so far as they are expressly provided for. This is not so in the present case. Secondly, the specific exception contained in the second paragraph of Article 17(6) is intended to be a standstill clause and therefore specifically does not have the aim of empowering a new Member State to adapt national legislation on accession and thereby to distance itself from the *acquis communautaire*.

50. I should also note that, to my mind, it is immaterial that under Paragraph 3(11) of the UStG 1972 in force until 1 January 1995 — at least according to the national court — leasing transactions were deemed to have been carried out in Austria where the vehicle was used predominantly in Austria. The Austrian legislature deliberately chose not to incorporate this provision in this form into the UStG 1994. Consequently, this provision was no longer valid law, irrespective of whether or not Paragraph 3(11) of the UStG 1972 is substantively the same as Paragraph 1(1) of the UStG 1994.

51. I therefore conclude that — even if the second subparagraph of Article 17(6) might be applicable to a chargeable event which occurs in another Member State, quod non — this provision cannot be applied to create an exception to the right to deduct input tax shortly after Austria's accession to the European Union.

52. This brings me to the power of a Member State to create an exclusion to the right to deduct input tax on grounds of competition pursuant to Article 17(7) of the Sixth Directive. This power likewise cannot be used in the present case. The judgment in *Metropol Treuhand and Stadler* leads inevitably to this conclusion. The Court places two conditions on use of this power. Firstly, a Member State may make use thereof only following consultation as provided for in Article 29 with the committee referred to therein. No such consultation was held in this case. Secondly, the rules relating to the deduction of VAT must contain an indication as to their temporal limitation. [22] There is no evidence of this in the present case.

22 — In *Metropol Treuhand and Stadler*, cited above in footnote 3, the Court also states that they cannot form part of a package of structural adjustment measures whose aim is to reduce the budget deficit and allow State debt to be repaid. In the present case this is immaterial, at least in the proceedings before the Court.

VII — Conclusion

53. In the light of the foregoing I propose that the Court should answer the question referred by the Verwaltungsgerichtshof for a preliminary ruling as follows:

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 precludes national legislation which contains an exclusion from the right to deduct value added tax for its own nationals in respect of a transaction which is carried out in another Member State and is regarded as a taxable transaction in that other Member State in accordance with the directive.