OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 13 September 2006 [1]

1. The present reference for a preliminary ruling from the Conseil d'État (Council of State) (France) is concerned essentially with the interpretation of Article 2(1) of Sixth Directive 77/388/EEC. [2] It seeks to ascertain whether sums paid in advance for the provision of hotel services, which the provider of the services retained when customers cancelled reservations that had been made for them, are subject to value added tax ('VAT').

I — The facts in the main proceedings, the legal framework and the question referred to the Court for a preliminary ruling

2. The Société thermale d'Eugénie-les-Bains (hereinafter the 'company' or the 'plaintiff'), established in the municipality of the same name (France), is engaged in the operation of thermal establishments, including the provision of hotel and restaurant facilities. The company receives sums paid in advance by customers of the establishments when reserving rooms.

3. Under Article L114-1 of the Code de la consommation (Consumer Code), resulting from Article 3-1 of Law No 92-60 of 18 January 1992, strengthening the protection accorded to consumers, [3] '[s]ave as otherwise provided in the contract, sums paid in advance are deposits, with the result that either party to the contract may go back on its undertaking, the customer losing the deposit, the business returning it forthwith'. Sums received by the company as deposits are deducted from the amount subsequently paid for accommodation or retained by the company in cases where customers cancel their reservations.

4. In 1992, the company was the subject of an accounting inspection in relation to the

1 — Original language: Portuguese.

2 — Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 (OJ 1991 L 376, p. 1) (the 'Sixth Directive').

3 — JORF (French official gazette), 21 January 1992, p. 968.

period from 1 January 1989 to 30 April 1992. As a result of this inspection, the tax authorities adjudged the company to be liable for VAT in relation to the deposits which had been paid to the company by customers when reserving rooms and which it had retained following cancellation of the reservations. The company was accordingly charged the sum of FRF 84 054 (EUR 12 814) on 8 December 1994 in respect of supplementary tax payable for the period in question. As it disagreed with that finding, the company complained to the tax authority, which dismissed the complaint on 14 February 1995.

5. The company brought an action before the tribunal administratif de Pau (Administrative Court, Pau) which was dismissed by decision of 18 November 1999. The company thereupon lodged an appeal before the Cour administrative d'appel de Bordeaux (Administrative Court of Appeal, Bordeaux), which was likewise dismissed by judgment of 18 November 2003. Those two courts took the view that deposits retained by the company in the event of cancellation by a customer of his reservation constitute direct consideration and remuneration for a distinct service consisting in establishing the customer's file and reserving accommodation for him. The deposits retained by the company in the present case should therefore be subject to VAT.

6. The company, maintaining that the deposits should be regarded as payments made to compensate for the loss suffered by the company as a result of the default of its customers and, as such, not subject to VAT, brought an action before the Conseil d'État, which decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must sums paid as deposits in the context of sales contracts in relation to supplies of services which are subject to [VAT] be regarded, where the purchaser makes use of the cancellation option available to him and those sums are retained by the vendor, as remuneration for the reservation service and, as such, subject to [VAT], or as cancellation payments made to compensate for the loss suffered as a result of the default of the customer, which have no direct connection with any service supplied for consideration and, as such, are not subject to value added tax?'

7. This question requires the Court to interpret several provisions of the Sixth Directive, notably Article 2(1), under 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.

8. Article 6(1) of the Sixth Directive defines 'supply of services' as any transaction which does not constitute a supply of goods within the meaning of Article 5 of that directive and

provides that such transactions 'may include inter alia ... obligations to refrain from an act or to tolerate an act or situation'.

9. Equally relevant for the purposes of the analysis is Article 10(2) of the Sixth Directive, which provides that '[t]he 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'. The same provision specifies, however, that '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'.

10. Lastly, it should be pointed out that, under Article 11.A(1)(a) of the Sixth Directive, the taxable amount in respect of supplies of services 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'.

II — Analysis

11. There are essentially two opposing views in the present case as to the classification of sums paid in advance by the company's customers and retained by the company when customers cancel reservations. The company considers that these sums, paid as deposits, are compensatory in nature and are consequently not subject to VAT. The governments which have submitted observations in the present case and the Commission of the European Communities all oppose that view. The French Republic, Ireland, the Portuguese Republic and the Commission take the view that sums paid, which are retained by the company when customers cancel reservations, do indeed come within the ambit of the common system of VAT. The company is alone in disputing the claim that such sums constitute direct consideration and remuneration for a distinct service performed by the company for its customers.

12. To settle the problem of the classification, within the framework of the common system of VAT, of deposits paid by customers and lost when they cancel reservations, it is necessary first to consider the Court's case-law on the interpretation of the concept of 'supply of goods or services effected for consideration ... by a taxable person acting

as such' within the meaning of Article 2(1) of the Sixth Directive.

13. The judgment in *Tolsma*,[4] concerning the activity of Mr Tolsma, the barrel organ player on the public highway with whom students of VAT will be most familiar, is particularly instructive in this connection. In that judgment, in which the Court rejected the argument of the Netherlands authorities that the donations received by Mr Tolsma from passers-by should be subject to VAT, the Court referred first to earlier judgments in which it had held that taxable transactions, within the framework of the VAT system, presuppose the existence of a transaction between the parties in which a price or consideration is stipulated.[5] Where a person's activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT. The basis of assessment for a provision of services is everything which makes up the consideration for the service and a provision of services is therefore taxable only if there is a direct link between the service provided and the consideration received.[6] In those circumstances, the Court finally concluded that a supply of services 'is effected "for consideration" ... 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'.[7]

14. On the same lines, the Court established in the more recent judgment in *Kennemer Golf*[8] that there is a direct link between the annual subscription fees paid by members of a sports association and the services which it provides, which are constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages.[9] The Court concluded that the annual subscription fees of members of a sports association can constitute the consideration for the services provided by the association, even though members who do not use, or do not regularly use, the association's facilities must still pay their annual subscription fees.[10] According to the Court, the obligation for an association to make its sports facilities and the associated advantages available to all members who have paid their annual subscription fees constitutes a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive.

15. In the present case, it is clear that a customer does not pay an advance, as a deposit, without receiving an undertaking

4 — Case C-16/93 *Tolsma* [1994] ECR I-743.

5 — Ibidem, paragraph 12. See also Case 89/81 *Hong Kong Trade Development Council* [1982] ECR 1277, paragraphs 9 and 10.

6 — *Tolsma*, paragraph 13, and the case-law cited therein.

7 — *Tolsma*, cited above, paragraph 14. For more recent applications of that case-law, see Case C-172/96 *First National Bank of Chicago* [1998] ECR I-4387, paragraph 26, Case C-435/03 *British American Tobacco International and Newman Shipping* [2005] ECR I-7077, paragraph 32, and Case C-210/04 *FCE Bank* [2006] ECR I-2803, paragraph 34.

8 — Case C-174/00 *Kennemer Golf & Country Club* [2002] ECR I-3293, paragraph 39.

9 — Idem, paragraph 40.

10 — Idem, paragraph 42.

from the company when the payment is made. On the one hand, the company makes a reservation, that is to say, it accepts an obligation to make a room available to the customer on an agreed date. Such a reservation service logically implies an obligation not to enter into a contract with anyone else in breach of that undertaking and to respect the customer's right to cancel the reservation. On the other hand, the company does not give such a guarantee, to the effect that certain facilities and services will be made available to its customers at a given time, free of charge. In return for this advantage, it asks customers to pay a sum which it will be entitled to retain in the event of their cancelling the reservation. It seems clear that there is a reciprocal synallagmatic link between this reservation service and the payment made by the customer.

16. Provided that, in the present case, the company receives sums which represent the value actually given in return for the reservation service supplied to the defaulting customers, such a service must be classified, in accordance with the Court's settled case-law, as a supply of services effected for consideration within the meaning of Articles 2(1) and 6(1) of the Sixth Directive. That conclusion is unavoidable, particularly in view of the fact that, as the Court has stated on many occasions, the Sixth Directive confers a very wide scope on VAT, comprising all economic activities of producers, traders and persons supplying services. [11]

17. The plaintiff contests this classification and advances two arguments against it. First, it maintains that a reservation service cannot be regarded as distinct from the principal service performed by a hotel. It claims that the deposits retained by the company are not intended to pay for distinct services which are provided for customers and can be obtained independently of the principal service. Second, it maintains that the sums it retains when customers have cancelled their reservations represent fixed sums paid to compensate for losses suffered by the company as a result of those cancellations.

A — *The claim that the reservation service is not a distinct service and that it cannot be obtained independently of the principal service*

18. It is true that a service which consists of guaranteeing that a room will be available to a person on a certain date will be exhausted when the principal hotel service is performed. It will cease to be a service distinct

11 — See Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 6, and Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 10.

from the principal service and will form a single entity with that service. By the same token, in the absence of cancellation by the customer, the sum paid in advance as a deposit will simply be deducted from the total price payable by the customer and will also cease to be independent of that price. In these circumstances, the payment of a sum as a deposit when a room reservation is made is equivalent to a payment made 'on account before the goods are delivered or the services are performed' within the meaning of the second subparagraph of Article 10(2) of the Sixth Directive. In accordance with that provision, the tax is to become chargeable on receipt of the payment and on the amount received.

19. In the present case, however, the sums at issue were retained by the company as a result of the default of the customers. They were not retained as a payment on account for the principal service, which the company was no longer obliged to provide for customers who cancelled their reservations. It should be noted that the company did in any case provide a service for those defaulting customers. It guaranteed them a room or a course of thermal treatment on the agreed date, refraining from entering into a contract with anyone else who might be interested and respecting the customers' right to cancel the reservation. This is a real advantage enjoyed by every customer for whom a reservation was made. Such a service actually provided for customers by the company in return for payment is, in my view, sufficiently distinct to fall within the broad concept of a supply of services effected for consideration within the meaning of Articles 2(1) and 6(1) of the Sixth Directive.

20. It should be noted, first, that customers who require a hotel room on a certain date are free to make or not to make a reservation. It is, in any case, an advantage for them to have a reservation. If they decide to make one, they will have a guarantee that they would not have had if they had simply decided to arrive at the hotel and ask for a room at that time.

21. From the hotelier's point of view, providing such an advantage, which customers will actually enjoy until such time as they cancel their reservation, involves costs. These include not only the cost of establishing the customer's file and preparing the room but also the costs connected with the obligation to respect the customer's right to cancel the reservation and to refrain from entering into a contract with anyone else who might be interested, so as not to compromise the obligation he has undertaken vis-à-vis the customer for whom he has made the reservation.

22. Thus, when the hotelier asks the customer to pay a sum as a deposit when

the reservation is made, that sum may be regarded objectively as consideration for a reservation service which is distinct both from the hotelier's and from the customer's point of view.

23. Such a reservation service is ancillary to the principal service inasmuch as it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied. [12] It remains, in any case, in the event of the customer cancelling the reservation, a service that is entirely distinct from the principal service, which the hotelier has not in fact supplied. The fact that this reservation service is ancillary to the principal service with which it is functionally associated dispenses with any need for reclassification in relation to the principal service. It must therefore be subject to the same system of VAT as the system applicable to the principal service.

24. Moreover, as the Commission points out, the fact that the customer decided not to take advantage of the principal service does not affect the distinct character of the service actually supplied to the customer from the time when the reservation was made to the time when it was cancelled. The fact that the customer decided not to make use of the availability of the room on the agreed date does not mean that he did not receive such a guarantee, a guarantee for which he did in fact pay the sum the company asked. As in the case of *Kennemer Golf*, cited above, so too in the present case the service at issue consists of an undertaking actually given by a taxable person, in return for a certain sum, to make its facilities and services available to certain persons, irrespective of the fact that those persons nevertheless decide not to avail themselves of that advantage.

25. Nor is the undertaking at issue in the present case similar to that in question in the cases of *Landboden-Agrardienst* [13] and *Mohr*, [14] cited by the plaintiff. In its judgments in those two cases, the Court held that an undertaking given by a farmer under a national or Community compensation scheme to reduce or discontinue production cannot be classified as a supply of services within the meaning of Article 6(1) of the Sixth Directive. [15] In the judgment in *Mohr*, cited above, the Court held that 'by compensating farmers who undertake to cease their milk production, the Community does not acquire goods or services for its own use but acts in the common interest of promoting the proper functioning of the Commu-

12 — Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24, and Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30.

13 — Case C-384/95 *Landboden-Agrardienste* [1997] ECR I-7387.

14 — Case C-215/94 *Mohr* [1996] ECR I-959.

15 — *Mohr*, paragraph 22, and *Landboden-Agrardienste*, paragraphs 24 and 25.

nity milk market'.[16] In the judgment in *Landboden-Agrardienste*, cited above, the Court confirmed that case-law by ruling that an undertaking given by a farmer not to harvest at least 20% of his potato crop does not entail either for the competent national authorities or for other identifiable persons any benefit which would enable them to be considered to be consumers of a service.[17]

26. In the present case, it is clear that the undertaking given by the company to make a room or a course of thermal treatment available on a given date entails for every customer who receives such an undertaking a real and distinct benefit which enables such customers to be considered to be consumers of a service within the meaning of the common system of VAT. Such a reservation service is one of the services supplied by a hotelier and even constitutes an essential part of his economic activity. Since the company provides such a service for every customer in return for payment of a sum which it requests when making the reservation, such a service must therefore be classified objectively as a supply of services within the meaning of Article 6(1) of the Sixth Directive.

16 — *Mohr*, paragraph 21.

17 — *Landboden-Agrardienste*, paragraph 24.

B — *The claim that the sums retained as a result of the customers' default represent compensation*

27. The plaintiff disputes the claim that the sums paid by its customers as a deposit constitute direct consideration for the reservation service which it provides. According to the plaintiff, it is a settled principle of French civil law that deposits represent compensation. It claims that there is a link between such deposits and the loss suffered by the company as a result of the default of the customer and that they therefore represent fixed compensation for such a loss.[18]

28. First, irrespective of the legal character attributed to deposits under French civil law, it is clear from the observations submitted in this case, in writing and at the hearing, that the right to retain the sum paid in advance as a deposit, which in accordance with French civil law is contractually agreed between a hotelier and each of his customers, is not necessarily related to any loss actually suffered by the hotelier as a result of the default of those customers. There is no provision to the effect that a deposit lost by the customer must be returned to him in cases where it transpires that the hotelier did not ultimately suffer any loss as a result of the cancellation. The fact that there is only a possible link between sums received as a

18 — The plaintiff points out in this connection that, under French civil law, a deposit is a sum of money deductible *in fine* from the total price on the performance of the contract, which is paid by the debtor when the contract is concluded but which is retained by the creditor *as compensation* in cases where the debtor waives performance of the contract.

deposit and a loss actually suffered by the hotelier as a result of a cancellation raises serious doubts as to whether the sums at issue, which the company received as a deposit, necessarily represent compensation within the meaning of the common system of VAT.

29. It should be noted that, in accordance with the case-law of the Court, a sum of money awarded by a judicial decision solely for the purpose of compensating for a commercial loss is not subject to VAT. [19] Clearly, such a sum does not constitute consideration for any supply of goods or services within the meaning of Article 2(1) of the Sixth Directive. It should be noted however that the sums which the Court held, particularly in the judgment in *BAZ Bausystem*, not to be subject to VAT were compensation awarded by a judicial decision. In the present case, there is no judicial or even extra-judicial record of the existence of any real loss which the plaintiff actually suffered as a result of the cancellation of reservations by its customers and with which the deposits that were retained were directly linked as compensation.

30. As the Conseil d'État rightly points out in its order for reference, it is necessary to seek a uniform application, within the European Community, of the rules on the assessment of liability to VAT. The Sixth Directive seeks to establish a common system of VAT by defining taxable transactions in a uniform manner and in accordance with Community rules. [20]

31. It should be noted that the uniform application of the Sixth Directive requires that an interpretation be given which does not depend on a classification that may vary according to the civil law of the Member State concerned. Otherwise, a practice identical to the practice at issue in the present case of reserving rooms in return for payment of a sum that is forfeited by the customer in the event of cancellation might be subject to VAT if it took place in another Member State where the legal character of such a payment in advance is not regarded in the same way as it is under French civil law. Such a possibility is by no means hypothetical. A sum paid in advance by a customer to a hotelier, which the hotelier is entitled to retain irrespective of whether any real loss is caused by the customer's cancellation, may only with difficulty be classified as compensation in other legal systems. [21]

19 — See Case 222/81 *BAZ Bausystem* [1982] ECR 2527, paragraph 11, in which the Court held that 'interest awarded to an undertaking by a judicial decision [is not taxable] where such interest has been awarded to it by reason of the fact that the balance of the consideration for the services provided has not been paid in due time'. See, to the same effect, Case C-281/91 *Muys' en De Winter's Bouw- en Aannemingsbedrijf* [1993] ECR I-5405, paragraphs 18 and 19, in which the Court held, conversely, that 'interest received by a supplier from his customer is taxable where it constitutes consideration for an agreement by the supplier to defer payment until the goods are delivered'.

20 — Case C-305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, paragraph 38, and Case C-25/03 *HE* [2005] ECR I-3123, paragraph 36.

21 — It could, for example, be classified as being intrinsically a sanction or penalty.

32. Consequently, the fact that under French civil law sums paid in advance as a deposit are regarded as compensation cannot be conclusive in precluding deposits received by the company from defaulting customers from being subject to VAT. I should like to point out in this connection that, in the different but very closely related context of the interpretation of the concept of the supply of goods within the meaning of the Sixth Directive, it is settled case-law that 'supply of goods' does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property. The purpose of the Sixth Directive might be seriously jeopardised if the requirements for there to be a supply of goods, which is one of the three taxable transactions, were to be subject to conditions differing according to the civil law of the Member State concerned. [22]

33. Moreover, as the Commission points out in its observations, a classification as compensation based on what is presumed under French civil law [23] to be the intention of the parties cannot preclude a sum paid by one contracting party to another, who supplies him with a distinct service in return, from being subject to VAT. If that were the case, there would be a strong incentive to reduce artificially the sums constituting the consideration for the service provided and to inflate those representing damages.

34. The concept of supply of services for consideration within the meaning of the Sixth Directive must be interpreted in the light of objective criteria by having regard to the objective character of the transaction in question. [24] In the present case it must accordingly be determined whether, in the light of the settled case-law of the Court referred to in point 13 et seq. of this Opinion, the deposit paid objectively constitutes consideration for a service actually provided by the hotelier for his customers before they cancelled their reservations. In my view, as I have already said, the answer to that question must be in the affirmative. The fact that a provider of services and his customer have agreed, in accordance with the applicable civil law, that a sum paid in advance is intended as a fixed payment to compensate the provider for any loss he may suffer in the event of default and not as remuneration for a service which he has actually provided for the customer, cannot be conclusive for the purpose of excluding such services from the common system of VAT in the absence of any record of the existence of any real loss which the plaintiff actually suffered as a result of the default of its customer.

22 — Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraphs 7 and 8, Case C-291/92 *Armbrecht* [1995] ECR I-2775, paragraphs 13 and 14, Case C-185/01 *Auto Lease Holland* [2003] ECR I-1317, paragraphs 32 and 33, and *HE*, paragraph 64.

23 — Article L114-1 of the Code de la consommation specifies that 'save as otherwise provided in the contract, sums paid in advance are deposits'.

24 — See, to this effect, Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 24, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 45, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 57 and 58, and Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 43.

III — Conclusion

35. In the light of the foregoing considerations, I propose that the Court should reply as follows to the question submitted by the Conseil d'État:

Articles 2(1) and 6(1) 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 are to be interpreted as meaning that sums paid as deposits in the context of sales contracts in relation to supplies of hotel services which are subject to value added tax must be regarded, where the purchaser makes use of the cancellation option available to him and those sums are retained by the vendor, as remuneration for the reservation service and, as such, subject to value added tax.