OPINION OF ADVOCATE GENERAL KOKOTT delivered on 12 May 2005 [1]

I — Introduction

1. In the present case the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) is seeking from the Court of Justice an 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 (hereinafter 'the Sixth Directive') [2] in respect of the supply of a standard software package which is subsequently customised to meet the purchaser's requirements.

2. In this connection the question arises whether there exists a single supply or two distinct supplies, namely the supply of the standard software, on the one hand, and the programming of customised features and some ancillary supplies, on the other. It is also unclear whether this supply or these supplies are to be regarded as a supply of goods or a supply of services. In so far as a supply of services is at issue, lastly, it is necessary to give an interpretation of Article 9 of the Sixth Directive in order to determine the place of supply.

3. The recipient of the supply, the tax entity Levob Verzekeringen BV, OV Bank NV and Others, Amersfoort (Netherlands) (hereinafter 'Levob'), provides insurance services that are exempt from value added tax. [3] Since Levob is therefore not entitled to deduct input tax, it wishes to assert an interpretation of the directive that results in the lowest possible VAT burden for the supply and customisation of the software within the Community.

1 — Original language: German.

2 — OJ 1977 L 145, p. 1.

3 — See Article 13B(a) of the Sixth Directive.

II — Legal framework

A — *Community law*

4. The provisions of the Sixth Directive that are relevant to these proceedings are reproduced below. In keeping with the question referred for a preliminary ruling, reference is made to the version that applied up to 6 May 2002. [4]

5. Under Article 2 of the Sixth Directive, the following are to be subject to value added tax:

'1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods.'

6. The term 'supply of goods' is defined in Article 5(1) of the Sixth Directive as 'the transfer of the right to dispose of tangible property as owner'.

7. Article 6(1) of the Sixth Directive makes the following distinction as regards the supply of services:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include inter alia:

— assignments of intangible property whether or not it is the subject of a document establishing title,

...'

4 — Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services (OJ 2002 L 128, p. 41) introduced inter alia into Article 9(2) of the Sixth Directive special provisions on the place of supply of electronically supplied services. An Annex L was also added to the directive, which contains an illustrative list of services covered. Paragraph 2 of the Annex mentions supply of software and updating thereof.

8. Article 8 of the Sixth Directive lays down the following rules governing the place of supply of goods:

'1. The place of supply of goods shall be deemed to be:

(a) in the case of goods dispatched or transported either by the supplier or by the person to whom they are supplied or by a third person: the place where the goods are at the time when dispatch or transport to the person to whom they are supplied begins. Where the goods are installed or assembled, with or without a trial run, by or on behalf of the supplier, the place of supply shall be deemed to be the place where the goods are installed or assembled.

(b) in the case of goods not dispatched or transported: the place where the goods are when the supply takes place.

...

2. By way of derogation from paragraph 1(a), where the place of departure of the consignment or transport of goods is in a country other than the country of import of those goods, the place of the supply by the importer within the meaning of Article 21 (2) and the place of any subsequent supplies shall be deemed to be within the country of import of the goods.'

9. Article 9 of the Sixth Directive makes the following provision regarding the place of supply of services:

'1. 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 ...

2. However:

...

(c) the place of the supply of services relating to:

— cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities

of the organisers of such activities, and, where appropriate, the supply of ancillary services,

— services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information,

...

shall be the place where those services are physically carried out;

...'

...

10. Under Article 11A(1) of the Sixth Directive, the taxable amount is:

(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied ...:

'(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, 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;

— transfers and assignments of copyrights, patents, licences, trade marks and similar rights,

— ...

...'

B — *National law*

11. The Sixth Directive has been transposed into Netherlands national law by the provisions of the 1968 Wet op de omzetbelasting von 1968 (Law on turnover tax). Since it is not clear that the national provisions that are relevant to the present case are substantively different from the rules laid down in the Sixth Directive, the national rules will not be reproduced.

III — Facts and questions referred for a preliminary ruling

12. On 2 October 1997 Levob concluded with Financial Data Planning Corporation (hereinafter 'FDP'), an undertaking established in the United States of America, a contract for the supply of software for the management of insurance policies. Under the contract, Levob was granted an open-ended, non-transferable licence for the Comprehensive Life Administration System (CLAS) standard software, customised to meet Levob's requirements. Levob is not permitted to award sub-licences. FDP was also to install the software and train Levob's staff.

13. The CLAS system is used by insurance companies in the United States without any special customisation. However, to be used by Levob a number of customised features were needed, which the contracting parties had ascertained in a joint study, attached to the contract. The customised features included translation into Dutch and integration of functions required in connection with the use of agents and the calculation of their commission.

14. The contract also provided that, after the completion of the customisation work, Levob would conduct an integral acceptance test on the program.

15. The price was broken down in the contract as follows. A sum of USD 713 000 was agreed for the supply of the standard software, USD 101 000 of which was payable upon the conclusion of the contract. The remainder was payable in monthly instalments of USD 36 000. The price for customisation was calculated based on expenditure, but was to be no less than USD 793 000 and no more than USD 970 000. Further sums of USD 7 500 each were envisaged for installation and staff training by FDP.

16. The parties further agreed that the licence for the standard software started in the United States prior to the customisation work. The related cost was to be invoiced

separately, whilst for importation into the Netherlands, for which Levob was responsible, the value of the data carriers was to be shown separately.

17. According to the referring court, in the appeal in cassation it can be taken as established that employees of Levob received the data carriers with the standard software pursuant to the contract in the United States and brought them into the Netherlands. [5] Subsequently, from 1997 to 1999, FDP installed the base program on the appellant's hardware, implemented the agreed customisations and trained the appellant's staff.

18. Differences of opinion subsequently arose between Levob and the tax authorities on the treatment of the transactions under the law on value added tax. Levob took the view that it owed value added tax only for the customisation, but not for the supply of the standard software. The tax authorities, on the other hand, believed that FDP had granted Levob a comprehensive licence for the customised software. It considered that that tax should be paid by Levob on the supply in its entirety as a supply of services. It issued additional notices of tax assessment to that effect. [6]

19. The action brought against these notices at the Gerechtshof Amsterdam was unsuccessful. Levob lodged an appeal in cassation against the judgment at first instance with the Hoge Raad, which, by a judgment of 30 January 2004, made reference to the Court of Justice pursuant to Article 234 EC for a preliminary ruling on the following questions:

'(1) (a) Are Article 2(1) and Article 5(1) of the Sixth Directive, in conjunction with Article 6(1) thereof, to be interpreted as meaning that the acquisition of software, such as that in the present case and on terms such as those at issue in this dispute — whereby separate payment is stipulated in respect of the standard software, recorded on a carrier, developed and put on the market by the supplier, on the one hand, and the subsequent customisation thereof to meet the purchaser's requirements, on the other — must be regarded as a single supply?

5 — However, at first instance the Gerechtshof (Regional Court of Appeal), Amsterdam, had expressly held that Levob had not shown beyond any doubt that it had the power to dispose of the standard software as owner before the customisation. The doubts arise because Levob was not able to provide any more precise information on when its employees received the software and Levob did not make any declaration on importation.

6 — Strictly speaking, two notices of assessment were issued, one for 1997, and one for 1998 and 1999. Both notices are being contested. However, the Hoge Raad has evidently made reference for a preliminary ruling only in the proceedings relating to the notice for 1997. In that notice the value added tax owed was fixed at NLG 52 002, of which, on balance, a sum of NLG 50 732 was for the customisation and a sum of NLG 1 290 was for the supply of the software package itself.

(b) If the answer to the above question is in the affirmative, are these provisions to be interpreted as meaning that this supply must be regarded as a service (of which the supply of the goods, namely the carriers, forms part)?

(c) If the answer to that question is in the affirmative, is Article 9 of the Sixth Directive (in the version in force until 6 May 2002) to be interpreted as meaning that this service is supplied at the place referred to in Article 9(1)?

(d) If the answer to the previous question is in the negative, which part of Article 9(2) of the Sixth Directive is applicable?

(2) (a) If the answer to Question 1(a) is in the negative, are the provisions referred to therein to be interpreted as meaning that the provision of non-customised software on the carriers must be regarded as a supply of tangible property for which the agreed separate price constitutes the consideration for the purposes of Article 11A(1)(a) of the Sixth Directive?

(b) If the answer to this question is in the negative, is Article 9 of the Sixth Directive to be interpreted as meaning that the service is supplied at the place referred to in Article 9(1) or at one of the places referred to in Article 9(2)?

(c) Does the same apply to the service consisting in the customisation of software as applies to the provision of the standard software?'

20. In the proceedings before the Court of Justice, Levob, the Netherlands Government and the Commission have submitted observations. Their submissions are reproduced in the legal assessment where appropriate.

IV — Legal assessment

21. The present case raises the general question whether the supply of software should be classified as a supply of goods or a supply of services within the meaning of the Sixth Directive. The individual questions referred address this point, and the consequences of such classification for the place of supply, in a number of variants. Conse-

quently, before answering the individual questions, it is necessary to consider the treatment of software for value added tax purposes.

22. In this connection, the question arises of the importance of the guidelines set by the Committee on Value Added Tax for the treatment of the supply of software. Reference has been made to those guidelines by the Hoge Raad, in particular the Advocaat-Generaal, and by Levob.

A — *The importance of the guidelines set by the Committee on Value Added Tax*

23. The Committee on Value Added Tax is an advisory body set up on the basis of Article 29 of the Sixth Directive, consisting of representatives of the Member States and of the Commission. The Committee is consulted in the cases provided for by the Sixth Directive and may also examine other questions raised by its chairman or at the request of one of its members in connection with the interpretation of the Sixth Directive. The Committee adopted the abovementioned guidelines unanimously at its 38th meeting on 25 May 1993, according to the Commission.

24. At the request of the Court, the Commission submitted the guidelines and explained that they were not legally binding and had not been published either. The confidential nature of the Committee's discussions and decisions is apparent from its rules of procedure, which have not been published either, as far as can be seen. [7] In the Netherlands the guidelines have been incorporated into administrative rules. [8]

25. In principle even non-legally binding opinions of advisory committees at Community level can offer useful indications as to the interpretation of Community legislation. However, as long as the Committee on Value Added Tax's guidelines are not published, the Court should not have any regard to them, since legal subjects do not have any opportunity to find out about them.

26. That must be the case, in particular, because there is no clear reason why the unanimously adopted Committee guidelines on the interpretation of the Sixth Directive should be kept secret. Indeed, their publication would seem to be necessary in order to ensure their widespread uniform interpretation.

7 — See the findings of the Court of First Instance in the order in Case T-178/99 *Elder* v *Commission* [1999] ECR II-3509, paragraph 7. The case concerned the rejection of an application by a member of the public to inspect the minutes of the Committee on Value Added Tax.

8 — Mededeling 57 of the Staatssecretaris van Financien (Secretary of State for Finance) (Order of 14 August 1998, No VB98/1785, VN 1998/40.33).

27. This situation is not altered by the fact that the guidelines have found expression in national administrative rules which have been published. Those administrative rules refer to national implementing law and not directly to the Sixth Directive. Furthermore, national rules cannot in general offer any indication as to the interpretation of Community law. In addition, if the Community guidelines are not published, the taxable person is not able to verify whether national administrative practice is actually consistent with the guidelines.

B — *The treatment of the supply of software under the law on value added tax*

28. According to the circumstances in the main proceedings, a distinction should be drawn between two cases, namely the supply of standard software recorded on a data carrier and the provision of software specially developed for customers.

1. The supply of standard software on a data carrier

29. The supply of standard software recorded on a fixed data carrier, for example a CD-ROM or a DVD, generally involves two operations. First of all, ownership of the data carrier is transferred and, secondly, an agreement is concluded, generally called a licensing agreement, covering the right to use the software recorded on the carrier.

30. The Netherlands Government therefore considers the supply of software to be a bundle of supplies, in which the grant of the right of use forms the principal supply. It therefore regards this comprehensive supply in its entirety as a supply of services. Levob, on the other hand, emphasises the transfer of the data carrier, which constitutes a supply of tangible property within the meaning of Article 5(1) of the Sixth Directive. The Commission adopts a more sophisticated position: if the licence to use the software were transferable, rights would be granted as enjoyed by an owner, with the result that, all in all, there would be a supply of goods. If the rights of use were non-transferable, on the other hand, there would be a supply of services.

31. Under Article 5(1) of the Sixth Directive, a supply of goods exists where the right to dispose of tangible property as owner is transferred. All transactions that do not satisfy this definition are regarded as supplies of services under Article 6(1) of the Sixth Directive.

32. With regard to the data carrier, there is no doubt that ownership is transferred to the acquirer, with the result that a supply of goods can be taken to exist. On the other hand, the grant of the right to use a computer program cannot in itself be regarded as a supply of goods, because such a right is not tangible property within the meaning of Article 5(1) of the Sixth Directive and cannot be treated as tangible property, like electric current or certain interests in immovable property. [9]

33. However, it is doubtful whether the transfer of the right to use the software may be regarded at all as a supply (of services) that is separate from the transfer of ownership of the data carrier.

34. In the two earlier judgments in *Bosch* [10] and *Brown Boveri*, [11] the Court has already dealt with a similar issue in connection with determining customs value. In *Bosch*, the Court found that the value of patents on processes enabling a machine to be used is not included in the customs value of that machine, since the Common Customs Tariff covers only the importation of tangible property, but not the importation of incorporeal property such as processes, services or know-how. [12]

35. In *Brown Boveri*, the Court ruled, contrary to the arguments made by Advocate General Lenz, [13] that the customs value of the carrier medium includes the value of the software embodied therein. [14]

36. The customs rules were later amended to the effect that only the value of the data carrier, but not the value of the software recorded on that carrier, is to be taken into account in determining the customs value. [15] Because of the reference in Article 11B(1) of the Sixth Directive, this fact has implications for the determination of the taxable amount for value added tax on import. Levob considers it very important for the supply of software to be treated as a supply of goods in the United States and subsequently as an import into the Community, not least in order to be able to benefit from this favourable rule on the determination of customs value.

9 — See Article 5(2) and (3)(a) of the Sixth Directive.

10 — Case 1/77 [1977] ECR 1473.

11 — Case C-79/89 [1991] ECR I-853.

12 — *Bosch* (cited in footnote 10), paragraphs 4 and 5.

13 — Opinion in *Brown Boveri*, point 29 et seq.

14 — *Brown Boveri* (cited in footnote 11), paragraph 21.

15 — See Article 167(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1): '[n]otwithstanding Articles 29 to 33 of the Code, in determining the customs value of imported carrier media bearing data or instructions for use in data processing equipment, only the cost or value of the carrier medium itself shall be taken into account. The customs value of imported carrier media bearing data or instructions shall not, therefore, include the cost or value of the data or instructions, provided that such cost or value is distinguished from the cost or value of the carrier medium in question.'

37. Following the period that is relevant to the main proceedings, the special rules governing the determination of customs value for software were once again repealed, however, after the import duty had in any case been reduced to zero under the Agreement on trade in information technology products. [16]

38. The abovementioned judgments and legislation are heavily influenced by the particular aims of customs law and the GATT requirements in this area. The judgments concern the determination of the transaction value of a product with respect to the assessment of duty. The special rules of customs law for computers and data carriers are intended to facilitate trade in those goods in order to promote technical and economic development. [17]

39. The rules on value added tax do not have the same underlying aim as customs law. The abovementioned judgments and legislation in the field of customs law do not therefore allow any conclusions to be drawn as to the treatment of standard software for value added tax purposes. Consequently, it must be determined, on the basis of autonomous criteria, whether two distinct supplies should be taken to exist from the point of view of value added tax where standard software is supplied on a data carrier.

40. However, acquisition of ownership of property is in principle accompanied by an unrestricted right to dispose of and use that property. For example, when a book is purchased, no separate licence is granted to read the book and in the case of a music CD no licence is granted to listen to the music. Similarly, when technical equipment is acquired, there is no need to conclude a special agreement on the use of the equipment because the equipment embodies intellectual property rights in the form of patented inventions.

41. However, limits are placed on the right to use a work embodied in an object through copyright. Copyright protection for software is governed at European level by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. [18]

16 — Article 167 was repealed by Commission Regulation (EC) No 444/2002 of 11 March 2002 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code and Regulations (EC) No 2787/2000 and (EC) No 993/2001 (OJ 2002 L 68, p. 11) on the following grounds (seventh recital): the purpose of Article 167(1) of Regulation No 2454/93 was to avoid the levying of customs duties on software imported on carrier media. That objective has since been achieved by the Agreement on trade in information technology products (ITA), approved by Council Decision 97/359/EC concerning the elimination of duties on information technology products (OJ 1997 L 155, p. 1). Without prejudice to the application of GATT Decision 4.1 of 12 May 1995, it is therefore no longer necessary to provide special implementing provisions for the determination of the customs value of carrier media.

17 — See point 15 et seq. of the Opinion of Advocate General Lenz in *Brown Boveri* (cited in footnote 13).

18 — OJ 1991 L 122, p. 42.

42. Article 1(1) of Directive 91/250 accords the same copyright protection to computer programs as to literary works. Under Article 4 of the directive, certain acts, in particular reproduction and distribution of a program, may be carried out only with the authorisation of the author. On the other hand, it can be concluded from Article 5(1) of Directive 91/250 that the use of the program by the lawful acquirer in accordance with its intended purpose does not in principle require authorisation by the author.

43. The bringing into circulation in the Community of a copy of a program by the rightholder or with his consent exhausts the distribution right within the Community of that copy (Article 4(c), second sentence, of Directive 91/250). Consequently, the first acquirer may effectively transfer ownership of the reproduction to a third party without the need for the author's consent. The first acquirer may therefore dispose of the tangible property as owner.

44. As the lawful acquirer of the original data carrier, a third party is also authorised to use the program recorded on the carrier in accordance with its intended purpose.[19] A contractual prohibition on the transfer of the right of use, which the manufacturer has agreed with the first acquirer, is not binding on third parties. If such a contractual provision can be agreed effectively at all, it is effective in any case only in the relationship between the holder of the protective right and the first acquirer. The first acquirer must, if necessary, pay compensation for damages to the other contracting party (the manufacturer) because it has committed a breach of contractual obligations. However, such breaches of contractual obligations do not affect either acquisition of ownership of the data carrier by the second acquirer or the transfer of the right of use associated with ownership.

45. A licensing agreement which is concluded in addition to the transfer of ownership of a data carrier on which the program in question is recorded is not therefore a constitutive condition for the right to use the program. Instead, the right of use stems from ownership of the reproduction. The purpose of the licensing agreement is in fact to restrict the right of use in the relationship between the holder of the protective right and the acquirer of the copy of the program.

46. The object of the licensing agreement is not therefore a taxable supply. The supply, which consists in the transfer of ownership of the reproduction, is in fact restricted even further.

19 — So that there is no unjustified multiple use of the program, the first acquirer must uninstall the program.

47. Contrary to the view taken by the Commission, the fact that such a licensing agreement includes a prohibition on the transfer of the right of use does not preclude classification of the entire transaction as a supply of goods.

48. In contrast to the above considerations, in the view of the Netherlands Government the acquisition of the data carrier must be of little importance. The only important factor is the acquisition of the right of use. The transfer of the data carrier would then be merely, as it were, the technical means to allow the software to be used. However, this view cannot be accepted.

49. This approach is supported by the fact that the important factor for the acquirer is generally not ownership of the 'means of transport', that is the data carrier. Furthermore, the supply of the software on a data carrier would be treated in the same way for tax purposes as the downloading of software from the internet since downloading is to be treated as a supply of services, at least as the legal situation stands at present. [20]

50. However, the grounds militating against this approach are more compelling. It would mean that computer programs on a data carrier, on the one hand, and music on a CD or a text in a book, on the other, would be treated differently for no apparent reason. Unlike in the case of these comparable copyright works, in the case of a computer program the right to use the creations embodied in the data carrier would be the primary factor and not ownership of the data carrier itself. Whilst a supply of goods within the meaning of Article 5(1) of the Sixth Directive is taken to exist in the case of the supply of a music CD or a book, the supply of a CD containing software would be treated as a supply of services for value added tax purposes.

51. The difficulties that can arise from such a differentiation can be seen by taking the example of a dictionary that is recorded on a CD-ROM or DVD. A dictionary CD of this kind contains many texts and images in digital form, but also programs to display and manage the data. Should such a CD be regarded, like a book, as a supply of goods or, like a CD containing a computer program, as a supply of services?

52. Furthermore, Levob rightly stresses that classification as a supply of services leads to difficulties where — as when standard software is sold in bulk business — intermediate dealers are used. In practice, the intermediate dealers obtain the data carriers from the manufacturer or from other intermediate dealers and sell them on to final consumers.

20 — See Article 9(2)(e), last indent, in conjunction with Annex L to the Sixth Directive, as amended by Directive 2002/38 (cited in footnote 4), which is admittedly no longer relevant as far as the present case is concerned.

They do not have a detailed knowledge of the terms of the licence that apply to final consumers and those terms are not covered in any form in the contract of sale between them and the acquirers of the software packages. It would therefore be unrealistic to accept that the acquirer acquires a right of use, which is not clearly defined, and not tangible property.

53. If a separate licensing agreement granting rights of use does actually come into being, this only happens when the software is installed on the final consumer's computer, when — in the legal opinion of the manufacturer — the final consumer accepts the terms of the licence. However, there is no need for consideration to be given in addition to the price for the data carrier, which has already been paid to the intermediate dealer. This transaction cannot therefore be used for the purpose of levying value added tax.

54. This example shows that using the supply of the data carrier as the connecting factor and not the grant of the right of use also offers practical benefits with regard to the levying of value added tax. The transfer of ownership of tangible property includes a publicity element which can easily be the connecting factor for taxation. It is more difficult to understand, on the other hand, when and between which persons intangible property is transferred. Moreover, there is a danger of manipulation. The presence or absence of the publicity element also justifies different treatment of the supply of software on a data carrier, on the one hand, and by downloading from the internet, on the other.

55. It should therefore be stated as an interim conclusion that the supply of standard software on a data carrier constitutes a supply of goods within the meaning of Article 5(1) of the Sixth Directive.

2. The development of special software customised to meet the customer's requirements

56. All parties are in agreement that the development of software specially customised to meet a customer's requirements is not a supply of goods, but a supply of services.

57. This argument must be accepted in principle. However, in an individual case very different situations are conceivable where more involved consideration is required. Here, too, the starting point is whether tangible property is transferred in which the intellectual work of programming

is embodied. That is certainly not the case where the specially developed program is only created in its complete form on the customer's computer.

58. If, on the other hand, the developer produces the program in accordance with the customer's requirements entirely within its undertaking and then transfers to the customer a data carrier containing the program, which need only be installed, it might be necessary to adopt the same assessment as for standard software.

59. This assessment is not affected by the simple fact that the software is specially tailored to the customer's requirements. This can be seen from a comparison with other works that are produced individually for a customer. In the case of a house built according to the client's requirements and ready for immediate occupancy, there is likewise a supply of goods and not a bundle of services provided by the different craftsmen and building contractors involved in the construction work.

60. According to the order for reference, the FDP employees customised the CLAS software after its installation on Levob's hardware. As a result, in the present case this supply constitutes a supply of services within the meaning of Article 6(1) of the Sixth Directive.

C — The questions referred for a preliminary ruling

1. One comprehensive supply or two distinct supplies (Question 1(a))

61. The first decisive point for further examination is the answer to the question whether the supply of standard software, on the one hand, and the customisation thereof to meet Levob's special requirements, on the other, constitute one comprehensive supply or two distinct supplies. This question is particularly important because the above arguments have shown that the supply of standard software is to be classified as a supply of goods, whilst the customisation is a supply of services.

62. If the supply of the software and customisation constituted separate supplies (hypothesis 2), different rules on the place of supply would be applicable. The consequence of this might be that only the customisation work in the Netherlands would be taxable, whilst the United States would have to be regarded as the place of supply of the standard software and no value

added tax would be incurred in respect of that supply in the Community. [21]

63. If, on the other hand, there existed a comprehensive supply to be classified as a single transaction (hypothesis 1), there would be a single place of supply.

64. Levob takes the view, based on the structure of the contract, that there are two distinct supplies. The Netherlands Government and the Commission take the opposite view. It is common ground between the parties that the installation of the program and staff training are ancillary supplies which should be classified in accordance with the principal supply.

65. The Sixth Directive does not make any specific provision regarding the conditions under which several related supplies should be treated as one comprehensive supply. In *CPP*, [22] however, the Court made the following fundamental observations on this point:

'In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.'

66. There are therefore two different aims associated with establishing the substance of a composite supply. On the one hand, it is necessary to differentiate the assessment of the different individual supplies according to their character. On the other hand, splitting a comprehensive supply into too many separately classified individual supplies would overcomplicate the application of the rules on value added tax. [23] In any case, an objective criterion must be used. The subjective perspective of the provider and/or

21 — However, value added tax would then be payable on import, but under the rules described above (point 36) only the value of the data carrier would be taken as the basis for assessment.

22 — Case C-349/96 [1999] ECR I-973, paragraph 29.

23 — In some Opinions there is even a discernible tendency in this situation to give precedence to practicability over accuracy: see the Opinion of Advocate General Cosmas in Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, point 14; Opinion of Advocate General Fennelly in Case C-327/94 *Dudda* [1996] ECR I-4595, 4597, point 35; and Opinion of Advocate General Fennelly in *CPP* (cited in footnote 22), point 47 et seq.

recipient of the supply is irrelevant. The Court's findings in *CPP* relate to a bundle of services. However, they may also be applied to a case where supplies of goods and services are provided together. [24]

67. The existence of a comprehensive supply to be regarded as a single transaction is suggested, in the view of the Court, in particular where one supply represents the principal supply and the other is only a dependent ancillary supply. An ancillary supply exists 'if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied'. [25]

68. In the present case, neither of the two main supplies (the supply of the standard software and the customisation thereof) is subsidiary to the other in such a way that it clearly represents an ancillary supply. However, it cannot be concluded on this basis that the two supplies cannot be regarded as a single comprehensive supply for value added tax purposes. The principal/ancillary supply arrangement is only *one* scenario already recognised in case-law.

69. The essential issue is still to determine the substance of the supplies, taking all the circumstances into account. In this connection, it is important whether both supplies are so closely linked that, in isolation, from the perspective of the average consumer, they do not have the necessary practical benefit for customers. [26]

70. It is for the referring court to make a final decision, based on all the relevant facts, on whether there is such a close link between the supply of the standard software and the customisation thereof in the specific case. Nevertheless, the Court of Justice can provide indications which may be useful in this connection.

71. The existence of an inseparable connection between the two supplies is suggested by the fact that a Netherlands insurance company like Levob — unlike an American company perhaps — cannot use the standard software without customisation. In addition,

24 — For example, in the judgment in *Faaborg-Gelting Linien* (cited in footnote 23), the supply of food and the restaurant service are regarded as a single supply of services. In the judgment in Case C-34/99 *Primback* [2001] ECR I-3833, the Court classified the granting of credit and the supply of furniture as a comprehensive supply.

25 — *CPP* (cited in footnote 22), paragraph 30. See also Case 173/88 *Henriksen* [1989] ECR 2763, paragraphs 14 to 16; Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24; and Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 27.

26 — In *Henriksen* (cited in footnote 25), paragraph 15, too, the Court regarded the close link between the supplies as important.

the customisation work cannot be carried out in isolation if no base software has previously been supplied, on which the adaptation is effected and with which the technician is familiar.

72. The customer could in theory entrust a third party with the task of carrying out the customisation. However, Levob did not opt for this approach with good reason, as sharing the tasks between two actors would create legal and practical difficulties. From a legal point of view, it would probably be necessary to obtain the author's consent in order to modify the program. [27] From a technical point of view, the third party would have to possess the necessary knowledge of the program structure in order to be able to make adaptations.

73. A further strong indication of the inseparable link between the two supplies is the fact that the software undertaking is responsible for the operability of the whole package consisting of standard software and customisations. Proper functioning is intended to be verified under the contract at issue by means of an integral acceptance test. It is therefore conceivable that any malfunction, whether it is caused by an error in the standard software or in the programming of the customisations, may ultimately result in the breakdown of the entire contract. The software undertaking's overall responsibility is consistent with the spirit and purpose of the contract, since it is of no use to Levob to have properly functioning standard software which has not been successfully adapted for its own purposes.

74. Since both supplies are procured from the same undertaking, it is certain that the same business partner is responsible for the operability of all components. If, on the other hand, Levob had acquired the standard software from one undertaking and had it customised by another undertaking, it could not have relied on an error made by one vis-à-vis the other. This would mean, for example, that Levob could not free itself from the contract on the supply of the faultless standard software merely because the customisation is unsuccessful.

75. The distinctive features in the structure of the contract mentioned by Levob do not preclude classification as a comprehensive supply. In particular, the invoicing method for the supplies is merely an indicator, in the view of the Court. Thus, it has already ruled that distinct supplies may exist even where a

27 — Restricted acts under Article 4(b) of Directive 91 250 include translation, adaptation, arrangement and any other alteration of a computer program.

single invoice is made out. [28] Conversely, the following applies by analogy: a comprehensive supply is not ruled out because separate prices are shown and separate invoices made out for individual elements. [29]

76. Splitting the supply into two price components served the purpose of making pricing for customisation flexible with reference to actual expenditure. However, this price arrangement does not necessarily mean that there are two supplies to be treated distinctly for value added tax purposes. A carpenter who builds made-to-measure cupboards can show the costs of materials as a fixed price in his quotation and the amount of labour based on the number of craftsman hours actually required. Nevertheless, there is no doubt that the result is the supply of a cupboard and not two separate supplies. This example shows that a separate price calculation for two supplies does not necessarily offer any indication as to their internal connection.

77. Neither the separate invoice for the standard software nor the transfer of the data carrier containing that software to the Levob employees who travelled to the United States for that purpose calls into question the abovementioned close link between that supply and the customisation of the software. By means of the operations described, the intention was clearly to create a separate act of importation, so that the favourable rules on the determination of customs value that applied at that time were effective in respect of value added tax. The structure of the contract as regards the transfer of the data carriers and the separate invoicing of the price for the standard software are not, however, linked to specific characteristics of that supply, which justified treating it separately from customisation for value added tax purposes.

78. If considerable importance were attached to the contractual provisions governing price and invoicing, the contracting parties would be able to influence classification for value added tax purposes as they wished. This would run counter to the requirement of assessing the supply or supplies under the contract objectively based on their substance.

79. The answer to Question 1(a) must therefore be that the acquisition of standard software on a data carrier and the subsequent customisation thereof to meet the customer's requirements must be regarded as a single supply within the meaning of the Sixth Directive where the subsidiary supplies are so closely linked that, in isolation, from the perspective of the average consumer, they do not have the necessary practical benefit for customers. In assessing this

28 — *CPP* (cited in footnote 22), paragraph 31.

29 — See the Opinion of Advocate General Fennelly in Case C-76/99 *Commission* v *France* (cited in footnote 25), point 31.

question, it is irrelevant whether separate prices have been agreed and separate invoices have been made out for the subsidiary supplies.

2. Hypothesis 1: one single supply

80. The referring court has asked Question 1 (b), (c) and (d) in the event that the supplies are to be classified as a single transaction, which is highly likely in the light of the arguments set out above. By Question 1(b), the referring court essentially seeks to ascertain whether the single supply should be regarded in its entirety as a supply of goods or a supply of services. The other questions seek to determine the place of supply.

(a) Classification as a supply of goods or a supply of services (Question 1(b))

81. The comprehensive supply received by Levob covers elements of both a supply of goods and a supply of services and neither the supply of the standard software nor the customisation thereof may be regarded as a mere ancillary supply.

82. In *Faaborg-Gelting Linien*,[30] the Court ruled that where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place. Where the individual elements of the bundle of supplies are not interrelated as principal and ancillary supplies, it must nevertheless be considered whether the main focus of the supplies is the supply of goods or the supply of services. In the case of the restaurant business that was the subject of the judgment in *Faaborg-Gelting Linien*, the Court accepted that service elements predominated.

83. In the present case, the main focus, having regard to all the circumstances, is also the service elements. It is crucial, first of all, that the standard software cannot be used as such by Levob. Levob's main concern was

30 — Cited in footnote 24, paragraphs 12 to 14; see also *CPP* (cited in footnote 22), paragraph 28, and Case C-150/99 *Stockholm Lindopark* [2001] ECR I-493, paragraph 26.

therefore not to acquire standard insurance software, but software customised specially to meet its requirements.

84. Secondly, it must be stated that customisation and installation were very expensive processes, lasting more than a year. Work began with the joint evaluation of requirements for customisation and ended with testing of the whole program. Installation and staff training are only ancillary supplies. However, the fact that they also form part of the contractual supplies shows that FDP was intended to supply a comprehensive 'all-in service' which went far beyond providing the base program.

85. Lastly, the service elements, that is the customisation of the software, its installation and the training services, also account for a larger proportion of the total price in value terms than the supply of the standard software.

86. The answer to Question 1(b) must therefore be that a comprehensive supply that consists of the supply of standard software, the customisation thereof to meet the customer's requirements, its installation and training services is to be regarded in its entirety as a supply of services within the meaning of Article 6(1) of the Sixth Directive where, having regard to all the circumstances, the service elements predominate. This may be the case, for example,

— where the customisation of the standard software is of crucial importance for its use by the acquirer,

— where customisation and installation are so expensive that they cannot be regarded as ancillary supplies and

— where the service elements account for the predominant part of the value of the comprehensive supply.

(b) Place of supply (Question 1(c) and (d))

87. By Question 1(c) and (d), which should be examined together, the referring court

seeks to ascertain whether the place of the supply, which is to be classified in its entirety as a supply of services, is to be determined on the basis of the general rule laid down in Article 9(1) of the Sixth Directive or whether one of the cases referred to in Article 9(2) applies. Under Article 9(1), the place of supply would be the place where the supplier of the services is established and under Article 9(2) the place where the recipient of the services is established.

88. The Netherlands Government and the Commission both take the view that Article 9 (2)(e), third indent, of the Sixth Directive is applicable, with the result that the place of supply of the services is the Netherlands. Levob believes, first of all, that there are two separate supplies and that the place of supply of the services (customisation of software) is to be determined on the basis of Article 9(1) of the Sixth Directive. In the event that the Court takes the view that there is a composite supply, Levob claims that the supply took place in its entirety in the United States in accordance with Article 8 of the Sixth Directive.

89. The Court has held that, according to Article 9(1) of the Sixth Directive, the place where the supplier has established his business is a primary point of reference in determining the place of supply. [31]

90. As regards the relationship between Article 9(1) and Article 9(2) of the Sixth Directive, the Court has also pointed out that Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) lays down the general rule: the object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, second, non-taxation. [32]

91. The Court has concluded from this that, for the purposes of interpreting Article 9 of the Sixth Directive, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1). [33] Article 9 (1) and (2) of the Sixth Directive do not therefore have a rule-exception relationship

31 — *Faaborg-Gelting Linien* (cited in footnote 24), paragraph 16, and Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 17.

32 — Case C-108/00 *Syndicat des producteurs indépendants* [*SPI*] [2001] ECR I-2361, paragraph 15. See also *Dudda* (cited in footnote 28), paragraph 20, Case C-429/97 *Commission* v *France* [2001] ECR I-637, paragraph 41, and Case C-68/03 *Lipjes* [2004] ECR I-5879, paragraph 16, concerning the relationship between Article 9(1) and Article 28b(E) of the Sixth Directive.

33 — *SPI* (cited in footnote 32), paragraph 16, and *Dudda* (cited in footnote 32), paragraph 21.

either, with the result that Article 9(2) should be given a restrictive interpretation. [34]

92. In Case C-429/97 *Commission* v *France*, on which Levob relies, the Court rejected the application of Article 9(2) to a composite supply and regarded Article 9(1) as a more practical solution. However, it is not possible to infer that the application of Article 9(2) to composite supplies is generally ruled out. The finding in Case C-429/97 must instead be seen in the context of the specific case. Taxation at the place where the recipient of the service was established would have led to conflicts of jurisdiction in that case, since the supply was made to a large number of recipients established in different Member States.

93. In the present case, this danger does not exist, because Levob is the only recipient of the composite supply. Despite the existence of a composite supply, it must first of all be examined whether one of the criteria referred to in Article 9(2) of the Sixth Directive applies.

94. The supply and customisation of software could constitute assignment of licences within the meaning of Article 9(2)(e), first indent, of the Sixth Directive, since the contract between FDP and Levob does provide for a licence to be granted both for the standard software and for the customisation.

95. As has already been stated, however, it is not of crucial importance that the right to use the standard software was assigned alongside the supply of the data carrier. The same applies to the customisation work, since it would not really make sense to customise the software specially for Levob without transferring a right to use that software. Since the main focus is the (comprehensive) supply of services and not the grant of the licence, the application of Article 9(2)(e), first indent, of the Sixth Directive is ruled out.

96. The training services to be provided by FDP could also be classified, in isolation, as educational within the meaning of Article 9 (2)(c), first indent, of the Sixth Directive. Those services are only accessory, however, with the result that a separate determination of the place of supply for this activity is ruled out.

34 — *SPI* (cited in footnote 32), paragraph 17.

97. Consequently, the essential question is whether Article 9(2)(e), third indent, of the Sixth Directive, which applies to 'services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information', may be relied on.

98. This provision may be interpreted in two ways. Firstly, it could be interpreted restrictively in such a way that it covers only the services provided by the professions referred to, including the data processing and the supplying of information arising *in connection with those activities*. In that case, the rule would not be relevant to the present case, since there is no such connection with services provided by the abovementioned occupational groups.

99. Secondly, data processing and the supplying of information could be regarded as further services which are independent of the first items on the list. In that case, the services at issue would fall within the scope of those terms even though the supply and programming of software would today probably not readily be described as 'data processing and the supplying of information'. However, excessively strict criteria may not be imposed on those terms; instead, it should be borne in mind that this part of the directive has remained without amendment since 1977.

100. The wording, in particular the choice of conjunction (as well as, sowie, ainsi que ...), tends to indicate — in other language versions too — that all the items on the list have equal status.

101. The Court has previously determined the application of Article 9(2)(e), third indent, of the Sixth Directive on the basis of whether the services to be assessed in a particular case are among the services supplied principally and habitually in the occupations listed in that provision. [35] This examination was appropriate because the Community legislature only used the occupations listed in that provision in order to define the types of services referred to therein, but does not require the supplier of the service actually to belong to one of the listed occupational groups. [36]

102. However, Article 9(2)(e), third indent, of the Sixth Directive also extends to 'data processing and the supplying of information', without any reference to occupational groups. In 1977 there was not yet any firm occupational image for software undertakings. Consequently, it is not possible in this

35 — Case C-167/95 *Linthorst, Pouwels and Scheres* [1997] ECR I-1195, paragraph 19 et seq., and Case C-145/96 *von Hoffmann* [1997] ECR I-4857, paragraph 15 et seq.

36 — *SPI* (cited in footnote 32), paragraphs 19 and 20, with reference to Case C-68/92 *Commission* v *France* [1993] ECR I-5881, paragraph 17, and Case C-69/92 *Commission* v *Luxembourg* [1993] ECR I-5907, paragraph 18, according to which supplies in the advertising sector can exist even where they have not been provided by an advertising agency.

case — that is to say, for services of data processing and the supplying of information — to make a comparison with the activities of the occupational groups listed, as the Court has done in the cases on which it has previously ruled.

103. If the draftsmen of the directive had wished to cover 'data processing and the supplying of information' only in so far as those services are typically supplied by members of the occupational groups listed, there would not have been any need for a separate mention of those services, since they would have already formed part of the activities of those occupational groups, including the other similar services.

104. Lastly, Levob stresses that the taxation of electronically supplied services at the place where the recipient of the service is established was introduced by Directive 2002/38 because taxation of such services within the Community had previously been possible only to a very limited extent. [37]

105. In this regard, it is sufficient to note that the amendments to the Sixth Directive that were introduced by Directive 2002/38 do not have any bearing on the present case since the supply and customisation of the software were not effected by electronic means. Consequently, the introduction of the rules on electronically supplied services do not allow any conclusions to be drawn as to the interpretation of the relevant rules, which applied prior to the adoption of Directive 2002/38.

106. Since the supplies are to be regarded as services of data processing and the supplying of information within the meaning of Article 9(2)(e), third indent, of the Sixth Directive, the place where the recipient of the supplies is established must be regarded as the place of supply.

3. Hypothesis 2: two distinct supplies (Question 2(a), (b) and (c))

107. In the present case, everything suggests — subject to the final assessment by the referring court — that there is a comprehensive supply to be classified as a single transaction. It is therefore not necessary to answer Question 2(a), which the referring court has asked only in the event that the notion of a comprehensive supply is rejected.

37 — Levob refers to the first recital in the preamble to Directive 2002/38 (cited in footnote 4).

108. If, contrary to expectations, it is nevertheless necessary to consider the supply of standard software on a data carrier separately, it follows from the arguments under IV B 1 that that supply constitutes a supply of goods within the meaning of Article 5(1) of the Sixth Directive. There is therefore no need to answer Question 2(b), which would have been relevant only if a supply of services were taken to exist.

109. As regards Question 2(c) concerning the place of supply in respect of the customisation of the standard software, reference can be made to the answer to Question 1(c) and (d). Even if the customisation is considered in isolation, the place of supply under Article 9(2)(e), third indent, of the Sixth Directive must be regarded as the place where its recipient is established.

V — Conclusion

110. On the basis of the above considerations, I propose that the Court answers the questions referred by the Hoge Raad der Nederlanden as follows:

(1) The acquisition of standard software on a data carrier and the subsequent customisation thereof to meet the customer's requirements must be regarded as a single supply within the meaning 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 where the subsidiary supplies are so closely linked that, in isolation, from the perspective of the average consumer, they do not have the necessary practical benefit for customers. In assessing this question, it is irrelevant whether separate prices have been agreed and separate invoices have been made out for the subsidiary supplies.

(2) A comprehensive supply that consists of the supply of standard software, the customisation thereof to meet the customer's requirements, its installation and training services is to be regarded in its entirety as a supply of services within the meaning of Article 6(1) of the Sixth Directive where, having regard to all the circumstances, the service elements predominate. This may be the case, for example,

— where the customisation of the standard software is of crucial importance for its use by the acquirer,

— where customisation and installation are so expensive that they cannot be regarded as ancillary supplies and

— where the service elements account for the predominant part of the value of the comprehensive supply.

(3) A comprehensive supply that consists of the supply of standard software, the customisation thereof to meet the customer's requirements, its installation and training services is to be regarded as data processing and the supplying of information within the meaning of Article 9(2)(e), third indent, of the Sixth Directive, with the result that the place where the recipient of the supplies is established must be regarded as the place of supply.