# OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 29 March 2001 [1]

1. By decision of 15 July 1999, the Tribunal d'arrondissement de Luxembourg (hereinafter 'the national court') referred to the Court for a preliminary ruling two questions concerning the interpretation of the 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'). In particular, the national court asks the Court to rule on the concept of a liberal profession as referred to in point 2 of Annex F to the Sixth Directive with a view to establishing whether that concept covers the activities of managing agents of buildings in co-ownership and whether, therefore, the reduced rate of VAT provided for the liberal professions by Luxembourg law may be applicable to that activity.

## Legal framework

### *Community law*

2. As regards Community law, the Sixth Directive, as indicated, is relevant here. In the context of that directive, for reasons that will become clear below, a distinction is to be made between:

— first, the rules governing *the reduction of VAT rates* on which the Luxembourg legislation on the rates applicable to the liberal professions is based;

— second, the rules governing *VAT exemptions*, containing the reference to the liberal professions, which are the subject of the present reference for a preliminary ruling.

The rules governing the reduced rates of VAT referred to in Article 12(3) and (4) and Article 28(2)(e) of the Sixth Directive.

3. Under Article 12(4) of the Sixth Directive Member States originally were permit-

1 — Original language: Italian.
2 — OJ 1977 L 145, p. 1.

ted to impose reduced rates of VAT on certain goods or services. The only binding obligation on Member States was to fix the rate so that 'the amount of value added tax resulting from the application thereof shall be such as in the normal way to permit the deduction therefrom of the whole of the value added tax deductible under the provisions of Article 17'.

4. Subsequently those rules were partially amended by Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388 (hereinafter 'Directive 92/77') [3]. Article 12(3)(a) of the Sixth Directive — as amended by Article 1(1) of Directive 92/77 — now provides that 'Member States may also apply either one or two reduced rates. The reduced rates may not be less than 5% and shall only apply to supplies of the categories of goods and services specified in Annex H' (which, for the purposes of the present case, do not include the services supplied by the liberal professions). Article 28 (referring to 'Transitional Provisions') of the Sixth Directive — as amended by Article 1(4)(e) of Directive 92/77 — provides furthermore that 'Member States which at 1 January 1991 applied a reduced rate to supplies of goods and services other than those specified in Annex H may apply the reduced rate or one of the two reduced rates provided for in Article 12(3) to such supplies, provided that the rate is not lower than 12%'.

3 — OJ 1992 L 316, p. 1.

The rules governing VAT exemptions referred to in Article 28(3)(b) of the Sixth Directive

5. Article 28(3)(b) of the Sixth Directive provides that Member States may 'continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned'. Point 2 of Annex F includes in such activities:

'Services supplied by authors, artists, performers, lawyers and *other members of the liberal professions*, other than the medical and paramedical professions in so far as these are not services specified in Annex B to the second Council Directive of 11 April 1967' (emphasis added).

*The rules of Luxembourg law governing VAT rates*

6. The Luxembourg legislature opted not to apply Article 28(3)(b) of the Sixth Directive in order to exempt from VAT the activities just referred to. Instead, it had recourse to the option to apply reduced rates as permitted by Article 12(3) and (4) and Article 28(2)(e) of the Sixth Directive.

7. According to the order for reference, under Article 40(4)(b) of the Grand-Ducal Law of 12 February 1979 on VAT a reduced rate of 6% (instead of the standard rate of 15%) applies to activities pursued in the exercise of a liberal profession, within the limits and under to the conditions laid down by the Grand-Ducal regulation.

8. The order for reference also makes clear that Article 4 of the Grand-Ducal Regulation of 7 March 1980 — laying down the limits and conditions for applying VAT at the reduced rate within the meaning of Article 40 of the law of 12 February 1979 — included in the concept of liberal profession the activities of lawyers (*avoués* and *avocats*), notaries, process-servers, property administrators or trustees (*administrateurs de biens*), engineers, architects, surveyors, inspectors, technicians, chemists, inventors, consultants, accountants, veterinary surgeons, journalists, photojournalists, interpreters, translators and any other similar activities.

9. Article 40 of the VAT Law was subsequently amended by Article 8 of the Finance Law of 20 December 1991 which fixed — as from 1993 — an intermediate rate of 12% for activities in the exercise of a liberal profession; in relation to those activities, a new Grand-Ducal Regulation of 21 December 1991 reproduced the non-exhaustive list of professions set out in the abovementioned Regulation of 7 March 1980. According to the information supplied by the Commission, that amendment to the rate was connected to the adoption by the Community of Directive 92/77 referred to above.

The activity of a managing agent of buildings in co-ownership in the Grand Duchy of Luxembourg

10. As the order for reference also notes, under the Law of 16 May 1975 on the co-ownership of buildings, the co-owners of a building or group of buildings must belong to a co-ownership association which is a legal entity in its own right.

11. According to the provisions of the Grand-Ducal Regulation of 13 June 1975 laying down measures for implementing the law on co-ownership, the managing agent is generally appointed by the co-owners in

general meeting and any natural person or legal entity may assume the office of managing agent. The managing agent ensure compliance with the co-ownership regulation and the decisions of the general meeting; he manages the building; he attends to its conservation and maintenance; in an emergency, he must, on his own initiative, see to the carrying out of all works necessary for the protection of the building; he normally represents, after authorisation by the meeting, the co-ownership association in civil matters and in legal proceedings.

## Facts and questions for a preliminary ruling

12. Mrs Christiane Adam is a managing agent of buildings in co-ownership in Luxembourg. In her VAT returns in respect of that activity for the financial years 1991 to 1994 she applied the reduced rate provided for by the Luxembourg law for the liberal professions on the ground that, in her judgment, the activity in point should be included in that category.

13. However, this was not the view of the Administration de l'enregistrement et des domaines (Luxembourg administrative authority responsible for VAT) which issued relevant adjustment notices imposing the standard rate of 15%. Mrs Adam's appeals against those notices were in vain, because they were rejected by the Director of that Administration by decisions of 11 and 15 November 1996.

14. Mrs Adam then appealed against those decisions to the Tribunal d'arrondissement de Luxembourg claiming that her activities were those of a liberal profession and, as such, according to the Luxembourg tax legislation, were entitled to a reduced VAT rate of 6% for the years 1991 to 1992 and the intermediate rate of 12% for the years 1993 to 1994 instead of the standard rate of 15%.

15. In considering the matter, the national court noted at the outset that while Luxembourg legislation relating to VAT contains a list of activities covered by the concept of liberal profession, it does not provide a definition of that concept. Finding, however, that that legislation transposes into Luxembourg law the Community directives relating to VAT, the national court concluded that 'Luxembourg legislation on the rates which apply to the liberal professions must be interpreted in accordance with the provisions of Community law relating to VAT'.

16. More specifically, it noted that under the terms of the Sixth Directive the 'standard' VAT rate is established by each Member State; that under Article 12 of the Sixth Directive Member States may apply increased or reduced rates for certain services and, finally, that under the transitional provisions set out in Article 28(3) of the Sixth Directive Member States may continue to exempt from VAT certain services listed in Annex F, including those

supplied by 'members of the liberal professions'.

17. Specifically on the basis of that latter point, the national court therefore decided to refer to the Court, under Article 234 EC, the following questions for a preliminary ruling:

'1. Is the concept of a liberal profession mentioned in point 2 of Annex F to the Sixth Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes an independent concept of Community law?

If the answer to the first question is in the affirmative:

2. Does the concept of a liberal profession cover the activity of managing agent of buildings in co-ownership?'

*Arguments of the parties*

18. In addition to the parties to the main proceedings, the Danish Government and the Commission have submitted observations to the Court. Their conclusions may be summarised as follows.

19. Both the administration de l'enregistrement et des domaines and the Commission have pointed out that the Community provision of which an interpretation is sought is not applicable in the present case since the national legislation in question concerns *the reduction of VAT rates* for the liberal professions, referred to in Article 12(3) and (4) and Article 28(2)(e) of the Sixth Directive, and not *VAT exemptions*, referred to in Article 28(3)(b), and Annex F to that Directive, referred to in the first question. While the Luxembourg Administration infers from this that the Court has no jurisdiction to rule on the questions referred to it (and only in the alternative suggests a negative reply to both questions), the Commission proposes that a reply be given to both questions referred by the national court, even if only to establish that the Member States are competent to determine the activities eligible for a reduced rate, with the sole proviso that the principle of VAT neutrality be respected.

20. For her part, Mrs Adam maintains that the Court has jurisdiction on the grounds that the legislation relating to VAT is 'eminently of a Community nature'. As regards the substance of the matter, she repeats that the activity of a managing agent of buildings in co-ownership should be categorised as a liberal profession.

21. Finally, the Danish Government, without dealing the question of the Court's jurisdiction, proposes that a reply be given to the first question to the effect that the concept of liberal profession referred to in point 2 of Annex F to the Sixth Directive constitutes a concept of Community law which, none the less, must be defined in the light of the national law of the Member States. Accordingly, the Danish Government does not deem a reply to the second question necessary, even though it considers, in the alternative, that such reply should be positive.

## Legal analysis

### *On the jurisdiction of the Court*

22. As has also become clear from the debate between the participants in these proceedings, the question arises, as an inescapable preliminary issue, so it seems to me, whether the conditions for referring a question for a preliminary ruling under Article 234 EC are met. That is to say, initial consideration should be given to whether or not the Community provision (point 2 of Annex F to the Sixth Directive) whose interpretation is sought is relevant to resolving the dispute in the main proceedings and whether therefore it is necessary for the Court to intervene, as required under Article 234 EC, to enable the national court to reach its decision.

23. On that point, as we know, the Court has consistently held that in principle 'it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver a judgment and the relevance of the questions which it submits to the Court' [4].

24. As we know, furthermore, the Court retains for itself a certain power of review of the assessments made by national courts which may lead it, in an appropriate case, to find the reference inadmissible. In particular, it has repeatedly held that 'it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, [or] where the problem is hypothetical'. [5] Accordingly, 'if it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment'. [6] For that reason, among others, the Court has excluded its

4 — Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20. Also see, *inter alia*, Cases C-421/97 *Tarantik* [1999] ECR I-3633, paragraph 33, and C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

5 — *Idéal Tourisme*, cited above, paragraph 20. See also Cases C-437/97 *EKW* v *Wein and Co.* [2000] ECR I-1157, paragraph 52; *Bosman*, cited above, paragraph 61; C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraphs 17 and 18, and C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25.

6 — *Lourenço Dias*, cited above, paragraph 20.

own jurisdiction where 'it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case'. [7]

25. In my opinion, in the present case it is difficult to contest the view that the Community provision whose interpretation is sought is not applicable to the main proceedings, as the defendant and the Commission, as well as the other participants in these proceedings, maintain. As has been seen above, the Luxembourg legislation in question is concerned with fixing a reduced VAT rate for the liberal professions; it is not concerned at all with VAT exemptions under Article 28(3)(b) and point 2 of Annex F to the Sixth Directive.

26. Moreover, it would appear that the national court is well aware of that and, in its order for reference, it correctly makes a distinction between the rules governing reduced rates (which in the present case provide the premiss for the Luxembourg legislation in question) and those relating to VAT exemptions. However, as noted above, the national court attaches decisive importance to the fact that 'the legislation relating to VAT transposes into Luxembourg law the relevant Community directives'. In particular, it would appear to be a decisive fact that the Community rules governing VAT exemptions, although not applicable to the present case, refer to the concept of liberal professions, as do the relevant national rules in the main proceedings, and that, while they are totally independent of each other, both sets of rules are concerned with VAT. That is why, according to the national court, 'Luxembourg legislation on the rates which apply to the liberal professions must be interpreted in accordance with the provisions of Community law relating to VAT'.

27. While appreciating the concern of the Luxembourg court to found its decision in Community law and Community concepts, I must say that the connection between the question discussed in the main proceedings and the Community legislation of which an interpretation is sought seems somewhat slender and, in any event, too slender to support the relevance of the questions referred for a preliminary ruling and thus the Court's jurisdiction to rule on them.

28. Above all, I must repeat once more that, while it appears in the same directive, the Community provision of which an interpretation is sought is quite distinct from those provisions which are relevant for the purposes of the national proceedings. Second, while it is true that under Article 12(3) and (4) and Article 28(2)(e) of the Sixth Directive Member States may apply reduced rates to certain activities, it is also true that the decision to avail of that possibility falls within the competence of the Member States and that, as regards the definition of those activities, the Member States are in no way obliged to refer to the

7 — Cases C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 26, and C-130/95 *Giloy* ECR I-4291, paragraph 22.

list contained in Annex F to the Sixth Directive relating to VAT exemptions. There is thus no possibility, as far as we are concerned here, of establishing an interpretative connection between the national provisions on the activities subject to a reduced rate and those of the Sixth Directive on operations eligible for exemption. It is also clear that no such connection can be based on the general — and, I would say, fortuitous — fact that both the national and Community provisions refer to VAT.

29. That being so, it seems to me that in this case that there are not even grounds for hypothesising, as might perhaps be inferred from a reading between the lines of the order for reference, a kind of indirect reference to the Community legislation (in the present case, Annex F to the Sixth Directive) in the national provisions in question. By this I mean that in the case now in question no reliance can be placed upon the well-known decision in *Dzozi* [8] according to which 'it does not appear either from the wording of Article 177 or from the aim of the procedure introduced by that article that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State'. [9]

30. Even without mentioning here the perplexity to which that decision may give rise, [10] in my opinion reliance on it is out of the question with respect to situations such as that now under consideration. That is clear from the judgment in *Kleinwort Benson* [11] in which the Court held that it had no jurisdiction to interpret a provision of the Brussels Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters in so far as what was involved was 'to enable the national court to decide on the application not of the Convention but of the national law of the Contracting State to which that court belongs'. [12] Over and above the non-binding character of the interpretation sought from the Court, that conclusion was based in particular on the fact that the provisions in question of the Convention were taken as a model and only partly reproduced in the legislation of the State concerned, but did not contain 'a direct and unconditional renvoi to Community law' and therefore had not been rendered applicable as such by the national legislation concerned which was outwith the scope of the Convention. [13]

31. But no different conclusions are to be drawn from the subsequent judgments in

8 — Joined Cases C-297/88 and C-197/89 [1990] ECR I-3763.

9 — Paragraph 36.

10 — See, on that point, Opinion of Advocate General Tesauro in Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, points 24 and 25, and the Opinion of Advocate General Jacobs in *Leur-Bloem* and *Giloy*, cited above, points 75 to 81.

11 — Cited above.

12 — Paragraph 14.

13 — Paragraphs 16 and 19.

*Leur-Bloem* [14] and *Giloy* [15] in which the Court instead held that it had jurisdiction. In the first of those judgments it held that it 'has jurisdiction under Article 177 of the Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provision of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned domestic legislation to Community law'. [16] In that case, in effect, the Court's jurisdiction is affirmed as the national legislature, required to transpose certain Community provisions into domestic law, extended the Community provisions intentionally and in full to purely internal situations.

32. In its judgment in *Giloy*, the Court, in contrast, stated that 'where, in regulating internal situations, domestic legislation adopts the same solutions as those adopted in Community law so as to provide for one single procedure in comparable situations, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply'. [17] More specifically, the Court affirmed its own jurisdiction where 'the provisions of domestic law in question apply without distinction to situations governed by domestic law and to situations governed by Community law, and sometimes to both simultaneously' with the result that '[national] law requires that the domestic provisions in question should always be applied in accordance with' [18] the relevant Community provisions. In such a case, the Court's jurisdiction thus derives from the fact that national law requires that the provisions prescribed by Community law be applied to certain internal situations.

33. The situation is quite different in the present case. As we have seen:

— the Luxembourg provision governing the application of a reduced VAT rate which applies to activities in the exercise of a liberal profession was adopted *autonomously* by the authorities of that country, and not to transpose a specific Community provision into domestic law. For the purpose of defining the activities subject to a reduced rate, those authorities were in no way obliged to refer to Community provisions such as those set out in Article 28(3) and Annex F to the Sixth Directive;

— for the purpose of determining the services subject to a reduced rate, the

14 — Cited above.
15 — Cited above.
16 — Paragraph 34.
17 — Paragraph 28.
18 — Paragraph 27.

Luxembourg legislation did not refer, either directly or indirectly, to the Community rules, which were therefore not applicable in domestic law. Nor, for the purpose of determining the services subject to reduced rates, did the Luxembourg legislature take as a model the provision of the Sixth Directive on VAT exemption;

— the mere fact that the reference to the liberal professions is contained both in the list of activities exempted from VAT in Annex F to the Sixth Directive and in the list of activities subject to a reduced rate under Article 40 of the Luxembourg law certainly does not mean that the Luxembourg legislature intended to reproduce, even partially, the wording of a Community provision.

34. In short, it seems to me that, in the situation just described, any ruling by the Court would risk being merely hypothetical or abstract inasmuch as it would be wholly alien to the factual and legal context of the main proceedings. On the other hand, the concept of a liberal profession referred to in Annex F to the Sixth Directive must be defined, in accordance with well-established principles of interpretation, in the light of the content and aims of the provision incorporating that concept; it cannot be transposed automatically into national law and used to define a similar concept contained in a provision whose content and aims are different. [19]

35. In light of the above considerations, I therefore consider that it may be concluded that the questions referred by the Tribunal d'arrondissement de Luxembourg for a preliminary ruling are not relevant for the purpose of resolving the dispute in the main proceedings and that therefore the conditions laid down in Article 234 EC for enabling the Court to rule on the interpretation of the concept of liberal professions referred to in Annex F, point 2, to the Sixth Directive are not met.

*On the substance of the questions*

36. However, if the Court should consider that it must declare itself competent to rule on the questions referred by the Tribunal d'arrondissement de Luxembourg, I consider that the reply to those questions is to be found in the arguments that I have developed above which lead to the same conclusions as those suggested by the Commission. In other words, I consider that this Court should reply to the national

19 — See, *inter alia*, Cases C-338/90 *Hamlin Electronics* [1992] ECR I-2333, paragraph 12, and C-467/93 *Analog Devices* [1995] ECR I-1403, paragraph 8. In particular, the Court has repeatedly made it clear that two identical expressions inserted into different provisions that have a different *ratio* may be interpreted differently: see, for example, the well-known Opinion 1/91 on the first draft EFTA Agreement in which it is stated that 'the identical wording of the terms of the provisions of the agreement and the corresponding Community provisions does not mean that they should necessarily be interpreted in the same way' (Opinion 1/91 [1991] ECR I-6079, paragraph 14).

court that Article 28(3) of and Annex F to the Sixth Directive are concerned with operations which are eligible for VAT exemption and not those, such as the ones in point the main proceedings, which are subject to a reduced VAT rate and in that case therefore the definition of the latter operations, including the concept of 'liberal profession', is a question which in this case is not relevant for the purposes of Community law, but falls within the competence of the Member States.

## Conclusion

37. In light of the above considerations, I therefore propose that the Court declare that it has no jurisdiction to rule on the questions referred by the Tribunal d'arrondissement de Luxembourg. In any event, Article 28(3) of and Annex F to the Sixth Directive are concerned with operations which are eligible for VAT exemption and not with those, such as the ones in point the main proceedings, which are subject to a reduced VAT rate; as a result, the definition of the latter operations, including the concept of 'liberal profession', is a question which in this case is not relevant for the purposes of Community law, but falls within the competence of the Member States.