Arrêt de la Cour
Case C-172/03

Wolfgang Heiser

v

Finanzamt Innsbruck

(Reference for a preliminary ruling from the
Verwaltungsgerichtshof (Austria))

(VAT – Exemption for medical care provided in the exercise of the profession of medical practitioner – Adjustment of deductions)

Opinion of Advocate General Tizzano delivered on 28 October 2004

Judgment of the Court (Second Chamber), 3 March 2005

Summary of the Judgment

1. *State aid – Definition – Effect on trade between Member States – Selective nature of measure – Justification by the nature or general scheme of the system – Effect on competition*

(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1)EC))

2. *State aid – Definition – Measure with a social purpose – Derogation provided for by Article 90(2) of the Treaty (now, after amendment, Article 86(2) EC) – State measures seeking to approximate the conditions of competition in a particular sector of the economy to those prevailing in other Member States – No effect on the classification as aid*

(EC Treaty, Art. 90(2) and 93(3) (now Art. 86(2) EC and 88(3) EC) and Art. 92(1) (now, after amendment, Art. 87(1) EC))

3. *State aid – Definition – Discontinuance, in the case of the changeover for medical practitioners from taxable to exempt status for the purposes of value added tax, of the reduction of input tax already deducted that is prescribed by Article 20 of the Sixth Directive in relation to goods that continue to be used in the business – Included*

(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1) EC); Council Directive 77/388, Art. 20)

1. Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC) lays down the following conditions for a measure to be classified as State aid. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition.

As regards the second condition, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected. Fulfilment of the second condition

does not therefore depend on the local or regional character of the services supplied or on the scale of the field of activity concerned.

As regards the third condition, it is settled case-law that the concept of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect. In that regard, Article 92(1) of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the system in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity which is a defining characteristic of the concept of State aid. The fact that the number of undertakings able to claim entitlement under the measure at issue is very large, or that they belong to different sectors of activity, is not sufficient to call into question its selective nature and therefore, to rule out its classification as State aid. Similarly, aid may concern a whole economic sector and still be covered by Article 92(1) of the Treaty. That would not be the case if a measure, although conferring an advantage on its recipient, were justified by the nature or general scheme of the system of which it is part.

As regards the fourth condition, aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition.

(see paras 27, 32-33, 36, 40, 42-43, 55)

2. The mere fact that a measure has a social purpose does not suffice to exclude the measure at issue outright from classification as aid within the meaning of Article 92 of the Treaty (now, after amendment, Article 87 EC). Article 92(1) does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. Moreover, the derogation provided for by Article 90(2) of the Treaty (now Article 86(2) EC) does not prevent a measure from being classified as State aid within the meaning of Article 92 thereof. Nor could it, once such a classification has been made, allow the Member State concerned not to notify the measure pursuant to Article 93(3) of the Treaty (now Article 88(3) EC). Finally, the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid.

(see paras 46, 51, 54)

3. Article 92 of the Treaty (now, after amendment, Article 87 EC) must be interpreted as meaning that a rule providing that the changeover for medical practitioners from taxable to exempt status for the purposes of VAT does not, in relation to goods that continue to be used in the business, entail the reduction of input tax already deducted that is prescribed by Article 20 of the Sixth Directive must be classified as State aid.

(see para. 59)

JUDGMENT OF THE COURT (Second Chamber)
3 March 2005(1)

(VAT – Exemption for medical care provided in the exercise of the profession of medical practitioner – Adjustment of deductions)

In Case C-172/03,REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 31 March 2003, received at the Court on 14 April 2003, in the proceedings
Wolfgang Heiser

v

Finanzamt Innsbruck,

THE COURT (Second Chamber),,

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, C. Gulmann, R. Schintgen, J. Makarczyk and J. Klu?ka, judges,
Advocate General: A. Tizzano,
Registrar: K. Sztranc, Administrator,
having regard to the written procedure and further to the hearing on 30 September 2004,after considering the observations submitted on behalf of:
– Mr Heiser, by R. Kapferer, Steuerberater,
– the Austrian Government, by E. Riedl and J. Bauer, acting as Agents,
– the Commission of the European Communities, by V. Kreuschitz, V. Di Bucci and K. Gross, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).
2 The reference was made in the course of proceedings brought by Mr Heiser against the Finanzamt Innsbruck (Austria) regarding a decision made by the latter on the adjustment of deductions of value added tax (‘VAT’).

The national legislation
3 According to the order for reference, transactions carried out in the exercise of the profession of medical practitioner are exempt from VAT under Paragraph 6(1)(19) of the Umsatzsteuergesetz (Law on Turnover Tax, BGBl. 663/1994, ‘UStG 1994’), except for the deduction of input tax. However, under Paragraph 29(5) of the UStG 1994, this exemption only applies to transactions made after 31 December 1996. Medical services rendered prior to 1 January 1997 were liable to VAT and chargeable at the standard rate.
4 This transition from VAT liability to VAT exemption implements Annex XV, Part IX, point 2(a), second indent, of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1). Under that Annex, the entry into force of the VAT exemption

provided for by Article 13A(1)(c) 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 (OJ 1977 L 145, p. 1, 'the Sixth Directive'), was postponed until 1 January 1997, inter alia for the provision of medical care by physicians in the field of public health and social welfare.

5 It is clear from the order for reference that where long-term medical services, such as orthodontic treatment, began prior to 1 January 1997 but were not completed until after 31 December 1996, those services are deemed to have been rendered after that date and are therefore exempt from VAT. If a medical practitioner received payments on account of such services before 1 January 1997 and the VAT on such services was paid, the tax exemption is to be subsequently applied to those payments on account. This tax relief is given in the 1997 tax year.

6 Paragraph 12(10) of the UStG 1994 provides:

'If, in the case of an item used by an undertaking as a fixed asset in its business, the circumstances material to the deduction of input tax in the calendar year of its first use (subparagraph 3) should change during the four calendar years following the year of its first use, compensation shall be effected for each year to which the change applies by adjusting the deduction of input tax.

This shall apply mutatis mutandis to input tax on subsequent acquisition or manufacturing costs, expenditure to be capitalised or, in the case of buildings, on the cost of major repairs, in which case the adjustment period shall start to run from the beginning of the calendar year that follows the year during which the services giving rise to those costs and expenditure were first used in connection with the fixed asset.

In the case of real estate within the meaning of Paragraph 2 of the Grunderwerbsteuergesetz 1987 (Law on Land Transfer Tax 1987) (including expenditure to be capitalised and the cost of major repairs) the period of four calendar years shall be replaced by a period of nine calendar years.

In the case of an adjustment that is to be made for the year during which the change takes place, one fifth, or in the case of real estate (including expenditure to be capitalised and the cost of major repairs) one tenth, of the total input tax on the item, expenditure or costs shall be taken as the basis for each year to which the change applies; in the event of a disposal or transfer, the adjustment for the remainder of the adjustment period shall be made not later than in the last return for the assessment period in which the disposal took place.'

7 Paragraph XIV(3) of Federal Law 21/1995, as amended by Federal Law 756/1996 ('Federal Law 21/1995'), provides as follows:

'There shall be no adjustment to the deduction of input tax under Paragraph 12(10) … of the UStG 1994 that would otherwise apply as a result of the first application after 31 December 1996 of the provisions in … Paragraph 6(1)(19) of the UStG 1994.'

8 Under the Gesundheits- und Sozialbereich-Beihilfengesetz (Law on Aid for the Health and Social Services Sectors, BGBl. 746/1996, 'GSBG 1996') medical practitioners are entitled to compensatory payments to make up for input tax paid.

9 Paragraph 3 of the GSBG reads as follows :

'(1) Medical practitioners, dentists ['Dentisten'] and other contracting parties shall be entitled to a compensatory payment determined according to the remuneration paid by the social security authorities, healthcare institutions and public welfare organisations for services within the meaning of Paragraph 6(1)(19) UStG 1994.

...

(3) The Bundesminister für Finanzen (Federal Minister of Finance) in conjunction with the Bundesminister für Arbeit und Soziales (Federal Minister of Employment and Social Affairs) shall make an order stipulating compensatory payment rates based on experience of the economic circumstances of the particular group of businesses concerned.'

10 The amount of the compensatory payment is laid down in the Verordnung des Bundesministers für Finanzen zu den Beihilfen- und Ausgleichsprozentsätzen, die in Rahmen des Gesundheits- und Sozialbereich-beihilfengesetzes (GSBG 1996) anzuwenden sind (Order of the Federal Finance Minister concerning the rates of aid and compensation applicable under the GSBG 1996, BGBl. II 56/1997, 'Order 56/1997').

The main proceedings and the question referred

11 Mr Heiser, the appellant in the main proceedings, is a medical practitioner specialising in dentistry.

12 By virtue of his transition to VAT exemption, in his 1997 VAT return, Mr Heiser claimed relief of approximately ATS 3.5 million for long-term orthodontic treatment which had begun after 1991 and had not been completed by 1 January 1997 and for which he had received payments on account on which VAT had been paid.

13 The tax office responsible took the view that in the case of long-term orthodontic treatment the service is supplied over the course of approximately a year. In its assessment of tax relating to turnover for 1997, of 4 October 1999 ('the tax assessment') it therefore allowed the VAT relief only in respect of treatment having commenced in 1996. It thus allowed only ATS 1 460 000 of the VAT relief applied for.

14 The appellant in the main proceedings appealed against the tax assessment.

15 The Finanzlandesdirektion für Tirol (appeals body, 'the Finanzlandesdirektion'), the respondent in the main proceedings whose place was then taken by the Finanzamt Innsbruck, instructed the tax office, in a letter of 1 March 2002, inter alia to determine the extent to which deductions should be adjusted under Paragraph 12(10) UStG 1994 as of 1 January 1997 in the case of transition from VAT liability to VAT exemption where the deduction of input tax is not possible.

16 On 19 September 2002, in the light of the findings made by the tax office by agreement with Mr Heiser, the Finanzlandesdirektion made a decision dismissing the appeal before it and varying the assessment to the appellant's detriment. By that decision, Mr Heiser's tax credit was reduced by ATS 89 635.94 and ATS 164 870.15 through the adjustment of deductions.

17 In the appeal which he brought before the Verwaltungsgerichtshof, Mr Heiser challenged, inter alia, the adjustment of deductions made by the Finanzlandesdirektion. The appeal essentially relies on the fact that Paragraph XIV(3) of Federal Law 21/1995 expressly exempts medical practitioners from having to adjust deductions as of 1 January 1997.

18 In its defence before that court, the Finanzlandesdirektion countered that, when it considered the appeal brought against the tax assessment, it did not apply Paragraph XIV(3) of Federal Law 21/1995, because the failure to adjust deductions constitutes unnotified aid under Article 92 of the Treaty. Under Article 93(3) of the EC Treaty (now Article 88(3) EC), the authorities of a Member State may not implement aid which is not notified. Paragraph XIV(3) is, moreover, contrary to Article 20 of the Sixth Directive.

19 In its order for reference, the Verwaltungsgerichtshof states that it is inherent in the system of VAT applied within the European Union by Community directives, and by the Sixth Directive in particular, that liability to VAT on transactions should go hand in hand with the right to a full deduction of input tax by an undertaking, whereas those undertakings whose turnover is exempt from tax should be excluded from that entitlement. If a change occurs in the circumstances relied on to determine the amount of input tax to be deducted, Article 20 of the Sixth Directive requires the initial deductions to be adjusted. That court points out that, under Article 20(2) of the Sixth Directive, in the case of capital goods, an adjustment is to be made if, after the year in which the goods were acquired, variations in the deduction entitlement occur compared to entitlement during the year of acquisition.

20 The referring court adds that Paragraph XIV(3) of Federal Law 21/1995 provides that, in the case of services in the medical field, and for medical practitioners in particular, contrary to Article 20 of the Sixth Directive, the transition from liability to VAT for such services, which was the system applicable until 31 December 1996, to exemption, from 1 January 1997, should not entail an adjustment in deductions made for goods already acquired during the period of liability to tax even though those goods also continue to be used during the period of tax exemption, that is to say, are used to carry out exempt transactions. This provision means that the deduction of input tax continues to apply to goods that are used to carry out exempt transactions. The result of that rule is the maintenance of the deduction for goods used for such transactions.

21 In the view of the Verwaltungsgerichtshof, it is not inconceivable that orthodontists in Austria might be in competition with orthodontists in other EU Member States. This is particularly so in border areas. As a result of the rule in Paragraph XIV(3) of Federal Law 21/1995, that is to say, a rule excluding the reduction of deductions inherent in the system of VAT and expressly provided for by Article 20 of the Sixth Directive, the Austrian legislature has favoured national medical practitioners.

22 The deduction constitutes an advantage granted using State resources which strengthens the position of the undertakings on which it is conferred compared with other competing undertakings, which cannot make such deductions.

23 The Verwaltungsgerichtshof doubts whether Paragraph XIV(3) of Federal Law 21/1995, by which the Republic of Austria discontinued the adjustment of VAT deductions made by medical practitioners until 31 December 1996 ('the measure at issue in the main proceedings'), was objectively justified in the sense discussed in paragraph 42 of the judgment in Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365), particularly as the disadvantages of discontinuing the deduction of input tax to the parties concerned are in any event recompensed by way of State compensatory payments under the GSBG 1996, and Order 56/1997.

24 It is against that background that the Verwaltungsgerichtshof decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Does a rule, such as that contained in Paragraph XIV(3) of Federal Law 21/1995, as amended by Federal Law 756/1996, providing that in the case of supplies made by doctors the changeover from taxable to exempt status for the purposes of value added tax does not, in relation to goods that continue to be used in the business, entail the reduction of input tax already deducted that is prescribed by Article 20 of [the Sixth Directive], constitute State aid within the meaning of Article 87 EC (formerly Article 92 of the EC Treaty)?'

The question referred for a preliminary ruling

25 It should be pointed out, to begin with, that the question asked by the referring court concerns the interpretation of Article 92 of the Treaty only.

26 In that regard, it must be observed, first, that a medical practitioner specialising in dentistry, such as Mr Heiser, must be considered to be an undertaking within the meaning of that provision since he provides, in his capacity as a self-employed economic operator, services on a market, namely the market in specialist medical services in dentistry (see, to that effect, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I?6451, paragraphs 76 and 77).

27 It must then be borne in mind that Article 92(1) of the Treaty lays down the following conditions for a measure to be classified as State aid. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 75).

28 As regards the first condition mentioned in the previous paragraph, it cannot be disputed that a measure such as that at issue in the main proceedings constitutes State intervention.

29 As regards the second condition cited in paragraph 27 of this judgment, Mr Heiser and the Austrian Government submit that the measure at issue in the main proceedings is not, in any event, liable to affect trade between Member States because the amounts involved in the discontinuance of the adjustment of deductions are generally very small. In the main proceedings, the amount involved is at most EUR 30 000 for the whole of the period covering the years 1997 to 2004, an amount which is far below the *de minimis* ceiling of EUR 100 000 over a three-year period rule laid down by the Commission Notice on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) which was applicable on the date of the entry into force of that measure in 1996.

30 The Austrian Government also submits that the effect of the measure at issue in the main proceedings on trade between Member States is not very marked given the particular nature of medical care which is primarily provided locally.

31 However, those arguments do not establish that the second condition cited in paragraph 27 is not fulfilled.

32 According to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 81 and the case-law cited therein).

33 The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the services supplied or on the scale of the field of activity concerned (see, to that effect, *Altmark Trans and Regierungspräsidium Magdeburg* , paragraph 82).

34 As regards the *de minimis* ceiling laid down by the Commission Notice of 6 March 1996, it is not apparent from the case-file put before the Court by the referring court that the amount of the deductions which a medical practitioner may be able to make under a measure such as that at issue in the main proceedings is, in all circumstances, less than the *de minimis* amount, which is set at EUR 100 000 over three years. The national legislation, as the Commission of the European Communities rightly observes, does not lay down any limit on the amount a medical practitioner, as an individual undertaking, may receive as a result of the discontinuance of the adjustment of deductions. Accordingly, it is not established that such a measure can be covered by the *de minimis* rule laid down by that notice.

35 Accordingly, since it is not inconceivable, as the Verwaltungsgerichtshof finds in the order for reference, that medical practitioners specialising in dentistry, such as Mr Heiser, might be in competition with their colleagues established in another Member State, the second condition for the application of Article 92(1) of the Treaty must be considered to be fulfilled.

36 As regards the third condition cited in paragraph 27 of this judgment, relating to the existence of an advantage, it is settled case-law that the concept of aid is more general than that of a subsidy. It embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragaraph 38, and the case-law cited).

37 Mr Heiser submits, essentially, that the measure at issue in the main proceedings does not constitute an advantage simply because the adjustment itself is, in any event, contrary to Community law.

38 Even if the legislation providing for the adjustment of deductions, that is to say, Paragraph 12(10) of the UStG 1994, in the main proceedings, is unlawful, the fact none the less remains that that legislation is liable to have an impact as long as it is not repealed or, at the very least, as long as its unlawfulness is not established. Consequently it is such as to create a charge which is normally included in the budget of a medical practitioner specialising in dentistry, such as Mr Heiser. The fact that the Republic of Austria subsequently discontinued the adjustment of deductions by a separate measure from that providing for such adjustment, therefore mitigates the charges which are normally included in the budget of such a medical practitioner and, accordingly, constitutes an advantage for him.

39 However, the Austrian Government contends that the discontinuance of the adjustment of deductions does not constitute aid as all medical practitioners are affected, including those specialising in dentistry, psychotherapists, midwives and other independent practitioners within the meaning of the Krankenpflegegesetz (law on the care of the sick) and hospitals. Discontinuance was thus not liable to confer an advantage only on certain medical practitioners.

40 In that regard, it must be observed that, according to settled case-law Article 92(1) of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the system in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity which is a defining characteristic of the concept of State aid as set out by that provision (see, inter alia, Case C-308/01 *GIL* [2004] ECR I-0000, paragraph 68, and the case-law cited).

41 It must be pointed out that the fact that the measure at issue in the main proceedings constitutes an advantage not only for medical practitioners specialising in dentistry, such as Mr Heiser, but also for other operators in the medical field or even for all operators in that field does not mean that that measure does not fulfil the condition of selectivity.

42 The fact that the number of undertakings able to claim entitlement under the measure at issue is very large, or that they belong to different sectors of activity, is not sufficient to call into question its selective nature and therefore, to rule out its classification as State aid (see, inter alia, Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 48, and the case-law cited). Similarly, aid may concern a whole economic sector and still be covered by Article 92(1) of the Treaty (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33, and the case-law cited).

43 That would not be the case if a measure, although conferring an advantage on its recipient, were justified by the nature or general scheme of the system of which it is part (see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragaraph 42, and the case-law cited).

44 In that connection, the Austrian Government contends that a measure such as that at issue in the main proceedings promotes solidarity between sickness insurance bodies because, in practice, it benefits such bodies. An increase in the expenses borne by independent medical practitioners because of a change in the taxation of their turnover would indirectly give rise to expenses for those bodies. They would, however, not be able to increase their income, as the rates of contributions by the policyholders are set by law. At the hearing, that government pointed out, as did Mr Heiser in his written observations, that the measure at issue in the main proceedings is not applied in addition to the compensation paid under the GSBG 1996 and Order 56/1997 as that compensation is only payable to medical practitioners not under contract, such as Mr Heiser.

45 However, that argument does not establish that a measure such as that at issue in the main proceedings cannot be classified as State aid.

46 First, the mere fact that discontinuance of adjustment of deductions has a social purpose, if such could be established, does not suffice to exclude the measure at issue outright from classification as aid within the meaning of Article 92 of the Treaty. Article

92(1) does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-0000, paragraph 51, and the case-law cited).

47 Second, with regard to the effects of a measure such as that at issue in the main proceedings, it must be observed that, in law, medical practitioners are the only beneficiaries. There is no indication in the case-file put before the Court by the referring court that the benefit of that measure was systematically passed on by them to the sickness insurance bodies so that the advantage was, in the end, cancelled out for medical practitioners.

48 Moreover, the Austrian Government does not explain why the advantage derived from the measure at issue in the main proceedings could be justified by the fact that medical practitioners not under contract were not eligible for the compensation provided for by Article 3 of the GSBG 1996, the amount of which was fixed by Order 56/1997. Nothing in the case-file indicates that medical practitioners under contract who receive such compensation do not also benefit from the discontinuance of adjustment.

49 Accordingly, in the absence of other relevant grounds relied on by the Austrian Government, it is not apparent from the case-file put before the Court that the measure at issue in the main proceedings is justified by the nature or general scheme of the system of which it is part.

50 In so far as the Austrian Government relies on Article 90(2) of the EC Treaty (now Article 86(2) EC) to deny that the measure at issue in the main proceedings is in the nature of an advantage, its argument cannot be upheld.

51 The derogation provided for by Article 90(2) of the Treaty does not prevent a measure from being classified as State aid within the meaning of Article 92 thereof. Nor could it, once such a classification has been made, allow the Member State concerned not to notify the measure pursuant to Article 93(3) of the Treaty (see Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 61, and the case-law cited).

52 Mr Heiser also submits that a measure such as that at issue in the main proceedings does not constitute an advantage where its sole effect is to eliminate a disadvantage previously affecting medical practitioners not under contract established in Austria compared with their colleagues established in other Member States. Whereas medical services supplied in those Member States were not subject to VAT, those supplied in 1995 and 1996 by medical practitioners not under contract established in Austria were liable to VAT.

53 It should be noted in that regard that even if the purpose of the measure at issue in the main proceedings is to compensate for the disadvantage Mr Heiser refers to, such a measure could not, in any event, as the Advocate General observes in point 50 of his Opinion, be justified by the fact that it is intended to correct distortions of competition on the Community market in medical services.

54 It should be borne in mind that, according to settled case-law, the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid (see, inter alia, Case C-372/97 *Italy* v *Commission* [2004] ECR I-0000, paragraph 67, and the case-law cited).

55 As regards the fourth condition cited in paragraph 27 of this judgment, to the effect that the intervention by the State must distort or threaten to distort competition, it must be borne in mind that aid, that is to say aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition (see Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30, and the case-law cited).

56 The argument of Mr Heiser and the Austrian Government that the fourth condition is not fulfilled on the ground that the medical practitioners who benefit from a measure such as that at issue in the main proceedings do not face competition based on prices, cannot be upheld.

57 Even if, as Mr Heiser and the Austrian Government point out, the choice of a medical practitioner by patients may be influenced by criteria other than the price of the medical treatment, such as its quality and the confidence placed in the medical practitioner, the fact none the less remains that that price is liable to have an influence, or even a substantial influence, on the choice of medical practitioner by the patient. That is so where, inter alia, as is clear from the case-file put before the Court, in the case of medical practitioners not under contract such as Mr Heiser, the patient has to pay more than 50% of the cost of the treatment out of his own pocket.

58 It follows from all the foregoing that a measure such as that at issue in the main proceedings must be considered to constitute State aid within the meaning of Article 92(1) of the Treaty.

59 The answer to the question referred must therefore be that Article 92 of the Treaty must be interpreted as meaning that a rule, such as that at issue in the main proceedings, providing that the changeover for medical practitioners from taxable to exempt status for the purposes of VAT does not, in relation to goods that continue to be used in the business, entail the reduction of input tax already deducted that is prescribed by Article 20 of the Sixth Directive, must be classified as State aid.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

Article 92 of the Treaty (now, after amendment, Article 87 EC) must be interpreted as meaning that a rule, such as that laid down by Paragraph XIV(3) of Federal Law 21/1995, as amended by Federal Law 756/1996, providing that the changeover for medical practitioners from taxable to exempt status for the purposes of VAT does not, in relation to goods that continue to be used in the business, entail the reduction of input tax already deducted that is prescribed by Article 20 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, must be classified as State aid.

[Signatures]

1 – Language of the case: German.