Case C-97/09

Ingrid Schmelz

v

Finanzamt Waldviertel

(Reference for a preliminary ruling from the Unabhängiger Finanzsenat, Außenstelle Wien)

(Sixth VAT Directive – Articles 24(3) and 28i – Directive 2006/112/EC – Article 283(1)(c) – Validity – Articles 12 EC, 43 EC and 49 EC – Principle of equal treatment – Special scheme for small undertakings – Exemption from VAT – Benefit of the exemption refused to taxable persons established in other Member States – Definition of 'annual turnover')

Summary of the Judgment

1. *Freedom to provide services – Restrictions – Tax legislation*

(Art. 49 EC; Council Directives 77/388, Arts 24(3), and 28i, and 2006/112, Art. 283(1)(c))

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Special scheme for small undertakings*

(Council Directives 77/388, Art. 24 and 24 bis, and 2006/112, Art. 284 to 287)

1. It is not contrary to Article 49 EC for Articles 24(3) and 28i of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2006/18, or Article 283(1)(c) of Directive 2006/112 on the common system of value added tax, to allow Member States to grant an exemption from value added tax with loss of the right of deduction to small undertakings established in their territory, but to exclude that possibility for small undertakings established in other Member States.

Admittedly, excluding small undertakings established outside the territory of a Member State from eligibility for the value added tax exemption renders the provision of services in that Member State less attractive for those small undertakings, and entails, in consequence, a restriction of the freedom to provide services.

Nevertheless, at this stage in the evolution of the system of value added tax, the objective consisting in guaranteeing the effectiveness of fiscal supervision in order to combat fraud, tax evasion and possible abuse and the objective of the scheme for small undertakings, which is to support their competitiveness, justify limiting the applicability of the value added tax exemption to the activities of small undertakings established in the territory of the Member State in which the value added tax is due. Restricting eligibility for the value added tax exemption to small undertakings established in the territory of the Member State which applies it is appropriate to ensure the effectiveness of fiscal supervision aimed at ascertaining whether the conditions for eligibility for that exemption have actually been met, given that undertakings generally retain the documents relating to all of their economic activities in the place of their establishment. Effective supervision of activities pursued under the freedom to provide services by a small undertaking not established in that territory is not easily achievable by the host Member State.

As regards the need to limit eligibility for that scheme to small undertakings established in the Member State in question, the rules on administrative assistance resulting from Regulation No 1798/2003 on administrative cooperation in the field of value added tax and repealing Regulation No 218/92, and Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, cannot ensure a useful exchange of data as regards small undertakings active in the territory of the Member State which applies a value added tax exemption. Pursuant to Article 272(1)(d) of Directive 2006/112, Member States may release small undertakings from all the formalities provided for in Articles 213 to 271 of that directive, which are intended to inform the tax authorities of the Member States of the activities subject to value added tax in their territory. Accordingly, as a general rule, small undertakings are not fiscally identified as regards value added tax in their Member State of establishment and that Member State does not hold any information concerning their turnover. As regards Directive 77/799, it concerns the exchange of information on taxes on income, capital and insurance services. While it cannot be ruled out that information relating, in particular, to income might prove useful, in particular for the investigation of possible value added tax fraud, the fact remains that that information does not include turnover liable to value added tax.

(see paras 51, 53, 59-61, 64-67, 71, 76, operative part 1)

2. Articles 24 and 24a of Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 2006/18, and Articles 284 to 287 of Directive 2006/112 on the common system of value added tax must be interpreted as meaning that the term ‘annual turnover’ refers to the turnover generated by an undertaking in one year in the Member State in which it is established.

(see para. 77, operative part 2)

JUDGMENT OF THE COURT (Grand Chamber)

26 October 2010 (*)

(Sixth VAT Directive – Articles 24(3) and 28i – Directive 2006/112/EC – Article 283(1)(c) – Validity – Articles 12 EC, 43 EC and 49 EC – Principle of equal treatment – Special scheme for small undertakings – Exemption from VAT – Benefit of the exemption refused to taxable persons established in other Member States – Definition of ‘annual turnover’)

In Case C?97/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Finanzsenat, Außenstelle Wien (Austria), made by decision of 4 March 2009, received at the Court on 10 March 2009, in the proceedings

Ingrid Schmelz

v

Finanzamt Waldviertel,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Presidents of Chambers, E. Juhász, G. Arestis, A. Borg Barthet, M. Ileši?, P. Lindh, T. von Danwitz and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 13 April 2010,

after considering the observations submitted on behalf of:

– the Austrian Government, by C. Pesendorfer and J. Bauer, acting as Agents,

– the German Government, by C. Blaschke and J. Möller, acting as Agents,

– the Greek Government, by M. Tassopoulou, K. Georgiadis and I. Bakopoulos, acting as Agents,

– the Council of the European Union, by A.-M. Colaert and J.?P. Hix, acting as Agents,

– the European Commission, by D. Triantafyllou and B.?R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 June 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the validity, with regard to Articles 12 EC, 43 EC, 49 EC and the principle of equal treatment, of Articles 24(3) and 28i 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 2006/18/EC of 14 February 2006 (OJ 2006 L 51, p. 12) (‘the Sixth Directive’) and of Article 283(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’). The reference also concerns the interpretation of Article 24(2) of the Sixth Directive and Article 287 of the VAT Directive.

2 The reference has been made in proceedings between Ms Schmelz, a German national resident in Germany, and the Finanzamt Waldviertel (‘the Finanzamt’), concerning a notice of assessment issued by the Finanzamt relating to turnover tax which Ms Schmelz allegedly owes for the tax years 2006 and 2007 in respect of income from the letting of an apartment located in Austria.

Legal context

European Union legislation

The Sixth Directive

3 Under Article 13B(b) of the Sixth Directive, the Member States are to exempt from tax the leasing or letting of immovable property.

4 Under Title XIV of the Sixth Directive concerning special schemes, Article 24(2)(a) and (b) of that directive, entitled ‘Special scheme for small undertakings’, in essence, allows Member States to maintain or grant exemptions from value added tax (‘VAT’) to taxable persons whose annual turnover is at the maximum equal to the equivalent in national currency of 5 000 European units of account at the conversion rate of the day on which the Sixth Directive was adopted.

5 In accordance with point 2(c) of Section IX, entitled ‘Tax’, appearing in Annex XV to the Act concerning the conditions of accession of 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), pursuant to Article 24(2) to (6) of the Sixth Directive, the Republic of Austria may exempt from VAT taxable persons whose annual turnover is less than the equivalent in national currency of EUR 35 000.

6 Article 24(3) of the Sixth Directive provides:

‘The concepts of exemption … shall apply to the supply of goods and services by small undertakings.

Member States may exclude certain transactions from the arrangements provided for in paragraph 2. …’

7 Article 28(2)(j) of the Sixth Directive states that ‘the Republic of Austria may apply one of the two reduced rates provided for in the third subparagraph of Article 12(3)(a) to the letting of immovable property for residential use, provided that the rate is not lower than 10%’.

8 Article 28i of the Sixth Directive, entitled ‘Special scheme for small undertakings’, added the following subparagraph to Article 24(3) of that directive:

‘In all circumstances supplies … of goods and services effected by a taxable person who is not established in the territory of the country shall be excluded from the exemption from tax under paragraph 2.’

The VAT Directive

9 Under Article 135(1)(l) of the VAT Directive, the Member States are to exempt the leasing or letting of immovable property.

10 Article 117(2) of the VAT Directive provides that the Republic of Austria ‘may apply one of the two reduced rates provided for in Article 98 to the letting of immovable property for residential use, provided that the rate is not lower than 10%’.

11 Under Article 272(1)(d) of the VAT Directive, Member States may release ‘taxable persons covered by the exemption for small enterprises provided for in Articles 282 to 292’ from certain or all obligations referred to in Chapters 2 (‘Identification’), 3 (‘Invoicing’), 4 (‘Accounting’), 5 (‘Returns’) and 6 (‘Recapitulative statements’) under Title XI (‘Obligations of taxable persons and certain non-taxable persons) of that directive.

12 Title XII of the VAT Directive on ‘Special schemes’ has a Chapter 1, entitled ‘Special

scheme for small enterprises'. Article 281 in Chapter 1, Section 1, concerning 'Simplified procedures for charging and collection', in essence, allows 'Member States which might encounter difficulties in applying the normal VAT arrangements to small enterprises, by reason of the activities or structure of such enterprises, [to] apply simplified procedures … for charging and collecting VAT …'.

13 Article 282 in Chapter 1, Section 2, of the VAT Directive, entitled 'Exemptions or graduated relief', states that 'the exemptions and graduated tax relief provided for in this Section shall apply to the supply of goods and services by small enterprises'.

14 Under Article 283(1)(c) of the VAT Directive, which also comes within Section 2, the arrangements provided for in that section are not to apply to 'supplies of goods or services carried out by a taxable person who is not established in the Member State in which the VAT is due'.

15 Pursuant to Article 287 of the VAT Directive, 'Member States which acceded after 1 January 1978 may exempt taxable persons whose annual turnover is no higher than the equivalent in national currency of the following amounts at the conversion rate on the day of their accession'. That amount was fixed at EUR 35 000 for the Republic of Austria.

16 Article 288 of the VAT Directive provides:

'The turnover serving as a reference for the purposes of applying the arrangements provided for in this Section shall consist of the following amounts, exclusive of VAT:

(1) the value of supplies of goods and services, in so far as they are taxed;

(2) the value of transactions which are exempt, with deductibility of the VAT paid at the preceding stage, pursuant to Articles 110 or 111, Article 125(1), Article 127 or Article 128(1);

(3) the value of transactions which are exempt pursuant to Articles 146 to 149 and Articles 151, 152 or 153;

(4) the value of real estate transactions, financial transactions as referred to in points (b) to (g) of Article 135(1), and insurance services, unless those transactions are ancillary transactions.

However, disposals of the tangible or intangible capital assets of an enterprise shall not be taken into account for the purposes of calculating turnover.'

17 Pursuant to Articles 411 to 413 of the VAT Directive, that directive repealed, inter alia, the Sixth VAT Directive and entered into force on 1 January 2007.

National legislation

18 Under Paragraph 6(1)(16) of the 1994 Law on Turnover Tax (Umsatzsteuergesetz 1994, BGBl. 663/1994; 'the UStG 1994'), in the version applicable to the facts at issue in the main proceedings, the leasing or letting of immovable property are exempt from turnover tax, with the exception of, in particular, the letting of immovable property for residential purposes.

19 Paragraph 6(1)(27) of the UStG of 1994, in the version applicable to the facts at issue in the main proceedings, provides that 'the turnover of small undertakings' is exempt. '"Small undertaking" is an undertaking resident or established in Austria whose turnover under Paragraph 1(1)(1) and (2) in the period of assessment does not exceed EUR 22 000' for 2006 and EUR 30 000 for 2007.

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 Ms Schmelz is a German national, resident in Germany. She is the owner of an apartment in Austria which she lets at a monthly rent of EUR 330 plus operating costs.

21 Since Ms Schmelz considered that, as she was a small undertaking, she was exempt from the payment of turnover tax pursuant to Article 6(1)(27) of the UStG of 1994, she did not charge that tax on the rent.

22 The Finanzamt takes the view that, unless she is resident or established in Austria, Ms Schmelz cannot benefit from the exemption granted to small undertakings. Therefore, having found that Ms Schmelz had generated net turnover of EUR 5 890.90 for 2006 and EUR 5 936.37 for 2007 in respect of her letting in Austria, the Finanzamt issued two tax assessments dated 19 June and 17 November 2008 respectively, finding Ms Schmelz liable to tax on the turnover in the amounts of EUR 334.93 and EUR 316.15 respectively.

23 Ms Schmelz then appealed against those assessments to the Unabhängiger Finanzsenat, Außenstelle Wien (Independent Finance Tribunal, Vienna). That court explained, by way of additional information, that Ms Schmelz declared on 10 March 2009 that she had generated no other turnover, during the years at issue in the main proceedings, in the territory of the European Union.

24 The referring court, on the one hand, considers that the decisions on liability to tax taken by the Finanzamt comply with national law, which itself is consistent with the provisions of both the Sixth Directive and the VAT Directive but, on the other hand, points out that, in contrast to Ms Schmelz, a person residing in Austria could, as a small undertaking, benefit from the exemption from turnover tax.

25 The Unabhängiger Finanzsenat, Außenstelle Wien, accordingly has doubts as to whether those directives are compatible with the prohibitions on discrimination resulting from primary law, namely, from Articles 12 EC, 43 EC and 49 EC, and from the general principle of European Union law ('EU law') on equal treatment.

26 As it is also unsure whether the amount of turnover which distinguishes small undertakings from other undertakings refers to turnover generated solely in the Member State in question, or whether it is necessary to take account of the turnover generated throughout the European Union, the Unabhängiger Finanzsenat, Außenstelle Wien, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the wording "as well as supplies of goods and services effected by a taxable person who is not established in the territory of the country" in Article 24(3) and in Article 28i of the Sixth … Directive … and a scheme transposing this provision into national law infringe the [EC] Treaty …, in particular the principle of non?discrimination (Article 12 EC), the freedom of establishment (Article 43 EC et seq.), the freedom to provide services (Article 49 EC et seq.), or fundamental rights under [European Union] law (the [EU]-law principle of equal treatment) because the provision has the effect that Union citizens who are not established in the territory of the relevant country are excluded from the exemption under Article 24(2) of the Sixth Directive (Special scheme for small undertakings), whilst Union citizens who are established in the territory of the relevant country are able to claim this exemption where the relevant Member State grants an exemption for small undertakings in accordance with the Directive?

2. Does the wording "supplies of goods or services carried out by a taxable person who is not

established in the Member State in which the VAT is due" in Article 283(1)(c) of [the VAT Directive] … and that of a scheme transposing this provision into national law infringe the [EC] Treaty …, in particular the principle of non?discrimination (Article 12 EC), the freedom of establishment (Article 43 EC et seq.), the freedom to provide services (Article 49 EC et seq.), or fundamental rights under [European Union] law (the [EU] law principle of equal treatment), because the provision has the effect that Union citizens who are not established in the relevant Member State are excluded from the exemption under Article 282 et seq. of [the VAT] Directive … (Special scheme for small enterprises), whilst Union citizens who are established in the territory of the relevant country are able to claim this exemption where the relevant Member State grants an exemption for small enterprises in accordance with the [VAT] Directive?

3. If the answer to the first question is in the affirmative: is the wording "as well as supplies of goods and services effected by a taxable person who is not established in the territory of the country" in Article 24(3) and in Article 28i of the Sixth Directive invalid within the meaning of Article 234(b) EC?

4. If the answer to the second question is in the affirmative: is the wording "supplies of goods or services carried out by a taxable person who is not established in the Member State in which the VAT is due" in Article 283(1)(c) of [the VAT] Directive invalid within the meaning of Article 234(b) EC?

5. If the answer to the third question is in the affirmative: should "annual turnover" within the meaning of Annex XV of the [Act concerning the conditions of accession of 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] …, IX. Taxation, point (2)(c) and of Article 24 of the Sixth Directive respectively be understood to mean the turnover generated in one year in the particular Member State for which the small undertakings scheme is utilised or the undertaking's turnover generated in one year throughout the [Union]?

6. If the answer to the fourth question is in the affirmative: Should "annual turnover" within the meaning of Article 287 of [the VAT] Directive be understood to mean the turnover generated in one year in the particular Member State for which the small undertakings scheme is utilised or the undertaking's turnover generated in one year throughout the [Union]?'

Admissibility of the questions referred

27 The Council of the European Union considers that the referring court did not have, at the time when it formulated the questions to be referred, all the information necessary to determine the issue of where Ms Schmelz is established. It claims that it subsequently became apparent that the applicant in the main proceedings was not pursuing any economic activity in Germany and that she was therefore not regarded as a person subject to VAT. Since the sole activity pursued by Ms Schmelz which is subject to VAT consists in letting, to individuals, an apartment located in Austria, the Council takes the view that she may be regarded as established in Austria. Therefore, it has not been established that the questions referred are relevant to the outcome of the dispute in the main proceedings.

28 In that regard, it should be borne in mind that, in the procedure under Article 234 EC, 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 judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation and/or the validity of EU law, the Court is in principle bound to give a ruling (see, to that effect, Case C?415/93 *Bosman* [1995] ECR I?4921,

paragraph 59, and Joined Cases C?317/08 to C?320/08 *Alassini and Others* [2010] ECR I?0000, paragraph 25).

29 Thus, the Court may reject a request for a preliminary ruling submitted by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Alassini and Others*, paragraph 26).

30 Furthermore, it is clear from the second paragraph of Article 234 EC that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5, and Case C?470/03 *AGM?COS.MET* [2007] ECR I?2749, paragraph 45).

31 In the present case, even assuming the information which Ms Schmelz gave to the referring court is correct, it certainly does not follow that the interpretation of EU law sought is obviously unrelated to the actual facts of the main action or its purpose, or that the problem is hypothetical. As was pointed out by the Austrian Government at the hearing, the fact that the only taxable activity pursued by Ms Schmelz is the letting of her apartment does not mean that the Austrian authorities can regard her as being established in Austria.

32 Consequently, it is necessary to reply to the questions referred by the Unabhängiger Finanzsenat, Außenstelle Wien.

Consideration of the questions referred

33 By the questions referred, which are interconnected and which, therefore, it is appropriate to examine together, the referring court asks, in essence, whether Articles 24(3) and 28i of the Sixth Directive, and Article 283(1)(c) of the VAT Directive, are consistent with Articles 12 EC, 43 EC, 49 EC and the general principle of equal treatment, inasmuch as they allow Member States to grant an exemption from VAT with loss of the right of deduction to small undertakings established in their territory, but exclude that possibility for small undertakings established in other Member States.

34 The referring court also asks whether the term ‘annual turnover’ used in Articles 24 and 24a of the Sixth Directive and Articles 284 to 287 of the VAT Directive refers to turnover generated by the undertaking in one year in the Member State in which the benefit of the exemption from VAT has been sought or to the turnover generated in one year throughout the European Union.

The applicable freedom

35 As regards the freedom applicable to the facts in the main proceedings, the referring court refers to freedom of establishment and freedom to provide services.

36 First, freedom of establishment, which Article 43 EC confers on EU nationals and which includes the right for them to take up and pursue activities as self?employed persons and to set up and manage undertakings, under the same conditions as those laid down for its own nationals by the law of the Member State where such establishment is effected, entails, in accordance with Article 48 EC, for companies or firms formed in accordance with the law of the Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006]

ECR I?8203, paragraph 17 and case?law cited).

37 According to the case-law of the Court, the concept of establishment within the meaning of the Treaty is a very broad one, allowing an EU national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Union in the sphere of activities as self-employed persons (*Centro di Musicologia Walter Stauffer*, paragraph 18 and case?law cited).

38 However, in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured a permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed (*Centro di Musicologia Walter Stauffer*, paragraph 19). It must be possible to establish the existence of that permanent presence on the basis of objective factors which are ascertainable having regard, in particular, to the extent of its physical existence in terms of premises, staff and equipment (see, to that effect Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 67).

39 It follows from the description of the facts of the case, as provided by the referring court, that Ms Schmelz does not meet those conditions.

40 Accordingly, the provisions governing freedom of establishment are not applicable in circumstances such as those of the dispute in the main proceedings.

41 Next, as regards freedom to provide services, first, the letting of immovable property must be considered to be a provision of services for remuneration within the meaning of the first paragraph of Article 50 EC (see, to that effect, Case C?70/09 *Hengartner and Gasser* [2010] ECR I?0000, paragraph 32). Second, the fact that Ms Schmelz has been letting an apartment, located in Austria, for a number of years does not preclude Article 49 EC from being applicable.

42 In that regard, the Court has held that services, within the meaning of the Treaty, may cover services varying widely in nature, including services which are provided over an extended period, even over several years. No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty (see Case C?215/01 *Schnitzer* [2003] ECR I?14847, paragraphs 30 and 31).

43 In the light of all of the foregoing, it must be held that Ms Schmelz’s letting activity is covered by freedom to provide services under Article 49 EC.

44 Lastly, as regards whether Article 12 EC, which lays down a general prohibition of all discrimination on grounds of nationality, is applicable to the facts of the case, it should be noted that that provision applies independently only to situations governed by EU law for which the Treaty lays down no specific rules of non-discrimination (Case C?311/08 *SGI* [2010] ECR I?0000, paragraph 31 and case?law cited).

45 However, Article 49 EC, which – as stated in paragraph 43 above – is applicable to the dispute in the main proceedings, lays down specific rules of non?discrimination. It follows that Article 12 EC is not applicable to the facts of the case in the main proceedings.

The existence of a restriction on the freedom to provide services

46 It is settled case-law that all of the Treaty provisions on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place them at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (*Bosman*, paragraph 94, and Case C?314/08 *Filipiak* [2009] ECR I?11049, paragraph 58).

47 In that regard, it should be borne in mind that Article 49 EC requires the abolition of all restrictions on the freedom to provide services, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State (see, to that effect, Case C?233/09 *Dijkman and Dijkman-Lavaleije* [2010] ECR I?0000, paragraph 23 and case?law cited).

48 It is also clear from case?law that Article 49 EC prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. That is true, in particular, of a measure under which a distinction is drawn on the basis of residence, in that that requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see Case C?388/01 *Commission* v *Italy* [2003] ECR I?721, paragraphs 13 and 14 and case-law cited).

49 The case in which tax provisions which apply to cross?border economic activities are less favourable than those which apply to an economic activity pursued within the borders of that Member State constitutes an example of a restriction which is prohibited by Article 49 EC (see *Filipiak*, paragraph 62).

50 It should be noted, in addition, that the prohibition on restrictions on freedom to provide services applies not only to national measures but also to measures adopted by the European Union institutions (see, by analogy in relation to the free movement of goods, Case C?114/96 *Kieffer and Thill* [1997] ECR I?3629, paragraph 27 and case?law cited).

51 In the present case, Articles 24(3) and 28i of the Sixth Directive, and Article 283(1)(c) of the VAT Directive, allow Member States to grant an exemption from VAT with loss of the right of deduction to small undertakings established in their territory, but preclude that possibility for small undertakings established in other Member States.

52 Accordingly, where a Member State provides for an exemption from VAT for small undertakings, such undertakings which are established in the territory of that Member State can, where relevant, offer their services under more advantageous conditions than small undertakings established outside that Member State, given that, under those provisions, Member States are prohibited from extending the benefit of that exemption to the latter.

53 In this case, it follows from the finding made in the last paragraph that the fact that small undertakings established outside Austria are excluded from the benefit of the VAT exemption renders the provision of services in Austria less attractive for those small undertakings. Consequently, it entails a restriction on the freedom to provide services.

54 Moreover, as the Advocate General stated in points 42 to 44, and 83, of her Opinion, first, the restriction cannot be attributed to the Member States, as the directives in question allow them to offer a VAT exemption only to small undertakings established in their respective territories. Second, the fact that small undertakings established outside the territory of the Member State in which the VAT is due can deduct input tax may not be sufficient to compensate for the non?application, vis?à?vis those small undertakings, of the VAT exemption scheme, particularly

where those small undertakings do not pursue activities which are subject to input tax.

55 In those circumstances, it is necessary to examine the possible justification for that restriction.

Justification

56 The Austrian, German, and Greek Governments, together with the Council and the European Commission, consider that the restriction on the freedom to provide services consisting of unequal treatment of small undertakings depending on whether or not they are established in Austria is justified by the need to guarantee the effectiveness of fiscal supervision. According to those governments and institutions, such supervision can be carried out effectively only by the Member State in the territory of which the small undertaking is established.

57 In that regard, it is clear from the case?law that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the exercise of the freedoms of movement guaranteed by the Treaty (Case C?318/07 *Persche* [2009] ECR I?359, paragraph 52).

58 However, for a restrictive measure to be justified, it must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (*Persche*, paragraph 52).

59 In that regard, restriction of the benefit of the VAT exemption to small undertakings established in the territory of the Member State which applies that exemption is appropriate to ensure the effectiveness of fiscal supervision aimed at ascertaining whether the conditions for benefiting from that exemption are actually met, given that undertakings generally retain the documents relating to all of their economic activities in the place of their establishment.

60 Accordingly, the governments and the institutions which intervened in the present case were right to consider that effective supervision of activities pursued under the freedom to provide services of a small undertaking which is not established in that territory is not at all easy for the host Member State.

61 As regards the need to limit the benefit of that scheme to small undertakings established in the Member State in question, those governments and institutions claim that the rules on administrative assistance resulting from Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 (OJ 2003 L 264, p. 1), and Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), cannot ensure a useful exchange of data.

62 They point out that, as the scheme for small undertakings seeks to alleviate the administrative charges relating to taxable activities, those undertakings are exempt from the administrative tax formalities in respect of turnover tax, with the result that the Member State of establishment does not have any exchangeable data for the purposes of Regulation No 1798/2003. They add that, since Directive 77/799 relates only to information concerning direct taxes, it does not allow for the establishment or communication of information on the turnover of small undertakings.

63 In that regard, it must be pointed out, first, that the objective which consists in guaranteeing the effectiveness of fiscal supervision in order to combat possible tax evasion, avoidance and abuse, the need for which was recalled in paragraph 57, cannot be attained in the absence of

relevant data. Second, as the Advocate General stated in point 33 of her Opinion, the scheme for small undertakings provides for administrative simplifications intended to support the creation, activities and competitiveness of small undertakings, and to retain a reasonable relationship between the administrative charges connected with fiscal supervision and the very small amounts of tax to be reckoned with.

64 Pursuant to Article 272(1)(d) of the VAT Directive, Member States may release small undertakings from all the formalities provided for in Articles 213 to 271 of that directive, which are intended to inform the tax authorities of the Member States of the activities subject to VAT in their territory.

65 Hence, as the Council stated, small undertakings do not, generally, have a VAT identification number in the Member State where they are established, and that Member State will have no data on their turnover. Thus, in the case in the main proceedings, the German Government confirmed that Ms Schmelz's small undertaking did not have a VAT identification number and that Germany has no data concerning her turnover.

66 As regards Directive 77/799, it must be observed that, in accordance with Article 1 thereof, it concerns the exchange of information on taxes on income, capital and insurance services. While it cannot be ruled out that information relating, in particular, to income might prove useful, in particular for the investigation of possible VAT fraud, it is nevertheless the case that that information does not include turnover liable to VAT.

67 In those circumstances, the governments and institutions which are parties to the present proceedings were correct in their view that the rules on administrative assistance laid down in Regulation No 1798/2003 and Directive 77/799 are not capable of ensuring an exchange of useful data in relation to small undertakings pursuing their activities in the territory of a Member State which applies a VAT exemption.

68 Moreover, such a dearth of information could be remedied only by the introduction of formalities such as those provided for in Articles 213 to 271 of the VAT Directive. However, as has been noted in paragraph 63 above, the scheme for small undertakings is specifically aimed at sparing small undertakings and the tax authorities from such formalities.

69 To guarantee the effectiveness of fiscal supervision of the turnover generated by a small undertaking in Member States other than that in which it is established would require, first, the implementation, in respect of small undertakings and tax authorities, of complex formalities which would allow for the collection of relevant data and for the identification of possible abuse and, second, repeated requests from the tax authorities in the Member State of establishment for administrative assistance from the tax authorities of all the other Member States of the Union for the purposes of exchanging that data.

70 It must be added that limiting the benefit of the VAT exemption solely to those taxable persons established in the Member State which has adopted such an exemption avoids a situation in which taxable persons pursuing activities in a number of Member States, without being established in them, can escape – altogether or to a large degree – taxation of their activities, under the cover of exemptions in force in those Member States, even though those activities, taken as a whole, would objectively exceed a small undertaking's level of activity. That would be irreconcilable with the need to encourage only small undertakings by means of the derogation from the principle of taxation which such an exemption mechanism represents.

71 In the light of the foregoing, it appears that, at this stage in the evolution of the VAT system, the objective which consists in guaranteeing the effectiveness of fiscal supervision in order to

combat fraud, tax evasion and possible abuse and the objective of the scheme for small undertakings, which is to support the competitiveness of such undertakings, justify, first, limiting the applicability of the VAT exemption to the activities of small undertakings established in the territory of the Member State in which the VAT is due and, second, the annual turnover generated to be taken into account being that generated in the Member State in which the undertaking is established.

72 In those circumstances, it must be held that limiting the benefit of the VAT exemption to small undertakings established in the Member State in which the VAT is due does not go beyond what is necessary to ensure the attainment of those two objectives.

73 It follows that consideration of the questions has disclosed no factor of such a kind as to affect the consistency of Articles 24(3) and 28i of the Sixth Directive, and Article 283(1)(c) of the VAT Directive, with Article 49 EC.

74 Lastly, in so far as the referring court also asks whether the provisions at issue in the main proceedings are consistent with the principle of equal treatment, it should be borne in mind that, as stated in paragraph 53 above, the unequal treatment in question does entail a restriction on the freedom to provide services. It therefore comes within the scope of Article 49 EC.

75 In the circumstances, as the Advocate General noted in point 75 of her Opinion, the principle of equal treatment must be regarded as not being applicable independently.

76 In the light of all of the foregoing, the answer to the questions referred is that consideration of those questions has not disclosed any factor of such a kind as to affect the validity, with regard to Article 49 EC, of Articles 24(3) and 28i of the Sixth Directive, or of Article 283(1)(c) of the VAT Directive.

77 Articles 24 and 24a of the Sixth Directive and Articles 284 to 287 of the VAT Directive must be interpreted as meaning that the term ‘annual turnover’ refers to the turnover generated by an undertaking in one year in the Member State in which it is established.

Costs

78 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 (Grand Chamber) hereby rules:

1. **Consideration of the questions has disclosed no factor of such a kind as to affect the validity, with regard to Article 49 EC, of Articles 24(3) and 28i 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, as amended by Council Directive 2006/18/EC of 14 February 2006, or of Article 283(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.**

2. **Articles 24 and 24a of Directive 77/388, as amended by Directive 2006/18, and Articles 284 to 287 of Directive 2006/112 must be interpreted as meaning that the term ‘annual turnover’ refers to the turnover generated by an undertaking in one year in the Member State in which it is established.**

[Signatures]

* Language of the case: German.