Joined Cases C-259/10 and C-260/10

Commissioners for Her Majesty's Revenue and Customs

v

The Rank Group plc

(References for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) and the Upper Tribunal (Tax and Chancery Chamber))

(Taxation – Sixth VAT Directive – Exemptions – Article 13B(f) – Betting, lotteries and other forms of gambling – Principle of fiscal neutrality – Mechanised cash bingo – Slot machines – Administrative practice departing from the legislative provisions – 'Due diligence' defence)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Supply of services – Difference in treatment of two supplies of services identical or similar from the point of view of the consumer – Breach of the principle of fiscal neutrality*

(Council Directive 77/388)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions – Exemption for games of chance – Power of the Member States to fix the conditions and the limits of that exemption – Limits – Observance of the principle of fiscal neutrality*

(Council Directive 77/388, Art. 13B(f))

3. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions – Exemption for games of chance – Power of the Member States to fix the conditions and the limits of that exemption – Limits – Observance of the principle of fiscal neutrality*

(Council Directive 77/388, Art. 13B(f))

4. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions – Exemption for games of chance – Power of the Member States to fix the conditions and the limits of that exemption – Limits – Observance of the principle of fiscal neutrality*

(Council Directive 77/388, Art. 13B(f))

5. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions – Exemption for games of chance – Power of the Member States to fix the conditions and the limits of that exemption – Limits – Observance of the principle of fiscal neutrality*

(Council Directive 77/388, Art. 13B(f))

1. The principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of value added tax of two supplies of services identical or similar from the point of view of the consumer and meeting the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not additionally require the actual existence of competition between the services in question or distortion of competition because of such difference in treatment to be established.

(see para. 36, operative part 1)

2. Where there is a difference in treatment of two games of chance as regards the granting of an exemption from value added tax under Article 13B(f) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, the principle of fiscal neutrality must be interpreted as meaning that no account should be taken of the fact that those two games fall into different licensing categories and are subject to different legal regimes relating to control and regulation.

That provision leaves a broad discretion to the Member States as regards the exemption or the taxation of the transactions concerned since it allows those States to fix the conditions and the limitations to which entitlement to that exemption may be made subject, provided that the principle of fiscal neutrality is observed.

In assessing whether two games of chance are similar, where a difference in treatment is such as to establish a breach of the principle of fiscal neutrality, matters such as whether or not the operation of games of chance is legal, the identity of the operators of the games and the legal form by means of which they exercise their activities are, as a rule, irrelevant. The same is true of the differences between public houses/bars and amusement arcades on the one hand, and licensed casinos on the other, as regards the setting in which games of chance are available, in particular accessibility in terms of location and opening times and the atmosphere. Finally, the fact that only one of two types of game is subject to an unharmonised tax is not such as to justify the conclusion that those types of game are not comparable.

(see paras 40-41, 45-48, 51, operative part 2)

3. In order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for the purposes of value added tax it must be established whether the use of those types of machine is comparable from the point of view of the average consumer and meets the same needs of that consumer, and the matters to be taken into account in that connection are, inter alia, the minimum and maximum permitted stakes and prizes and the chances of winning.

(see para. 58, operative part 3)

4. The principle of fiscal neutrality must be interpreted as meaning that a taxable person may not claim reimbursement of the value added tax paid on certain supplies of services in reliance on a breach of that principle where the tax authorities of the Member State concerned have, in practice, treated similar services as exempt supplies, although they were not exempt from value added tax under the relevant national legislation.

Although a public authority following a general practice may be bound by that practice, the fact remains that the principle of equal treatment, which is reflected, in matters relating to value added tax, by the principle of fiscal neutrality, must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a

third party. It follows that a taxable person may not demand that a certain supply be given the same tax treatment as another supply, when such treatment is incompatible with the relevant national legislation.

(see paras 61-64, operative part 4)

5. The principle of fiscal neutrality must be interpreted as meaning that a Member State which has exercised its discretion under Article 13B(f) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes and has exempted from value added tax the provision of all facilities for playing games of chance, while excluding from that exemption a category of machines which meet certain criteria, may not contest a claim for reimbursement of value added tax based on the breach of that principle by arguing that it had responded with due diligence to the development of a new type of machine not meeting those criteria.

The direct effect of a provision of a directive, such as that of Article 13B(f) of the Sixth Directive 77388, depends neither on the existence of a deliberate wrongful act or negligence by the Member State concerned when transposing the directive at issue into national law, nor on the existence of a sufficiently serious breach of Union law. Accordingly, that provision may be relied on before the national courts by an operator of games of chance or gaming machines in order to prevent the application of rules of national law incompatible with that provision.

(see paras 69-70, 74, operative part 5)

JUDGMENT OF THE COURT (Third Chamber)

10 November 2011 (*)

(Taxation – Sixth VAT Directive – Exemptions – Article 13B(f) – Betting, lotteries and other forms of gambling – Principle of fiscal neutrality – Mechanised cash bingo – Slot machines – Administrative practice departing from the legislative provisions – ‘Due diligence’ defence)

In Joined Cases C?259/10 and C?260/10,

REFERENCES for preliminary rulings under Article 267 TFEU from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) and from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), by decisions of 20 and 19 April 2010, received at the Court on 26 May 2010, in the proceedings

Commissioners for Her Majesty’s Revenue and Customs

v

The Rank Group plc,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis, T. von

Danwitz (Rapporteur) and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 30 June 2011,

after considering the observations submitted on behalf of:

– The Rank Group plc, by K. Lasok QC, and V. Sloane, barrister, instructed by P. Drinkwater, solicitor,

– the United Kingdom Government, by S. Hathaway, acting as Agent, assisted by G. Peretz, barrister,

– the European Commission, by R. Lyal, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for preliminary rulings concern the interpretation of the principle of fiscal neutrality in the context of the application of Article 13B(f) 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, 'the Sixth Directive').

2 The references were made in the course of two sets of proceedings between the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') and The Rank Group plc ('Rank') concerning the Commissioners' refusal of the request made by Rank for the repayment of the value added tax ('VAT') it paid on services supplied in connection with certain games in the years 2002 to 2005.

Legal context

European Union legislation

3 Article 2(1) of the Sixth Directive provides that 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to VAT.

4 Article 13 of that directive, headed 'Exemptions within the territory of the country', provides:

'...

B. Other exemptions

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(f) betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State;

…’.

National legislation

VAT legislation

5 Section 31(1) of the Value Added Tax Act 1994, in the version in force at the material time, provides that the supply of goods or services is to be an exempt supply if it corresponds to one of the transactions described in Schedule 9 to that Act.

6 Group 4 of Schedule 9, entitled ‘Betting, gaming and lotteries’, provides, in Item 1, that the provision of any facilities for the placing of bets or the playing of any games of chance is to be an exempt supply.

7 Notes 1 and 3 to Group 4 provided:

‘(1) Item 1 does not include:

…

(b) the granting of a right to take part in a game in respect of which a charge may be made under section 14 of the Gaming Act 1968 …

…

(d) the provision of a gaming machine.

…

(2) “Game of chance” has the same meaning as in the Gaming Act 1968 …

(3) “Gaming machine” means a machine in respect of which the following conditions are satisfied, namely:

(a) it is constructed or adapted for playing a game of chance by means of it; and

(b) a player pays to play the machine (except where he has an opportunity to play payment free as the result of having previously played successfully) either by inserting a coin or token [after 2003: coin, token or other thing] into the machine or in some other way; and

(c) the element of chance in the game is provided by means of the machine.’

The gaming and betting regulations

8 Section 52(1) of the Gaming Act 1968, in the version in force at the material time, provides that, for the purposes of that Act, ‘gaming’ means the playing of a game of chance for winnings in money or money’s worth and ‘machine’ includes any apparatus.

9 Section 26(1) and (2) of that Act provides:

‘1. [Part III] of this Act applies to any machine which

(a) is constructed or adapted for playing a game of chance by means of the machine, and

(b) has a slot or other aperture for the insertion of money or money’s worth in the form of cash or tokens.

2. In the preceding sub-section the reference to playing a game of chance by means of a machine includes playing a game of chance partly by means of a machine and partly by other means if (but only if) the element of chance in the game is provided by means of the machine’.

10 Where a machine fell within that definition of a ‘gaming machine’, it could be operated only in duly licensed premises and in accordance with conditions affecting the stake and prize levels and the number of machines in a given place. Where the activity carried out by means of a certain machine was a ‘game’ but the machine did not fall within that definition its use was governed by other legislative provisions laying down, inter alia, other limits for stakes and prizes.

11 In contrast, activities considered to be ‘betting’ were governed by the Betting, Gaming and Lotteries Act 1963. If a customer wished to place a bet he was required to visit premises licensed for the purpose of betting (licensed betting offices, ‘LBOs’).

12 Premises could only be licensed either for betting or for gaming. In addition, the conditions for obtaining a licence and the regulation of licensed premises varied, in particular in relation to the sale of alcohol and opening hours. Betting was confined to LBOs and licensed gaming to casinos, public houses/bars, bingo halls and amusement arcades.

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

13 Rank is the representative member of a VAT group which operates bingo clubs and casinos in the United Kingdom in which customers have access to mechanised cash bingo (‘MCB’) and slot machines.

14 After having declared and paid to the Commissioners the VAT on services supplied by means of MCB and slot machines, Rank brought two separate actions before the Value Added Tax Tribunal, which is now the First Tier Tribunal (Tax Chamber) (‘the Tribunal’), to obtain repayment of that tax. The first action concerns the taxation of MCB between 1 January 2003 and 31 December 2005 and the second the taxation of slot machines between 1 October 2002 and 5 December 2005.

15 Those actions were essentially based on the argument that the different types of MCB and slot machines were treated differently for the purposes of exemption from VAT although they were comparable, indeed identical, from the consumer’s point of view and that, accordingly, the fact that certain types of MCB and slot machines were subject to VAT breached the principle of fiscal neutrality.

The MCB action

16 MCB was played in sequences of several games. While the amount of the stake was announced in advance, the amount of the prize, which depended on the number of players in a particular game, could change during a block of games and even during the first part of a game, and was not necessarily known by the players at the time when they placed their stakes.

17 It is common ground between the parties to the main proceedings that, owing to the reference to the Gaming Act 1968 in Item 1(b) of Group 4 of Schedule 9 to the VAT Act 1994, the exemption of MCB from VAT was applicable only if the stake was lower than or equal to 50 pence and the prize lower than or equal to GBP 25. On the other hand, if one of those conditions was not fulfilled, the game in question was not exempt from VAT. It is also common ground that these two types of MCB were identical from the customer's point of view. The Commissioners maintained that, none the less, there was no breach of the principle of fiscal neutrality, since there was no evidence that the different treatment had affected competition between those games.

18 By decision of 15 May 2008 the Tribunal found in favour of Rank. The Commissioners' appeal against that decision was dismissed by the High Court of Justice (England and Wales), Chancery Division by judgment of 8 June 2009. The Commissioners then appealed against that judgment to the Court of Appeal (England and Wales) (Civil Division).

The slot machines action

19 As regards slot machines, the application of the exemption from VAT provided for in Group 4, Item 1, of Schedule 9 to the VAT Act 1994 was excluded if the machine in question made available to the player was a 'gaming machine' within the meaning of Items 1(d) and 3 of Group 4.

20 In that regard, the slot machines operated by Rank and regarded as such gaming machines, which at the same time come under Part III of the Gambling Act 1968 ('Part III machines'), are compared with two other types of slot machine, according, in particular, to whether or not the element of chance in the game is provided, on demand by the gaming software incorporated in the machine used by the player, by that machine itself.

21 As regards the taxed Part III machines, that element is provided by an electronic random number generator ('RNG') physically incorporated in the machine used by the player. On the other hand, the first type of comparator ('comparator machines I') consists of machines a number of which are electronically connected to a common, separate RNG, which is none the less situated in the same premises as the terminals used by players.

22 The second type of comparator consists of 'Fixed Odds Betting Terminals' ('FOBTs') which could be installed only in LBOs. A player using a FOBT bet on the outcome of an event or a 'virtual' game (a 'format') loaded on to the software of the FOBT by inserting credit in the terminal. The outcome of the event or the virtual game was determined by means of an RNG placed outside the LBO premises in question. A dispute as to whether, regard being had to the law on the regulation of gaming, certain formats available on FOBTs offered 'betting' or 'playing' was not settled by a judgment because the parties concerned reached an agreement. Because FOBTs did not correspond to the definition of 'gaming machine' in VAT law, they were exempt from VAT. However, they were subject to general betting duty.

23 Before the Tribunal, it was undisputed that the taxed Part III machines and comparator machines I were similar from the consumer's point of view. On the other hand, the Commissioners denied, in particular, that the two categories of machines were in competition with each other and that the comparator machines I were actually exempt under domestic law.

24 By decision of 19 August 2008 the Tribunal found in favour of Rank on certain points at issue and deferred to a later stage its decision on other points. In that first decision the Tribunal considered, in particular, that comparator machines I were exempt from VAT under domestic legislation. In any event, in practice the Commissioners had deliberately treated the comparator machines I as exempt.

25 The Commissioners' appeal against that decision was dismissed by the High Court of Justice (England and Wales), Chancery Division, on 8 June 2009. The Commissioners appealed against that judgment to the Court of Appeal (England and Wales) (Civil Division), challenging in particular the finding that there existed a relevant practice of treating comparator machines I as VAT exempt supplies.

26 On 11 December 2009 the Tribunal found in favour of Rank on the issues on which it had reserved judgment initially. With respect to comparator machines I, the Tribunal found that the Commissioners could not rely on the 'due diligence' defence, even though the comparator machines I had been placed on the market only after the adoption of the domestic legislation at issue. The Tribunal also held that there had been a breach of the principle of fiscal neutrality with respect to the FOBTs, which were, to a high level of abstraction, similar to taxed Part III machines from the point of view of the majority of players. The two types of machines are regarded simply as gambling machines. The differences are either not known or are irrelevant to most consumers.

27 The Commissioners appealed to the Upper Tribunal (Tax and Chancery Chamber) against the judgment of 11 December 2009. That appeal relates, in particular, to the examination of the similarity between taxed slot machines and FOBTs and also to the rejection of the due diligence argument.

The questions referred to the Court in Case C-259/10

28 Since it considers that the result of the main proceedings depends on the interpretation of European Union law, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where there is differential VAT treatment:

– as between supplies that are identical from the point of view of the consumer; or

– as between similar supplies that meet the same needs of the consumer;

is that of itself sufficient to establish an infringement of the principle of fiscal neutrality or is it relevant to consider (and, if so, how)

(a) the regulatory and economic context;

(b) whether or not there is competition between the identical services or, as the case may be, the similar services in question; and/or

(c) whether or not the different VAT treatment has caused distortion of competition?

2. Is a taxpayer whose supplies are, as a matter of national law, subject to VAT (by reason of the exercise by a Member State of its discretion under Article 13B(f) of the Sixth Directive) entitled to claim a repayment of VAT paid on those supplies on the basis of an infringement of the principle of fiscal neutrality arising out of the VAT treatment of other supplies ("comparator supplies") where:

(a) as a matter of national law, the comparator supplies were subject to VAT but

(b) the taxing authority of the Member State had a practice of treating comparator supplies as exempt from VAT?

3. If the answer to Question 2 is in the affirmative, what conduct amounts to a relevant practice, and in particular:

(a) is it necessary that the taxing authority has made a clear and unambiguous statement that comparator supplies would be treated as exempt from VAT;

(b) is it relevant that at the time the taxing authority made any statement it had an incomplete or incorrect understanding of facts relevant to the correct VAT treatment of the comparator supplies; and

(c) is it relevant that VAT was not accounted for by the taxpayer, or sought by the taxing authority, in respect of the comparator supplies, but that the taxing authority has subsequently sought to recover that VAT, subject to the normal domestic limitation periods?

4. If the difference in fiscal treatment results from a consistent practice of the domestic tax authorities based on a generally accepted understanding of the true meaning of domestic legislation, does it make any difference to the existence of a breach of the principle of fiscal neutrality if:

(a) the tax authorities subsequently change their practice;

(b) a national court subsequently holds that the amended practice reflects the correct meaning of domestic legislation;

(c) the Member State is precluded by domestic and/or European law principles, including legitimate expectation, estoppel, legal certainty and non retroactivity, and/or by limitation periods from collecting the VAT on the supplies previously regarded as exempt?'

The questions referred to the Court in Case C-260/10

29 The Upper Tribunal (Tax and Chancery Chamber), having also taken the view that the outcome of the main proceedings before it depended on the interpretation of Union law, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where a Member State in the exercise of its discretion under Article 13B(f) of the Sixth VAT Directive subjected certain types of machines used for gambling ("Part III gaming machines") to VAT, while retaining exemption for other such machines (which included fixed odds betting terminals, "FOBTs"), and where it is contended that in so doing the Member State infringed the principle of fiscal neutrality: is it (i) determinative, or (ii) relevant, when comparing Part III gaming machines and FOBTs that

(a) FOBTs offered activities that were "betting" under domestic law (or activities that the relevant regulatory authority, for the purposes of exercising its regulatory powers, was prepared to treat as "betting" under domestic law) and

(b) Part III gaming machines offered activities subject to a different classification under

domestic law, namely “gaming”

and that gaming and betting were subject to different regulatory regimes under that Member State’s law relating to the control and regulation of gambling? If so, what are the differences between the regulatory regimes in question to which the national court should have regard?

2. In determining whether the principle of fiscal neutrality requires the same tax treatment of the types of machine referred to in Question 1 (FOBTs) and Part III gaming machines, what level of abstraction should be adopted by the national court in determining whether the products are similar? In particular, to what extent is it relevant to take into account the following matters:

(a) similarities and differences in the permitted maximum stakes and prizes as between FOBTs and Part III gaming machines;

(b) that FOBTs could be played only on certain types of premises licensed for betting, which were different, and subject to regulatory constraints that were different from those applicable to premises licensed for gaming (although FOBTs and up to two Part III gaming machines could be played alongside each other in premises licensed for betting);

(c) that the chances of winning the prize on FOBTs were directly related to the published fixed odds, whereas the chances of winning on Part III gaming machines could in some cases be varied by a device that ensured a particular percentage return to the operator and player over time;

(d) similarities and differences in the formats available on FOBTs and Part III gaming machines;

(e) similarities and differences between FOBTs and Part III gaming machines in the interaction which could occur between the player and the machine;

(f) whether or not the matters referred to above were either known to the generality of players of the machines or regarded by them as relevant or important;

(g) whether the difference in VAT treatment is justified by any of the above?

3. In a situation where a Member State, in the exercise of its discretion under Article 13B(f) of the Sixth VAT Directive, exempted gambling from VAT but subjected a defined class of machines used for gambling to VAT:

(a) is there in principle a defence of due diligence available to a Member State to a claim that the principle of fiscal neutrality has been infringed by that Member State; and

(b) if the answer to (a) is “yes”, what factors are relevant in determining whether or not the Member State is entitled to rely on that defence?’

30 By order of the President of the Court of 9 August 2010, Cases C?259/10 and C?260/10 were joined for the purposes of the written and oral procedures and of the judgment.

The questions referred

Question 1(b) and (c) in Case C?259/10

31 By this question the Court of Appeal (England and Wales) (Civil Division) seeks to know, essentially, whether the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for VAT purposes of two supplies of services which are identical or similar from the point of view of the consumer and which meet the same needs of the consumer is

sufficient to establish an infringement of that principle or whether such an infringement requires in addition that the actual existence of competition between the services in question or distortion of competition because of the difference in treatment be established.

32 According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98 *Commission* v *France* [2001] ECR I-3369, paragraph 22; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 47, and Case C-41/09 *Commission* v *Netherlands* [2011] ECR I-0000, paragraph 66).

33 According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.

34 Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer (see, to that effect, Case C?109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraphs 22 and 23, and Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraphs 19 to 21, 24, 25 and 28).

35 That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition (see, to that effect, Case C-404/99 *Commission* v *France* [2001] ECR I-2667, paragraphs 46 and 47, and Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517, paragraphs 47 to 51).

36 Having regard to the foregoing considerations, the answer to Question 1(b) and (c) in Case C-259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established.

Question 1(a) in Case C?259/10 and the first question in Case C?260/10

37 By these questions, the referring courts seek, essentially to know whether or not, where there is a difference in the treatment of two games of chance as regards the grant of a VAT exemption under Article 13B(f) of the Sixth Directive, the principle of fiscal neutrality must be interpreted as meaning that account must be taken of the fact that those two games fell into different licensing categories and were subject to different legal regimes relating to control and regulation.

38 According to Article 13B(f) of the Sixth Directive, betting, lotteries and other forms of gambling are exempt from VAT, subject to conditions and limitations laid down by each Member State.

39 That exemption is based on practical considerations, in that gambling transactions do not lend themselves easily to the application of VAT, and not, as is the case with certain public interest services supplied in the social sector, on a desire to afford those activities more advantageous VAT treatment (see Case C-89/05 *United Utilities* [2006] ECR I-6813, paragraph 23, and Case C-

58/09 *Leo-Libera* [2010] ECR I-0000, paragraph 24).

40 It is apparent from the actual wording of Article 13B(f) of the Sixth Directive that that provision leaves a broad discretion to the Member States as regards the exemption or the taxation of the transactions concerned since it allows those States to fix the conditions and the limitations to which entitlement to that exemption may be made subject (*Leo-Libera*, paragraph 26).

41 However, when the Member States exercise their power under that provision to lay down the conditions and limitations of the exemption and, therefore, to determine whether or not transactions are subject to VAT, they must respect the principle of fiscal neutrality inherent in the common system of VAT (see Case C?283/95 *Fischer* [1998] ECR I?3369, paragraph 27, and *Linneweber and Akritidis*, paragraph 24).

42 As observed in paragraph 32 of the present judgment, that principle precludes treating similar goods and supplies of services differently for VAT purposes.

43 In order to determine whether two supplies of services are similar within the meaning of the case-law cited in that paragraph, account must be taken of the point of view of a typical consumer (see, by analogy, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 29), avoiding artificial distinctions based on insignificant differences (see, to that effect, *Commission* v *Germany*, paragraphs 22 and 23).

44 Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (see, to that effect, Case C-481/98 *Commission* v *France*, paragraph 27, and, by analogy, Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 27, and Case C?302/00 *Commission* v *France* [2002] ECR I-2055, paragraph 23).

45 In accordance with settled case?law, as regards the levying of VAT, the principle of fiscal neutrality precludes any general distinction between lawful and unlawful transactions (see, inter alia, Case 269/86 *Mol* [1988] ECR 3627, paragraph 18; Case C-158/98 *Coffeeshop 'Siberië'* [1999] ECR I-3971, paragraphs 14 and 21, and Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 50). The Court concluded that Member States cannot reserve the exemption solely to lawful games of chance (*Fischer*, paragraph 28). The lawful or unlawful nature of the operation of a game of chance thus cannot be taken into account in the examination of the similar nature of two games of chance.

46 It is also clear from the case-law of the Court of Justice that, in assessing whether games of chance or gaming machines are similar, the identity of the operators of the games and the legal form by means of which they exercise their activities are, as a rule, irrelevant (see *Linneweber and Akritidis*, paragraphs 25 and 29, and the case-law cited).

47 In addition, it follows from that judgment, and from paragraphs 29 and 30 thereof in particular, that the differences between public houses/bars and amusement arcades on the one hand, and licensed casinos on the other, as regards the setting in which games of chance are available, in particular the accessibility in terms of location and opening times and the atmosphere, are of no relevance to the question of the comparability of such games.

48 Finally, according to paragraphs 29 and 30 of *Fischer*, the fact that only one of two types of game is subject to an unharmonised tax is not such as to justify the conclusion that those types of game are not comparable. The common system of VAT would be distorted if the Member States

could adjust its application on the basis that there are other, unharmonised, taxes.

49 It follows that the differences in the legal systems relied on by the referring courts are of no relevance to the assessment of the comparability of the games concerned.

50 That outcome is not called into question by the fact that, in certain exceptional cases, the Court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue, such as whether or not a drug is reimbursable or whether or not the supplier of a service is subject to an obligation to provide a universal service, may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs (Case C-481/98 *Commission* v *France*, paragraph 27, and Case C-357/07 *TNT Post UK* [2009] ECR I-3025, paragraphs 38, 39 and 45).

51 Having regard to the foregoing considerations, the answer to question 1(a) in Case C?259/10 and to the first question in Case C?260/10 is that, where there is a difference in treatment of two games of chance as regards the granting of an exemption from VAT under Article 13B(f) of the Sixth Directive, the principle of fiscal neutrality must be interpreted as meaning that no account should be taken of the fact that those two games fall into different licensing categories and are subject to different legal regimes relating to control and regulation.

The second question in Case C?260/10

52 By this question, the Upper Tribunal (Tax and Chancery Chamber) seeks to know, essentially, whether or not, in order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for VAT purposes, account must be taken of permitted minimum and maximum stakes and prizes, the chances of winning, the available formats and the possibility of interaction between the player and the slot machine.

53 It must first be observed that, if Article 13B(f) of the Sixth Directive and the discretion which that provision grants to the Member States, mentioned in paragraph 40 of this judgment, are not to be deprived of all useful effect, the principle of fiscal neutrality cannot be interpreted as meaning that betting, lotteries and other games of chance must all be considered to be similar services within the meaning of that principle. A Member State may thus limit the VAT exemption to certain forms of game of chance (see, to that effect, *Leo-Libera*, paragraph 35).

54 It follows from that judgment that that principle is not breached where a Member State imposes VAT on services supplied by means of slot machines while exempting horse-race betting, fixed-odds bets, lotteries and draws from VAT (see, to that effect, *Leo-Libera*, paragraphs 9, 10 and 36).

55 However, in order not to deprive the principle of fiscal neutrality of meaning and so as not to distort the common system of VAT, a difference of treatment for VAT purposes cannot be based on differences in the details of the structure, the arrangements or the rules of the games concerned which all fall within a single category of game, such as slot machines.

56 It is apparent from paragraphs 43 and 44 of the present judgment that the determination whether games of chance which are taxed differently are similar, which it is for the national court to make in the light of the circumstances of the case (see, to that effect, Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paragraphs 42 and 45, and *Marks & Spencer*, paragraph 48), must be made from the point of view of the average consumer and take account of the relevant or significant evidence liable to have a considerable

influence on his decision to play one game or the other.

57 In that regard, differences relating to the minimum and maximum stakes and prizes, the chances of winning, the formats available and the possibility of interaction between the player and the slot machine are liable to have a considerable influence on the decision of the average consumer, as the attraction of games of chance lies chiefly in the possibility of winning.

58 In the light of the foregoing considerations, the answer to the second question in Case C?260/10 is that, in order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for VAT purposes it must be established whether the use of those types of machine is comparable from the point of view of the average consumer and meets the same needs of that consumer, and the matters to be taken into account in that connection are, inter alia, the minimum and maximum permitted stakes and prizes and the chances of winning.

The second question in Case C?259/10

59 By the second question in Case C?259/10, the Court of Appeal (England and Wales) (Civil Division) seeks to know, essentially, whether the principle of fiscal neutrality must be interpreted as meaning that a taxable person may claim reimbursement of the VAT paid on certain services in reliance on a breach of that principle, where the tax authorities of the Member State concerned have, in practice, treated similar services as exempt supplies, although they were not exempt from VAT under the relevant national legislation.

60 That question concerns the argument raised in the main proceedings by the Commissioners, that the taxation of Part-III-machines did not breach the principle of fiscal neutrality, given that, under the provisions of the 1994 VAT Law, comparator I machines were not exempt from VAT either, although the Commissioners accept that they did not levy VAT on those machines during the years at issue in the main proceedings.

61 In that regard, it must be recalled that the principle of fiscal neutrality was intended to reflect, in matters relating to VAT, the general principle of equal treatment (see, inter alia, Case C?174/08 [2009] ECR I?10567, paragraph 41, and Case C?262/08 *CopyGene* [2010] ECR I-0000, paragraph 64).

62 Although a public administration following a general practice may be bound by that practice (see, to that effect, Case 268/84 *Ferriera Valsabbia* v *Commission* [1987] ECR 353, paragraphs 14 and 15, and Joined Cases C?189/02 P, C?202/02 P, C?205/02 P to C?208/02 P and C?213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I?5425, paragraph 211), the fact remains that the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see, to that effect, Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraph 15; Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14, and Case C?51/10 P *Agencja Wydawnicza Technopol* v *OHIM* [2011] ECR I?0000, paragraphs 75 and 76).

63 It follows that a taxable person cannot demand that a certain supply be given the same tax treatment as another supply, where such treatment does not comply with the relevant national legislation.

64 Accordingly, the answer to the second question in Case C?259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a taxable person cannot claim reimbursement of the VAT paid on certain supplies of services in reliance on a breach of that principle, where the tax authorities of the Member State concerned have, in practice, treated similar services as

exempt supplies, although they were not exempt from VAT under the relevant national legislation.

65 In the light of that reply, there is no need to answer the third and fourth questions referred in Case C?259/10.

The third question in Case C?260/10

66 By this question the Upper Tribunal (Tax and Chancery Chamber) seeks, in essence, to know whether the principle of fiscal neutrality must be interpreted as meaning that a Member State which has exercised its discretion under Article 13B(f) of the Sixth VAT Directive and has exempted from VAT the provision of all facilities for playing games of chance, while excluding from that exemption a category of machines which meet certain criteria, may contest a claim for reimbursement of VAT based on the breach of that principle by arguing that it responded with due diligence to the development of a new type of machine not meeting those criteria.

67 That question relates to the Commissioners' argument that, at the time of the adoption of the national provisions at issue in the main proceedings excluding Part-III-machines from the VAT exemption for games of chance, there were no similar gaming machines which were exempt. The different treatment of similar machines arose only subsequently as a result of the development of a new type of slot machine of which the tax authorities did not become aware until some time after it had begun to be marketed. Subsequently, the United Kingdom of Great Britain and Northern Ireland acted with due diligence in adopting, within a reasonable time, appropriate measures to put an end to the different tax treatment.

68 In that regard, it must, first, be recalled that, where the conditions or limitations which a Member State imposes on the exemption from VAT for games of chance or gambling are contrary to the principle of fiscal neutrality, that Member State cannot rely on such conditions or limitations to refuse an operator of such games the exemption which he may legitimately claim under the Sixth Directive (see *Linneweber and Akritidis*, paragrapah 37).

69 Accordingly, Article 13B(f) of the Sixth Directive has direct effect in the sense that it can be relied on by an operator of games of chance or gaming machines before national courts to prevent the application of rules of national law which are inconsistent with that provision (see *Linneweber and Akritidis*, paragraph 38).

70 Such direct effect of a provision of a directive depends neither on the existence of a deliberate wrongful act or negligence by the member State concerned when transposing the directive at issue into national law, nor on the existence of a sufficiently serious breach of Union law (see, to that effect, Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, paragraphs 25 and 27; Joined Cases C?397/01 to C?403/01 *Pfeiffer and Others* [2004] ECR I?8835, paragraph 103, and Case C?309/06 *Marks & Spencer*, paragraph 36).

71 In addition, account must be taken of the fact that, under the national legislation at issue, the provision of any facilities for placing bets or playing games of chance was, as a rule, exempt from VAT, except in the case of the provision of gaming machines meeting certain criteria. The establishment of such limitative criteria precludes the Member State from arguing that it believed that there were no machines which did not meet those criteria and that it did not even need to consider the possibility of the development of such machines.

72 Moreover, according to the order for reference and the observations of the United Kingdom, the Gaming Board, the regulatory body for gaming and thus an administrative entity of the Member State concerned, was informed of the existence of the new slot machines even before their commercial use.

73 In the light of those points, the Commissioners' argument which alleges that the tax authorities came to know of the existence of those machines only later, in order to justify the difference in treatment of the two types of machine for a certain period, cannot succeed.

74 Consequently, the answer to the third question in Case C?260/10 is that the principle of fiscal neutrality must be interpreted as meaning that a Member State which has exercised its discretion under Article 13B(f) of the Sixth VAT Directive and has exempted from VAT the provision of all facilities for playing games of chance, while excluding from that exemption a category of machines which meet certain criteria, may not contest a claim for reimbursement of VAT based on the breach of that principle by arguing that it responded with due diligence to the development of a new type of machine not meeting those criteria.

Costs

75 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 (Third Chamber) hereby rules:

1. **The principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of value added tax of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established.**

2. **Where there is a difference in treatment of two games of chance as regards the granting of an exemption from value added tax under Article 13B(f) 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, the principle of fiscal neutrality must be interpreted as meaning that no account should be taken of the fact that those two games fall into different licensing categories and are subject to different legal regimes relating to control and regulation.**

3. **In order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for the purposes of value added tax it must be established whether the use of those types of machine is comparable from the point of view of the average consumer and meets the same needs of that consumer, and the matters to be taken into account in that connection are, inter alia, the minimum and maximum permitted stakes and prizes and the chances of winning.**

4. **The principle of fiscal neutrality must be interpreted as meaning that a taxable person cannot claim reimbursement of the value added tax paid on certain supplies of services in reliance on a breach of that principle, where the tax authorities of the Member State concerned have, in practice, treated similar services as exempt supplies, although they were not exempt from value added tax under the relevant national legislation.**

5. **The principle of fiscal neutrality must be interpreted as meaning that a Member State which has exercised its discretion under Article 13B(f) of the Sixth Directive 77/388 and has exempted from value added tax the provision of all facilities for playing games of chance, while excluding from that exemption a category of machines which meet certain criteria, may not contest a claim for reimbursement of VAT based on the breach of that principle by arguing that it responded with due diligence to the development of a new type of machine not meeting those criteria.**

[Signatures]

* Language of the case: English.