Provisional text

JUDGMENT OF THE COURT (Second Chamber)

7 April 2022 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 132(1)(b) – Exemptions for certain activities in the public interest – Exemption for hospital and medical care – Private hospital – Duly recognised establishment – Comparable social conditions)

In Case C?228/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Niedersächsisches Finanzgericht (Finance Court, Lower Saxony, Germany), made by decision of 2 March 2020, received at the Court on 2 June 2020, in the proceedings

I GmbH

v

Finanzamt H,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele (Rapporteur), T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– I GmbH, by W. Franz, Rechtsanwalt,

– Finanzamt H, by K. Hintzelmann, acting as Agent,

– the German Government, by J. Möller and S. Heimerl, acting as Agents,

– the European Commission, by J. Jokubauskait? and L. Mantl, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 132(1)(b) 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’).

2 The request has been made in proceedings between I GmbH and the Finanzamt H (Tax Office H, Germany) concerning the exemption from value added tax (VAT) for hospital services supplied by I during the 2009 to 2012 tax years.

Legal context

European Union law

3 Article 131 of the VAT Directive is the only article in Chapter 1 of Title IX of that directive, headed ‘General provisions’ and ‘Exemptions’, respectively. That article reads as follows:

‘The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.’

4 Article 132(1) of the VAT Directive, which is contained in Chapter 2, headed ‘Exemptions for certain activities in the public interest’, of Title IX of that directive, provides:

‘Member States shall exempt the following transactions:

…

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

…’

5 Article 133 of that directive provides:

‘Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

…’

6 Article 134 of the VAT Directive provides:

‘The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.’

German law

7 Under Paragraph 4, point 14, of the Umsatzsteuergesetz (Law on Turnover Tax) of 21 February 2005 (BGBl. 2005 I, p. 386), in the version applicable to the dispute in the main proceedings (‘the UStG’), the following are exempt from VAT:

‘…

(b) hospital and medical care, including diagnosis, medical assessment, prevention, rehabilitation, obstetrics and hospice services as well as closely related activities undertaken by bodies governed by public law. The services described in the first sentence shall also be exempt where they are provided by:

aa) approved hospitals within the meaning of Paragraph 108 of [Book V of the Sozialgesetzbuch (Social Security Code)]

…

cc) bodies which have been engaged to supply care by providers of statutory accident insurance in accordance with Paragraph 34 of [Book VII of the Social Security Code].’

8 Paragraph 108, headed ‘Approved hospitals’, of Book V of the Social Security Code (‘the SGB V’), states:

‘Health insurance funds may procure hospital care only from the following hospitals (approved hospitals):

1. [University hospitals]

2. Hospitals which are included in a *Land*-level hospital plan (plan-listed hospitals), or

3. Hospitals which have concluded a care supply contract with the Landesverbände der Krankenkassen (*Land*-level health insurance fund associations) and the Verbände der Ersatzkassen (substitute fund associations).’

9 Paragraph 109 of the SGB V, headed ‘Conclusion of care supply contracts with hospitals’, provides in points 2 and 3:

‘…

(2) There shall be no right to conclude a care supply contract as referred to in Paragraph 108, point 3, of the SGB V …

(3) A care supply contract as referred to in Paragraph 108, point 3, of the SGB V may not be concluded where the hospital

1. does not offer a guarantee of efficient and cost-effective hospital care;

2. … [does not meet certain quality requirements]; or

3. is not necessary for the purposes of providing need-based hospital care for insured persons.

…'

10 Paragraph 1, headed 'Principle', of the Gesetz zur wirtschaftlichen Sicherung der Krankenhäuser und zur Regelung der Krankenhauspflegesätze (Krankenhausfinanzierungsgesetz) (Law on the financing of hospitals) of 10 April 1991 (BGBl. 1991 I, p. 886; 'the KHG'), provides:

'(1) The purpose of this Law is to provide economic security for hospitals in order to ensure high-quality, patient-centred and need-based care for the population through efficient, high-quality and independently operated hospitals and to contribute towards socially sustainable healthcare charges.'

11 Paragraph 6 of the KHG, headed 'Hospital planning and investment programmes', provides in point 1:

'The *Länder* shall draw up hospital plans and investment programmes aimed at attaining the objectives set out in Paragraph 1; the costs associated with these, in particular their impact on healthcare charges, shall be taken into account.'

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

12 The applicant in the main proceedings is a company whose corporate purpose is the planning, establishment and operation of a hospital in which all areas of neurology are represented.

13 The applicant in the main proceedings supplies hospital services within the meaning of German law and its operation is State-approved. However, it is not included in the hospital requirements plan for Lower Saxony and is not, therefore, a plan-listed hospital within the meaning of Paragraph 108, point 2, of the SGB V. The applicant in the main proceedings is not a contracted hospital, since it has not concluded care supply contracts with the statutory health insurance or substitute funds, within the meaning of Paragraph 108, point 3, of the SGB V.

14 The patients of the applicant in the main proceedings consist of self-funding patients who pay for their treatment in advance, privately insured patients and/or patients entitled to *Beihilfe* (aid paid to public servants in the event of illness), 'embassy' patients, for whom the embassy of a foreign State issues confirmation that it will cover the charges, patients who are members of the German armed forces, patients affiliated to occupational insurance associations and patients covered by statutory health insurance. Patients with private or statutory health insurance were each treated following confirmation that the charges would be covered either by the service which pays aid to public servants in the event of illness, a health insurance fund, a substitute fund or private insurance. In the case of embassy patients, the costs were borne by foreign social security institutions acting through the embassies concerned.

15 Initially, the applicant in the main proceedings invoiced hospital and medical care and closely related activities on the basis of fixed-rate daily fees, as is the usual practice among the

hospitals referred to in Paragraph 108 of the SGB V, plus any supplements where patients were accommodated in single or double rooms. Optional medical services were invoiced separately. Subsequently, the applicant in the main proceedings gradually invoiced its various services on the basis of fixed-rate payments by case group, in accordance with a system referred to as the '*Diagnosis Related Group*' system. In 2011, 15 to 20% of days in hospital were invoiced under that system.

16 On 28 June 2012, the applicant in the main proceedings concluded with an accident insurance fund, in its capacity as provider of statutory accident insurance, a framework agreement, within the meaning of Paragraph 4, point 14(b)(cc) of the UStG, which came into effect on 1 July 2012.

17 In its turnover tax returns for the 2009 to 2012 financial years, the applicant in the main proceedings treated the hospital services invoiced on the basis of fixed-rate fees and the user fees charged to non-resident doctors as transactions exempt from turnover tax.

18 In the course of a tax audit carried out by the Finanzamt für Grossbetriebsprüfung H (Tax Office H, responsible for the audit of large-scale undertakings), the auditor took the view that most of the services supplied by the applicant in the main proceedings before 1 July 2012 should not be exempt from VAT since, prior to that date, it was not an approved hospital. That position was confirmed by the tax office by decision of 6 September 2017.

19 The applicant in the main proceedings submits that those services are exempt from VAT under Article 132(1)(b) of the VAT Directive. It states that it operates an approved hospital and supplies hospital and medical care in the same way as a body governed by public law. It maintains that its activities are pursued in the public interest. First, it offers a range of services comparable to that supplied by public hospitals or hospitals included in the hospital plan. Secondly, it supplies its services to anyone, whether statutorily insured, privately insured or not insured at all. Treatment costs are to a large extent borne by social security bodies, including not only statutory health insurance funds but also the German armed forces, occupational insurance associations, the service which administers aid to public servants in the case of illness, and embassies. Patients whose expenses are thus covered by social security bodies represented, in terms of days in hospital, 33.08% in 2009, 34.31% in 2010, 38.15% in 2011 and 40.30% in 2012.

20 The referring court states that the applicant in the main proceedings does not satisfy the conditions for exemption laid down in Paragraph 4, point 14(b)(aa) of the UStG and that it may rely on the exemption provided for in Paragraph 4, point 14(b)(cc) of the UStG only from 1 July 2012, the date on which the framework agreement concluded with the accident insurance fund came into force.

21 That court notes that, for hospitals other than bodies governed by public law, Paragraph 4, point 14(b)(aa) of the UStG reserves the exemption from VAT to hospitals which were the first to be included in the hospital plan and whose services meet specified needs under social security law. In accordance with Paragraph 108 and Paragraph 109, point 3(3) of the SGB V, statutory health insurance funds or substitute funds may conclude a care supply contract with a hospital only where this is necessary in order to provide need-based care for insured persons. Even if a hospital is included in a hospital plan, the economic aspects remain relevant since, under Paragraph 1 of the KHG, the purpose of that law is to contribute towards sustainable healthcare charges. Therefore, according to the referring court, no additional hospital can be included in the hospital plan for the *Land* in which it is located or, therefore, conclude care supply contracts with the statutory health insurance funds where enough hospital beds for a particular speciality are already available within the *Land* in question.

22 Consequently, the referring court considers that the system of turnover tax leads to similar services being treated differently. The advantage enjoyed by some hospitals over others is based solely on the fact that the former are older and were able to be the first to be included in the hospital plan or to conclude care supply contracts.

23 In addition, the referring court states that, within the case-law of the Bundesfinanzhof (Federal Finance Court, Germany), there is an emerging trend towards the view that Paragraph 4, point 14, of the UStG does not meet the requirements laid down in Article 132(1)(b) of the VAT Directive on the ground that the tax exemption for services offered in hospitals which are not bodies governed by public law applies only on condition that those services meet specified needs under social security law.

24 For the determination of whether the hospital services and closely related activities offered by the applicant in the main proceedings were supplied under social conditions comparable with those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of the VAT Directive, the referring court has doubts as to the relevance of criteria relating to the management, cost structures and economic performance of the establishment in question, as adopted by the Bundesfinanzhof (Federal Finance Court). It considers that it would be more appropriate to take the point of view of patients.

25 In particular, the social conditions would be comparable if the costs of the majority of patients were covered by social security bodies. According to the referring court, a hospital's costs is not a suitable criterion for determining whether a private hospital offers its services under social conditions comparable with those applicable to a public hospital, given that a specialist private hospital must necessarily charge more than a public hospital which also performs simple medical procedures that do not require expensive equipment.

26 In those circumstances, the Niedersächsisches Finanzgericht (Finance Court, Lower Saxony, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Paragraph 4, point 14(b), of [the UStG] compatible with Article 132(1)(b) of [the VAT Directive], in so far as hospitals which are not bodies governed by public law qualify for exemption from tax on condition that they are approved within the meaning of Paragraph 108 of [the SGB V]?

(2) If Question 1 is to be answered in the negative: when do hospitals governed by private law provide hospital care under social conditions comparable with those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of the VAT Directive?'

Consideration of the questions referred

The first question

27 It is apparent from the information provided by the referring court that the provisions of German law relevant to the resolution of the dispute in the main proceedings provide that a hospital which is not a body governed by public law may qualify for exemption from VAT under Paragraph 4, point 14(b)(aa) of the UStG if that hospital is approved within the meaning of Paragraph 108 of the SGB V, either because it is included in a *Land*-level hospital plan or because it has concluded care supply contracts with the statutory health insurance or substitute funds.

28 However, the German Government refers to an additional factor relating to national law. It states that it is apparent from an administrative circular, applicable since 1 January 2009, that

even private hospitals which are not approved under Paragraph 108 of the SGB V may qualify for exemption from VAT where their services correspond to those performed by hospitals managed by public bodies or by approved hospitals within the meaning of Paragraph 108 of the SGB V and the costs of those services are largely borne by health insurance funds or other social security bodies.

29 In that regard, it should be borne in mind that, in proceedings under Article 267 TFEU, the Court is only empowered to rule on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (judgment of 17 December 2020, *Onofrei* , C?218/19, EU:C:2020:1034, paragraph 18 and the case-law cited).

30 Thus, it is for the Court to answer the national court's questions as they have been framed and within the limits set by the national court.

31 The first question should therefore be examined having regard to the matters of law described by the referring court, which poses that question in the light of the conditions laid down in Paragraph 108 of the SGB V. The administrative circular referred to by the German Government does not affect the relevance of that question, particularly since that government does not dispute the applicability of the conditions thus mentioned by the referring court, but, at most, refers to additional alternative conditions which were not mentioned by that court.

32 In those circumstances, it must be considered that, by its first question, the referring court asks, in essence, whether Article 132(1)(b) of the VAT Directive must be interpreted as precluding national legislation which stipulates that the provision of medical care by a private hospital is to be exempt from VAT if that hospital is approved in accordance with the national provisions relating to the general health insurance regime, following its inclusion in a *Land*-level hospital plan or the conclusion of care supply contracts with the statutory health insurance or substitute funds.

33 In accordance with settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 28 October 2021, *Magistrat der Stadt Wien (Grand Hamster – II)*, C?357/20, EU:C:2021:881, paragraph 20).

34 In that regard, it should be borne in mind that the terms used to specify the exemptions laid down in Article 132 of the VAT Directive are to be interpreted strictly, as they are a departure from the general principle that VAT is to be paid on each supply of services made for consideration by a taxable person. However, the interpretation of those terms must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT and be consistent with the objectives underlying those exemptions. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 must be construed in such a way as to deprive the exemptions of their intended effect (judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 57).

35 Those rules of interpretation apply to the specific conditions laid down for the exemptions provided for in Article 132 of the VAT Directive to apply and in particular to those concerning the status or identity of the economic agent performing the services covered by the exemption (judgment of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraph 57).

36 It is clear from the wording of Article 132(1)(b) of the VAT Directive that Member States are to exempt hospital and medical care and closely related activities undertaken by bodies governed by public law or, 'under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised

establishments of a similar nature’.

37 In accordance with the wording of that provision, two cumulative conditions must be satisfied for hospital and medical care and closely related activities offered by an entity other than a body governed by public law to be eligible for exemption from VAT. The first condition relates to the services supplied and requires that they be undertaken under social conditions comparable with those applicable to bodies governed by public law (see, to that effect, judgment of 5 March 2020, *Idealmed III*, C?211/18, EU:C:2020:168, paragraphs 20 and 21).

38 The second condition relates to the status of the establishment supplying those services and requires the operator to be a hospital, a centre for medical treatment or diagnosis or another duly recognised establishment of a similar nature.

39 In the present case, the referring court is uncertain whether the provisions of German law which reserve the exemption from VAT to approved hospitals on the basis of national provisions relating to the general health insurance regime are compatible with the second condition.

40 In that regard, the Court has previously held that it is, in principle, for the national law of each Member State to lay down the rules according to which the recognition of an establishment for the purposes of granting the exemption laid down in Article 132(1)(b) of the VAT Directive may be given to establishments which request it. The Member States enjoy a discretion in that regard (see, to that effect, judgment of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraph 63 and the case-law cited).

41 Such recognition does not presuppose a formal recognition procedure and need not necessarily be derived from national tax law provisions (see, to that effect, judgment of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraph 61).

42 Where a taxable person seeks the status of an establishment duly recognised for the purposes of Article 132(1)(b) of the VAT Directive, it is for the competent authorities to observe the limits of the discretion conferred upon them by that provision in applying the principles of EU law, in particular the principle of equal treatment which, in the field of VAT, takes the form of the principle of fiscal neutrality (see, to that effect, judgment of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraph 64 and the case-law cited).

43 It is in the light of those principles that it is necessary to determine the limits of the discretion conferred on a Member State by the VAT Directive and to examine whether Article 132(1)(b) of that directive must be interpreted as meaning that making a private hospital subject to the condition that it be approved under national provisions relating to the general health insurance regime, which means that that hospital must be included in the local hospital plan or have concluded care supply contracts with the statutory health insurance or substitute funds, falls within such limits.

44 Thus, it is necessary to ascertain, first, whether the requirement to be ‘duly recognised’ relates to all the entities referred to in Article 132(1)(b) of the VAT Directive, or only to ‘other establishments of a similar nature’, within the meaning of that provision.

45 In that regard, it should be noted at the outset that, in the Spanish, French, Italian, Portuguese and Romanian versions of Article 132(1)(b) of the VAT Directive, the expression ‘duly recognised’ is placed after the reference to ‘other establishments of a similar nature’, whereas in other language versions, inter alia German, English and Latvian, the expression ‘duly recognised’ is placed between the terms ‘other’ and ‘establishments of a similar nature’. Accordingly, some language versions of Article 132(1)(b) of the VAT Directive suggest that only ‘other establishments

of a similar nature’ are subject to the requirement that they be ‘duly recognised’, while other versions accept that that requirement applies to all categories of private establishment covered by that provision.

46 In accordance with settled case-law, provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union (judgment of 26 July 2017, *Mengesteab*, C?670/16, EU:C:2017:587, paragraph 82 and the case-law cited).

47 It is also settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions (see, to that effect, judgment of 28 October 2021, *KAHL and Roeper*, C?197/20 and C?216/20, EU:C:2021:892, paragraph 33 and the case-law cited).

48 In the present case, since, in order to qualify for the exemption, ‘other establishments’ must be ‘of a similar nature’ to ‘hospitals and centres for medical treatment or diagnosis’, the condition for the recognition of an establishment must be understood as applying to all the establishments mentioned in Article 132(1)(b) of the VAT Directive.

49 That interpretation is supported by the context and objective of Article 132(1)(b) of the VAT Directive.

50 In that regard, it should be noted, first of all, as regards the context of that provision, that the latter is contained in Chapter 2, headed ‘Exemptions for certain activities in the public interest’, of Title IX of that directive. That exemption thus covers establishments which pursue objectives in the public interest.

51 Next, it is apparent from the Court’s case-law that medical services supplied for the purpose of protecting, including maintaining or restoring, human health can benefit from the exemption under Article 132(1)(b) of the VAT Directive (judgment of 21 March 2013, *PFC Clinic*, C?91/12, EU:C:2013:198, paragraph 27 and the case-law cited).

52 It follows that, in the context of the exemption laid down in Article 132(1)(b) of the VAT Directive, the purpose of the services is relevant in determining whether those services are exempt from VAT and whether the establishment concerned comes within Article 132(1)(b) of the VAT Directive. That exemption is intended to apply to services whose purpose is to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health, but does not include services which serve purely cosmetic purposes (judgment of 21 March 2013, *PFC Clinic*, C?91/12, EU:C:2013:198, paragraphs 28 and 29).

53 Lastly, it should be borne in mind that the first paragraph of Article 133 of the VAT Directive allows Member States to make the granting of the exemption provided for in Article 132(1)(b) of that directive subject to one or more of the conditions set out in that provision. Those conditions relate to the aims of those bodies, their management and the prices charged by them, and concern all the private bodies referred to in Article 132(1)(b).

54 In the light of the discretion enjoyed by the Member States in that context, as noted in paragraph 40 above, the Court has held that the existence of the option provided for in the first paragraph of Article 133 of the VAT Directive supports the interpretation that it is for the national law of each Member State to lay down the rules according to which such recognition may be granted to establishments which request it, even if the fact that a Member State has not exercised that option does not affect the possibility that an establishment may be recognised for the purposes of granting the exemption referred to in Article 132(1)(b) of the VAT Directive (see, to that effect, judgment of 6 November 2003, *Dornier*, C?45/01, EU:C:2003:595, paragraphs 64 to

66).

55 However, if the national authorities are not to be deprived of the discretion which that provision confers upon them, the recognition of an establishment within the meaning of Article 132(1)(b) of the VAT Directive cannot be equated with the authorisation to carry out certain activities in accordance with national legislation (see, to that effect, judgment of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraph 75).

56 It follows that the recognition of an establishment that may be exempted from VAT under Article 132(1)(b) of the VAT Directive allows the Member States, first, to ensure that only establishments which pursue activities in line with the purposes of that provision qualify for such an exemption and, secondly, to make eligibility for that exemption subject to compliance with the conditions laid down in Article 133 of the VAT Directive, and cannot, therefore, be limited solely to the ‘other establishments’ referred to in Article 132(1)(b).

57 As regards the objective pursued by Article 132(1)(b) of the VAT Directive, it should be borne in mind that that provision aims in particular to reduce the cost of medical care and to make that care more accessible to individuals (judgment of 6 November 2003, *Dornier*, C?45/01, EU:C:2003:595, paragraph 43), which also entails the accessibility of high-quality care.

58 The public interest objective pursued by that provision supports the interpretation that the discretion enjoyed by the Member States, in accordance with the case-law referred to in paragraph 40 above, relates to all the establishments mentioned in that provision.

59 That interpretation is, moreover, consistent with the principle of fiscal neutrality, which precludes, inter alia, as stated in paragraph 42 above, operators which carry on the same activities from being treated differently as far as the levying of VAT is concerned (judgment of 6 November 2003, *Dornier*, C?45/01, EU:C:2003:595, paragraph 44).

60 It follows that a Member State may, in the exercise of its discretion, subject a private hospital to the condition that it be ‘duly recognised’ in order for the provision of medical care by that hospital under social conditions comparable with those applicable to bodies governed by public law to be exempted under Article 132(1)(b) of the VAT Directive.

61 As regards, secondly, the factors to be taken into account for the purpose of recognition of establishments that are eligible for the exemption from VAT, within the meaning of Article 132(1)(b) of the VAT Directive, it is for the national authorities, in accordance with EU law and subject to review by national courts, to take into consideration a number of factors, which include the public interest of the activities of the taxable person in question, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs of the services in question may be largely met by health insurance schemes or other social security bodies (judgment of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraph 65 and the case-law cited).

62 Furthermore, as pointed out in paragraph 42 above, the discretion conferred by Article 132(1)(b) of the VAT Directive is limited by the requirements arising from the principle of fiscal neutrality.

63 In the implementation of the exemption laid down in Article 132(1)(b) of the VAT Directive, compliance with fiscal neutrality requires, inter alia, that all organisations other than those governed by public law should be placed on an equal footing for the purpose of their recognition for the supply of similar services (see, to that effect, judgment of 8 June 2006, *L.u.P.*, C?106/05, EU:C:2006:380, paragraph 50).

64 In the present case, it is apparent from the information provided by the referring court that, under German law, the approval of a private hospital, in accordance with the national provisions relating to the general health insurance regime, means that that establishment has been included in a *Land*-level hospital plan or has concluded care supply contracts with statutory health insurance or substitute funds.

65 In particular, according to the German Government's explanations, the *Länder* draw up hospital plans in order to attain the objectives referred to in Paragraph 1 of the KHG, namely to provide economic security for hospitals in order to ensure high-quality, patient-centred and need-based care for the population through efficient, high-quality and independently operated hospitals and to contribute towards socially sustainable healthcare charges.

66 The German Government states, in essence, that, in order to conclude care supply contracts with statutory health insurance or substitute funds, a private hospital must guarantee efficient and cost-effective hospital care, meet the quality requirements defined more precisely in law, and be necessary for the purpose of providing hospital care adapted to the needs of the insured. Where several suitable hospitals apply to conclude a care supply contract and a choice has to be made, the decision is taken having regard to the public interest and the diversity of the hospital operators after due assessment of which hospital best meets the requirements of high-quality, patient-centred, need-based, efficient and effective hospital care.

67 The referring court states, in that regard, as mentioned in paragraph 21 above, that the consequence of applying the national legislation at issue is that the exemption provided for in Article 132(1)(b) of the VAT Directive applies only if the services supplied by the private hospital in question meet specified needs under social security law. Thus, in practice, a private hospital would have no prospect of being included in the hospital plan for the *Land* in which it is located or of concluding care supply contracts with the statutory health insurance funds if enough hospital beds for a particular speciality are already available within the *Land* in question.

68 As the Advocate General observed in points 111 and 112 of his Opinion, it follows from the information provided by the referring court that the providers of statutory accident insurance, the *Land*-level health insurance fund associations and substitute fund associations all enjoy a discretion as to whether to conclude an agreement with a hospital and that the *Länder* are not obliged to include in their hospital plan private non-university hospitals that carry on their activities under social conditions comparable with those applicable to bodies governed by public law.

69 The exercise of such discretion depending on needs defined under social security law may, contrary to the principle of fiscal neutrality, result in similar private hospitals being treated differently as regards the exemption laid down in Article 132(1)(b) of the VAT Directive in respect of similar services supplied under social conditions comparable with those applicable to bodies governed by public law.

70 Therefore, the answer to the first question is that Article 132(1)(b) of the VAT Directive must be interpreted as precluding national legislation which – by stipulating that the provision of medical care by a private hospital is to be exempt from VAT if that establishment is approved in accordance with the national provisions relating to the general health insurance regime, following

its inclusion in a *Land*-level hospital plan or the conclusion of care supply contracts with statutory health insurance or substitute funds – results in comparable private hospitals which supply similar services under social conditions comparable with those applicable to bodies governed by public law being treated differently as regards the exemption laid down in that provision.

The second question

71 By its second question, the referring court asks, in essence, what factors the competent authorities of a Member State may take into consideration in order to determine whether medical care supplied by a private hospital is provided under social conditions comparable with those applicable to bodies governed by public law, within the meaning of Article 132(1)(b) of the VAT Directive.

72 The referring court seeks, in particular, to ascertain whether the hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management may be taken into account for that purpose, or whether it is necessary to take the patient's point of view and to regard social conditions as comparable where the costs of the majority of patients are borne by social security bodies.

73 In that regard, it should be borne in mind that Article 132(1)(b) of the VAT Directive does not define precisely the aspects of the healthcare services concerned that must be compared in order to assess whether they are provided under comparable social conditions and, consequently, whether that provision is applicable (see, to that effect, judgment of 5 March 2020, *Idealmed III*, C?211/18, EU:C:2020:168, paragraph 24).

74 In those circumstances, the Court has found that factors such as whether the services are in the public interest, and the fact that the services are covered by the social security scheme or are supplied under contracts concluded with public authorities of a Member State, at prices fixed by those contracts and whose costs are partially borne by the social security institutions of that Member State, are factors that may be taken into account (see, to that effect, judgments of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraphs 69 and 70, and of 5 March 2020, *Idealmed III*, C?211/18, EU:C:2020:168, paragraph 32).

75 As regards, in the first place, the scope of the concept of 'comparable social conditions', it should be noted, as the Advocate General observed in point 89 of his Opinion, that it is clear from the very wording of Article 132(1)(b) of the VAT Directive that that condition relates to the services supplied by the establishment concerned.

76 It also follows from the wording of that provision that, first, the conditions under which the services are supplied in a hospital must be, not identical, but similar to those under which the services are supplied in an establishment governed by public law and, secondly, those conditions must be of a social nature.

77 In the second place, as the Advocate General observed in point 86 of his Opinion, the condition relating to 'comparable social conditions' is intended to prevent the services offered by private establishments from being exempt where those establishments are not subject to the same social obligations as establishments governed by public law.

78 In the third place, as pointed out in paragraph 57 above, Article 132(1)(b) of the VAT Directive is intended, inter alia, to reduce the cost of medical care and to make that care more accessible to individuals, which also entails the accessibility of high-quality care.

79 Therefore, in order to determine whether the services of private hospitals are provided under

social conditions comparable with those applicable to bodies governed by public law, it will be for the referring court, first of all, to take into consideration the conditions, laid down by the applicable legislation, to which hospitals governed by public law are subject as regards the services supplied, and which are intended to achieve the objective of reducing the cost of medical care and making high-quality care more accessible to individuals, and which are appropriate and necessary for that purpose.

80 Next, it follows from the objective of the exemption provided for in Article 132(1)(b) of the VAT Directive, as noted in paragraph 78 above, that the costs of the services supplied by private hospitals which remain payable by patients must be taken into account.

81 In that regard, as the European Commission states, the question whether fixed-rate daily fees are calculated in a comparable way in a private hospital and in a hospital governed by public law may prove relevant. Similarly, it will be for the referring court to examine whether the services supplied by private hospitals are covered by the social security regime or under contracts concluded with public authorities of a Member State, so that the costs that remain payable by patients are at a level comparable to those borne by patients of public establishments.

82 Lastly, the private hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management may be taken into consideration, in so far as hospitals governed by public law are subject to comparable management indicators and such indicators contribute to achieving the objective of reducing medical costs and making high-quality care more accessible to individuals, which is a matter for the referring court to determine.

83 In the light of the foregoing, the answer to the second question is that Article 132(1)(b) of the VAT Directive must be interpreted as meaning that, in order to determine whether medical care provided by a private hospital is supplied under social conditions comparable with those applicable to bodies governed by public law, the competent authorities of a Member State may take into consideration – where they are intended to attain the objective of reducing medical costs and making high-quality care more accessible to individuals – the regulatory conditions applicable to the services supplied by hospitals governed by public law and indicators of that private hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management, in so far as those indicators are also applicable to establishments governed by public law. Account may also be taken of the method of calculating fixed-rate daily fees and the fact that the services supplied by that private hospital are borne by the social security regime or under contracts concluded with public authorities, so that the cost borne by patients is similar to that borne by patients for similar services supplied by hospitals governed by public law.

Costs

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

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

1. **Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation which – by stipulating that the provision of medical care by a private hospital is to be exempt from value added tax if that establishment is approved in accordance with the national provisions relating to the general health insurance regime, following its inclusion in a *Land*-level hospital plan or the conclusion of care supply contracts with statutory health insurance or substitute funds – results in comparable private hospitals which supply similar services under social conditions comparable with those applicable to bodies governed by public law being treated differently as regards the exemption laid down in that**

provision.

2. **Article 132(1)(b) of Directive 2006/112 must be interpreted as meaning that, in order to determine whether medical care provided by a private hospital is supplied under social conditions comparable with those applicable to bodies governed by public law, the competent authorities of a Member State may take into consideration – where they are intended to attain the objective of reducing medical costs and making high-quality care more accessible to individuals – the regulatory conditions applicable to the services supplied by hospitals governed by public law and indicators of that private hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management, in so far as those indicators are also applicable to establishments governed by public law. Account may also be taken of the method of calculating fixed-rate daily fees and the fact that the services supplied by that private hospital are borne by the social security regime or under contracts concluded with public authorities, so that the cost borne by patients is similar to that borne by patients for similar services supplied by hospitals governed by public law.**

[Signatures]

* Language of the case: German.