Conclusions
OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 10 December 2002 (1)

Case C-45/01

Christoph-Dornier-Stiftung für Klinische Psychologie
v
Finanzamt Gießen

(Reference for a preliminary ruling from the Bundesfinanzhof)

((Value added tax – Article 13A(1)(b) and (c) of the Sixth Directive 77/388/EEC – Exemption from tax – Psychotherapeutic treatment given in an out-patient facility provided by a foundation (charitable establishment) employing qualified psychologists who are not registered as doctors – Direct effect))

I ? Introduction

1. By the four questions it has referred, the Bundesfinanzhof (Federal Finance Court) asks whether psychotherapeutic treatment, given in an out-patient facility by a foundation employing qualified psychologists who are not registered as doctors, is to be exempted from VAT in accordance with the two tax exemptions provided for in the Sixth VAT Directive (2) (hereafter the Sixth Directive) relating respectively to hospital and medical care, and medical care.

2. The Sixth Directive provides that hospital and medical care and closely related activities undertaken by bodies governed by public law or comparable bodies are to be exempt from tax. It also provides that the provision of medical care in the exercise of the medical and paramedical professions is likewise to be exempted from VAT. After the claimant foundation had been refused the latter tax exemption for reasons to be considered in more detail below, it sought to persuade the national appeal court to interpret the former tax exemption broadly.

3. Accordingly, by its first two questions the national court asks in substance whether the former tax exemption is available in the present case. The third question relates to the latter tax exemption. The fourth question concerns the potential direct effect of the two tax exemptions.

II ? Legal framework

A ? Community law

4. Article 13A(1)(b) and (c) of the Sixth Directive provide: 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 such exemptions and of preventing any possible evasion, avoidance or abuse:...

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to 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;
(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned.
5. Article 13A(2) of the Sixth Directive provides:
(a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n) of this Article subject in each individual case to one or more of the following conditions:
? they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,
? they shall 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,
? they shall charge prices 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 value added tax,
? exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax.
(b) The supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (n) above if:
? it is not essential to the transactions exempted,
? its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.
B ? National law
6. As in force at the relevant time, Paragraph 4 of the German Umsatzsteuergesetz 1980 (Law on Turnover Tax, hereafter the UStG) (3) provided as follows: The following transactions covered by Paragraph 1(1)(1) to 1(1)(3) are exempt:...
14. transactions arising from the pursuit of the profession of doctor, dentist, natural medical practitioner, physiotherapist, midwife or a similar professional medical activity for the purposes of Paragraph 18(1)(1) of the Einkommensteuergesetz [Law on Income Tax] or pursuit of the profession of clinical chemist. Other supplies of goods and services by associations whose members belong to the professions set out in the first sentence are also exempt vis-à-vis their members in so far as those supplies are directly used to carry out transactions exempt under the first sentence. ...
16. transactions closely linked with the operation of hospitals, diagnostic clinics and other bodies providing medical care, diagnoses or clinical results and of old people's homes, residential accommodation for the elderly and nursing homes, where:
(a) those bodies are run by legal persons governed by public law or
...
(c) in the case of diagnostic clinics and other establishments providing treatment by doctors, diagnoses or clinical results, the services are provided under the supervision of a doctor and in the previous calendar year at least 40% of the services are provided to the persons specified in number (15)(b) ...
.
7. Paragraph 4(15)(b) of the UStG specifies the following persons:insured persons, persons in receipt of social assistance or ... persons entitled to maintenance.
8. According to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), Article 3(1) of the Grundgesetz (Basic Law) means that the question whether medical activities are exempt from turnover tax does not depend solely on legal form. Accordingly, exemption from tax of the activities of a person who practises the professions listed in Paragraph 4(14)(1) of the UStG is not limited to the person who actually practises the profession but can also be claimed by a partnership or a company.
III ? Facts and questions

9. The Christoph-Dornier-Stiftung für Klinische Psychologie (hereafter the foundation) is a charitable foundation established under private law. According to the order of the national court, its object is to develop the practice of and research into clinical psychology. It also aims at improving methods of treatment by appropriate theoretical and practical research and at making important results of clinical psychological research available to the public. For these purposes, it maintains an out-patient facility in which patients are given psychotherapeutic treatment by qualified psychologists employed by the foundation.
10. In 1990, the year to which the dispute relates, the qualified psychologists the foundation employed were not doctors. However, they were licensed to practise under the Heilpraktikergesetz (Medical Practitioners Law) and had received further education to qualify as psychotherapists.
11. More than 40% of the services the foundation provided in 1990 were provided to persons insured under the compulsory social insurance scheme, to persons in receipt of social assistance or to persons entitled to maintenance. The foundation's board members and principal employees were psychotherapists who were licensed as medical practitioners.
12. In 1990, the Finanzamt (Finance Office) taxed the services supplied by the foundation at a reduced rate of tax under Paragraph 12(2)(8) of the UStG. Disagreeing with the foundation, it took the view that the transactions were not exempt from tax under Paragraph 4(16)(c) of the UStG.
13. The foundation contested its tax assessment for 1990 before the Finanzgericht (Finance Court). It argued that if applied in accordance with the constitution and the Sixth Directive the conditions for exemption in question covered not only services provided under supervision of a doctor but also services provided by establishments offering psychotherapeutic treatment where they were supervised not by doctors but by qualified psychologists holding a further education qualification, similar to that of a specialist doctor, in psychotherapy and licensed as medical practitioners. The refusal of the tax exemption created a difference in treatment, without any substantive reason, compared with the taxation of comparable services provided under the supervision of a doctor.
14. The Finanzgericht was of the view that neither Article 13A(1)(b) of the Sixth Directive nor constitutional considerations required that Paragraph 4(16)(c) of the UStG be applied more broadly than its wording entailed. It accordingly rejected the claim on the ground that the foundation had not provided the services specified in Paragraph 4(16)(c) of the UStG under the supervision of doctors.
15. The foundation appealed against this judgment to the Bundesfinanzhof. The latter stayed the proceedings and referred the following four questions to the Court for a preliminary ruling:
1. Does psychotherapeutic treatment, given in an out-patient facility provided by a foundation (charitable establishment) employing qualified psychologists who are licensed under the Heilpraktikergesetz but who are not registered as doctors, qualify as closely related activities to hospital and medical care within the meaning of Article 13A(1)(b) of Directive 77/388?
2. In order for there to be an other duly recognised establishment of a similar nature within the meaning of Article 13A(1)(b) of Directive 77/388, must there be a formal recognition procedure or can recognition also derive from other regulations (e.g. regulations concerning the assumption of costs by authorities responsible for the provision of social security) which apply equally to hospitals, centres for medical treatment and other establishments? Is an exemption from tax unavailable to the extent that the authorities responsible for providing social security do not reimburse, or only partially reimburse, patients for the costs of psychotherapeutic treatment given by the aforementioned employees of the plaintiff?
3. Is the psychotherapeutic treatment provided by the claimant exempt from tax on the basis of the neutrality of value added tax, because the psychotherapists it employs could have provided the same treatment on a tax-exempt basis under Article 13A(1)(c) of Directive 77/388 if they had provided it themselves as self-employed taxable persons?
4. Is the claimant entitled to rely on the tax exemption of its transactions involving psychotherapeutic treatment under Article 13A(1)(b) and (c) of Directive 77/388?
IV ? Analysis of the questions referred

16. The questions referred concern on the one hand the conditions of the exemption provided for in Article 13A(1)(b) of the Sixth Directive and on the other the conditions of the exemption provided for in Article 13A(1)(c) of the Sixth Directive.
17. Although the fact that the foundation provides treatment in an out-patient facility suggests that the latter exemption may be available, the first two questions refer principally to the exemption provided for in letter (b). Obviously, this is a consequence of the fact that at the time the main proceedings were raised the national measures transposing the tax exemption under Article 13A(1)(c) (hereafter letter (c)) had not ensured that legal and natural persons were given identical treatment, and such an exemption was therefore unavailable. The dispute in the proceedings accordingly concentrated on the tax exemption under letter (b).
18. Before the national court, the claimant in the main proceedings argued in particular that Paragraph 4(16) of the UStG 1980 (the national law intended to transpose Article 13A(1)(b) (hereafter letter (b)) of the Sixth Directive) was incompatible with Community law, since it made the tax exemption dependent on whether the treatment was provided under the supervision of a doctor. The Sixth Directive did not provide for such a condition.
A ? The first and second questions
19. In the opinion of the national court, the availability of the tax exemption under letter (b) depends first on whether the foundation made supplies which are to be regarded as activities closely related to hospital or medical care. This view pre-supposes that the psychotherapeutic treatment provided by the foundation constituted neither hospital nor medical care in the sense of medical care provided under the supervision of recognised doctors.
20. Given that the foundation was not a body governed by public law, a hospital or a centre for medical treatment or diagnosis, a further condition of the availability of the letter (b) tax exemption was that the foundation be an other duly recognised establishment within the meaning of that provision.
21. Since the first two questions thus concern Article 13A(1)(b) of the Sixth Directive and require a certain basic understanding of that provision, I shall consider them together.
1. Submissions of the parties
22. The *foundation* began by criticising the Bundesfinanzhof's question and explained that the treatment provided by the psychotherapists it employed encompassed the diagnosis, treatment and cure of psychological diseases and disorders, and was therefore medical care concerning the health of persons within the meaning of the judgment of the Court in Case C-384/98 *D* v *W* . (4)
23. The foundation emphasised that this issue depended on the substance of the supply and not on formal licensing as a doctor or as a paramedic equated in law to a doctor. It followed that medical care included not only treatment provided by doctors but also treatment provided by a licensed practitioner of a medical profession whose qualification was comparable to that of a doctor, as was that of the qualified psychologists in the present case.
24. The *German Government* firmly rejected this view, most emphatically in the oral hearing, and submitted that Article 13A(1)(b) of the Sixth Directive should not be interpreted too broadly, if only to give proper weight to its nature as an exception to the general rule. It relied on the judgment of the Court in *Commission* v *France* , (5) in which the Court held that the contested tax exemption was designed to ensure the availability of low-cost access to hospital and medical care. In its opinion, other forms of medical care were not to be given the same privilege. The German Government considered its view to be supported by the fact that in contrast to letter (c), letter (b) did not draw a distinction between medical and paramedical.
25. The German Government also submitted that the psychotherapeutic treatment the foundation provided was not closely related activities, since the foundation's activity was self-contained and the disputed treatment was not provided in combination with any further medical care.
26. The *Danish Government* likewise submitted that the tax exemption under letter (b) should be interpreted narrowly. In its view, the exemption was subject to the condition that the exempt treatment constituted either hospital care or medical care in the sense of medical care provided by a licensed doctor, or was sufficiently closely related to an actual supply of such hospital or medical

care.
27. According to the *Commission* , by its first question the national court was asking whether the disputed psychotherapeutic treatment, which was not provided by licensed doctors, constituted medical care and/or closely related activities to such care.
28. The Commission supported a broad interpretation such that medical care in letter (b) and the provision of medical care in letter (c) encompassed fundamentally the same supplies, namely medical care concerning the health of persons. In this connection, the Commission emphasised that the supplies covered by letter (b) and by letter (c) respectively differed less in their substance than in the form in which they were provided. (6)
29. Moreover, to regard the disputed psychotherapeutic treatment as medical care would be consistent with the purpose of the letter (b) tax exemption. In support of this proposition, the Commission referred to the judgment in *Commission* v *France* (7) in which the Court held that the tax exemption under letter (b) was designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT. The Commission added that the present case did not concern activities closely related to actual medical care, as the contested psychotherapeutic treatment was supplied on a stand-alone basis.
30. The *Commission* was therefore of the opinion that whether the letter (b) tax exemption was available in the present case depended on whether the foundation was to be regarded as an other duly recognised establishment of a similar nature. As regards the second question, which relates to this point, both the *Commission* and the *Danish Government* pointed out that the Sixth Directive did not lay down any formal recognition procedure. Accordingly, how recognition was granted was a matter for national law.
31. However, the *Commission* did emphasise that recognition could depend on conditions outside tax law, provided they referred to the activity undertaken. In this regard, it considered that the assumption of costs by authorities responsible for the provision of social security could constitute recognition. However, in its opinion the assumption of part only of the costs could not constitute partial recognition of the establishment concerned.
32. On the question of recognition of the establishment concerned, the *foundation* too proceeded on the basis that it was a matter for national law. It added that the costs of its supplies were assumed in exactly the same way as those of corresponding medical supplies, and that it followed that the foundation had been recognised by national law.
33. Given its answer to the first question, the *German Government* considered it to be unnecessary to answer the second question. On a subsidiary basis, it submitted that the recognition procedure was a matter for national law. It was not in principle impossible that recognition could be granted on the basis of criteria outside tax law, for example the reimbursement of costs by authorities responsible for the provision of social security; however, for that purpose, it was essential that the national VAT provisions referred to those criteria. The German Government emphasised that German law required the establishments to provide their services under the supervision of a doctor.
2. Analysis
The nature of the supplies
34. The letter (b) tax exemption is not available unless the disputed psychotherapeutic treatment may be classified either as medical care or as activities closely related to such care. It is not disputed that the criterion of hospital care is not relevant.
35. It must first be observed that in accordance with settled case-law, the tax exemptions constitute independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the Sixth Directive. (8)
36. It appears questionable that the disputed psychotherapeutic treatment falls within the concept of activities closely related to medical care. The Commission referred to the judgment in *Commission* v *France* , (9) according to which that concept refers to the relationship of an ancillary supply to the principal supply. However, the supplies in the present case are apparently

unconnected to any other medical supplies: they are not provided within the framework of hospital care; nor can they be regarded as supplementary to any medical care provided by licensed doctors.
37. According to the judgment in *Card Protection Plan* (10) a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. Since the disputed supplies are stand-alone supplies in that they are not related to any hospital or medical care, they cannot be classified as ancillary supplies. Accordingly, they are not closely related activities to medical care.
38. By its first question the national court is clearly to be understood as asking also whether and, if so, to what extent the disputed psychotherapeutic treatment is to be classified as medical care.
39. In this connection, the question arises in the present case as to whether the fact that the disputed psychotherapeutic treatment is not provided by licensed doctors is in itself sufficient to preclude subsuming it within the concept of medical care.
40. The proposition that it should not be classified as medical care is clearly supported by the requirement that the tax exemptions envisaged by Article 13 of the Sixth Directive are to be interpreted strictly since these exemptions constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person. (11)
41. However, the purpose of this requirement suggests that the provision should not be interpreted so narrowly. The requirement is intended to ensure that the tax privilege granted by Article 13 to certain supplies is granted only to those supplies which accord with the purpose for which the privilege is granted. As regards the privileges granted to medical supplies by Article 13A(1)(b) or (c) of the Sixth Directive, the requirement to interpret exceptions narrowly is therefore properly taken into account where the question is as to whether or not all supplies provided by a doctor in the course of his profession are to be exempted from tax. (12) However, the present case concerns not whether a distinction should be drawn between different activities carried out by a doctor but the tax treatment of supplies which, it is not disputed, would attract the tax privilege if they were carried out by a licensed doctor.
42. The German Government does not dispute the proposition that the disputed psychotherapeutic treatment concerns the health of persons. Accordingly, it falls within the definition of medical care in letter (c), established by the Court as being medical care concerning the health of persons. (13)
43. It follows that in principle, the requirement to interpret the exemption conditions in Article 13 of the Sixth Directive strictly does not prevent treating psychotherapeutic treatment in the same way irrespective of whether the person providing it is licensed as a doctor for the purposes of letter (b). However, what is questionable is the significance of the point that the German versions of letters (b) and (c) use different wording to refer to medical care: whereas letter (b) refers to medical care provided by a doctor (ärtzliche Heilbehandlung), letter (c) refers to medical care concerning the health of persons (Heilbehandlungen im Bereich der Humanmedizin).
44. The Court's most recent discussion of the relationship between the two exemptions is in its judgment in *Kügler* . In that judgment the Court stated, [i]t follows that Article 13A(1)(b) and (c) of the Sixth Directive, which have separate fields of application, are intended to regulate all exemptions of medical services in the strict sense. Article 13A(1)(b) exempts all services supplied in a hospital environment while Article 13A(1)(c) is designed to exempt medical services provided outside such a framework, both at the private address of the person providing the care and at the patient's home or at any other place. (14)
45. That indicates that the Court considers it possible to draw a clear distinction between the two tax exemptions, but that the criterion is less the substance of the supply than the place it is provided. In expressing this view, the Court referred to its judgment in *Commission* v *United Kingdom* . (15) In that judgment the Court held that in contrast to letter (b), which exempted services encompassing a whole range of medical care normally provided on a non-profit-making basis in establishments pursuing social purposes such as the protection of human health, letter (c) exempted services provided outside hospitals within the framework of a confidential relationship between the patient and the person providing the care.

46. The difference between the definitions of the two tax exemptions seems to be that the exemptions relate to activities which are carried out in different places: under letter (b), in establishments pursuing social purposes, and under letter (c), in other places, in particular in consulting rooms. By contrast, the substance of the activity appears not to be definitive, with the consequence that the difference between the wording of the two sets of conditions for exemption cannot preclude the application of the letter (b) exemption to the disputed psychotherapeutic treatment.
47. Moreover, subsuming the disputed psychotherapeutic treatment within the concept of medical care is consistent with both the purpose of the tax exemption and the principle of the neutrality of VAT.
48. As regards the purpose of the tax exemption for medical care, the Court has repeatedly held that such a privilege is designed, to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT. (16) The costs depend far less on the identity of the person giving the treatment than on the substance of the services.
49. In its judgment in *Kügler* , (17) the Court moreover recalled that, [t]he principle of fiscal neutrality precludes, *inter alia* , economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. To the extent that the foundation's employees have the necessary professional training as qualified psychologists having received further education to qualify as medical practitioners, such that their services are equivalent to services supplied by specialist doctors with equivalent qualifications, the principle of fiscal neutrality precludes treating the services provided by the two professions differently.
50. Finally, consideration must be given to the argument that applying letter (b) to psychotherapeutic treatment of the type in question would create an overlap between the field of application of letter (b) and letter (c).
51. The clear distinction drawn in the Court's case-law (18) suggests that as a rule there should be no overlap. In my opinion, the finding in paragraph 36 of *Kügler* cannot be understood as meaning that the fact that the disputed psychotherapeutic treatment is provided in an out-patient facility in itself precludes the application of letter (b). Whether that circumstance affects the availability of the letter (b) tax exemption is instead to be examined in the context of the question whether the facility is an other duly recognised establishment.
Recognition of the foundation
52. Given the general agreement between the submissions of the parties and the judgment in *Kügler* , I need discuss the question as to recognition of the foundation only briefly. Admittedly, *Kügler* concerned the tax exemption under Article 13A(1)(g) of the Sixth Directive and the reference therein to organisations recognised as charitable. None the less, that tax exemption appears to be similar to the letter (b) tax exemption: its availability likewise depends both on the substance of the supply and on the place it is provided, and letter (g) refers also to bodies governed by public law and similar organisations recognised as charitable by the Member State concerned. The wording of letter (g) is clearer only in so far as it expressly refers to the competence of the Member State to grant the recognition required.
53. In the present case it is not in dispute that there being no relevant provision in the Sixth Directive, the question whether an establishment has been duly recognised for the purposes of the letter (b) tax exemption is to be answered by reference to national law. For that reason, the judgment in *Kügler* is applicable: according to it, [i]t will ... be for the national authorities, in accordance with Community law and subject to review by the national courts, to determine, in the light in particular of practice followed by the competent administrative body in analogous situations, which organisations should be recognised as charitable within the meaning of Article 13A(1)(g) of the Sixth Directive. (19)
54. As regards the question as to which national provisions are to be taken into account, the Court continued: In the main proceedings, the national court will thus be able to take into account the existence of specific provisions, be they national or regional, legislative or administrative, or tax or

social security provisions, the fact that associations carrying on the same activities as the claimant in the main proceedings are already entitled to a similar exemption, given the public interest inherent in those activities, and the fact that the costs of the services supplied by the claimant in the main proceedings may be largely met by statutory health funds or by social security bodies with which private operators such as the claimant in the main proceedings have contractual relations. (20)

55. Because of the similarity between the substance of letter (g) and of letter (b), (21) these statements appear to apply equally to the interpretation of letter (b).

56. On the basis of the foregoing considerations, I suggest that the answer to the first and second questions should be that psychotherapeutic treatment, given in an out-patient facility by a foundation employing qualified psychologists who are not registered as doctors, qualifies as medical care, and therefore not as closely related activities; to such care, within the meaning of Article 13A(1)(b) of Sixth Directive 77/388. It is for the national court to establish, in the light of all relevant factors, whether the taxable person is a duly recognised establishment of a similar nature for the purposes of Article 13A(1)(b) of the Sixth Directive.

B ? The third question

1. Submissions of the parties

57. The parties differ as to whether it is necessary to answer the third question. By contrast, they largely agree as to how the substance of the question should be answered.

58. The *German Government* was of the view that there was no need for an answer since letter (b) was a *lex specialis* compared with letter (c) and therefore ousted the latter provision. The *Commission* pointed out that the Bundesfinanzhof referred the third question only in case the letter (b) tax exemption was not available. Since it was for the national court to establish whether the letter (b) tax exemption was available in the present case, it was necessary to answer the third question.

59. As regards the relationship between the tax exemptions under letter (b) and letter (c), the *foundation* submitted that because of the principle of the neutrality of VAT letter (c) was the *lex specialis* compared with letter (b). If medical care in letter (b) were interpreted broadly, in the way the foundation suggested, paramedical professions within the meaning of letter (c) would be covered by letter (b) too. The foundation submitted that it was accordingly necessary to answer the third question.

60. As regards the substance of the question, the foundation submitted in summary that the services supplied by the employed psychotherapists would have been exempt from tax if the psychotherapists had supplied them in the course of a self-employed practice. In this connection, the foundation emphasised that irrespective of the existence of a contract of employment the psychotherapists carried out their activity on their own responsibility and applying their expertise independently.

61. The *German Government* likewise submitted that the psychotherapists employed by the foundation could have provided the same treatment on a tax-exempt basis if they had provided it independently as taxable persons, since psychotherapeutic services of qualified psychologists were medical care within the meaning of Article 13A(1)(c) of the Sixth Directive.

62. Both the *Danish Government* and the *Commission* emphasised that the field of application of Article 13A(1)(c) of the Sixth Directive was not restricted to natural persons.

2. Analysis

63. I should like first to observe that I think it necessary to answer the third question irrespective of what the relationship discussed above between the letter (b) tax exemption and the letter (c) tax exemption may be. (22) As the Commission observed, it is for the national court to establish whether the letter (b) tax exemption is available in the present case.

64. However, it appears to be unnecessary to consider the parties' submissions individually, since the answer to the third question may be taken directly from *Kügler* . (23)

65. By its first question in *Kügler* , the Bundesfinanzhof asked whether the tax exemption envisaged in Article 13A(1)(c) of the Sixth Directive was dependent on the legal form of the taxable

person supplying the medical or paramedical services referred to in that provision. On that point, the Court held that the exemption envisaged in Article 13A(1)(c) of the Sixth Directive is not dependent on the legal form of the taxable person supplying the medical or paramedical services referred to in that provision.

66. The reason the Court gave for its decision was that the wording of Article 13A(1)(c) did not make the tax exemption dependent on whether the taxable person was endowed with a particular legal form. (24) It was enough that medical (or paramedical) services were involved and were supplied by persons who possessed the necessary professional qualifications. The Court also emphasised that such an interpretation was consistent with the objective of reducing the cost of medical care. (25) Finally, the Court stated that such an interpretation was consistent with the principle of fiscal neutrality, which precluded, *inter alia* , economic operators carrying on the same activities from being treated differently as far as the levying of VAT was concerned. (26)

67. Since it is not disputed in the main proceedings that the qualified psychologists employed by the foundation supply medical care and possess the necessary professional qualifications, it appears that the answer to the first question in *Kügler* may be applied directly to the present case.

C ? The fourth question

1. Submissions of the parties

68. The fourth question concerns the potential direct effect of the tax exemptions provided for in letter (b) and letter (c) of Article 13A(1) of the Sixth Directive.

69. The *foundation* referred in particular to what it considered to be the incorrect transposition of the Sixth Directive in the Federal Republic of Germany. In transposing Article 13A(1)(b) of the Sixth Directive, the national legislature had made the tax exemption subject to an additional condition, namely that the supplies had to be provided under the supervision of a doctor. This gave rise to a difference in treatment between certain medical supplies which were excluded from the tax exemption in the Federal Republic of Germany and identical supplies to which other Member States did grant the exemption, and this infringed the principle of fiscal neutrality. The foundation submitted that national law required to be interpreted in conformity with the Sixth Directive and therefore disregarding the condition it considered to infringe the Sixth Directive.

70. The *German Government* disputed the proposition that the letter (b) and the letter (c) tax exemptions had direct effect, since neither was, so far as its subject-matter was concerned, unconditional. Letter (b) provided that the tax exemption was dependent on recognition of the establishment concerned by the Member State, and to that extent the Member State accordingly had a margin of discretion. Under letter (c), it was likewise for the Member State to define the scope of the medical and paramedical professions.

71. The *Commission* considered that the possibility Article 13A(2)(a) of the Sixth Directive granted to the Member States (in particular in relation to letter (b)) of making the grant of the tax exemptions subject to certain conditions did not in principle affect the conclusion that Article 13A(1) had direct effect. Nor did Article 13A(2)(b) of the Sixth Directive preclude Article 13A(1) from having direct effect, since that restriction was contingent in nature and therefore, according to the case-law of the Court, did not prevent direct effect. (27)

72. Moreover, the requirement that the establishment concerned be duly recognised by the Member State did not preclude letter (b) from having direct effect. Once such recognition had been given in an individual case, it was sufficiently clear from that provision what economic activities were covered by the exemption from VAT.

2. Analysis

73. The answer to the fourth question is also to be taken from the judgment in *Kügler* . (28) Admittedly, that case concerned the direct effect of Article 13A(1)(g) of the Sixth Directive; but the basic issue is comparable in that that provision grants a tax exemption to organisations recognised as charitable by national law. (29)

74. On that point, the Court held that the exemption provided for in Article 13A(1)(g) of the Sixth Directive could be relied upon by a taxable person before national courts in order to oppose national rules incompatible with that provision.

75. The Court started from the proposition that in accordance with settled case-law, wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive. (30)
76. In order to establish the direct effect of Article 13A(1)(g), the Court said in particular that a Member State could not rely upon its failure to adopt the very provisions which were intended to facilitate the application of the exemption and to which the introductory part of Article 13A(1) of the Sixth Directive referred. (31) The Court also held that Article 13A(1)(g) of the Sixth Directive indicates in a sufficiently precise and unconditional manner the activities to which the exemption applies. (32)
77. The Court then considered the point that the Member State had an undoubted discretion for the purpose of according the organisations in question recognition. In that regard, it stated that as long as the Member States observed the limits of the discretion which was accorded to them by Article 13A(1)(g) of the Sixth Directive, persons could not rely on the Sixth Directive in order to acquire recognition.
78. The Court held that [i]t will accordingly be for the national authorities, in accordance with Community law and subject to review by the national courts, to determine, in the light in particular of practice followed by the competent administrative body in analogous situations, which organisations should be recognised as charitable within the meaning of Article 13A(1)(g) of the Sixth Directive. The Court added that a Member State could grant recognition otherwise than by tax provisions. (33) The possibility under Article 13A(2) of the Sixth Directive of making the grant of the exemptions provided for in Article 13A(1) subject to one or more conditions did not affect the conclusion that Article 13A(1) had direct effect, since that possibility was contingent in nature and a Member State could not rely on its own omission to adopt the measures necessary for laying down such conditions. (34)
79. The Court thus reached the conclusion that the exemption provided for in Article 13A(1)(g) of the Sixth Directive could be relied upon by an individual before national courts in order to oppose national rules incompatible with that provision. At the same time, the Court stated that it was for the national court to establish, in the light of all relevant factors, whether the taxable person was an organisation recognised for the purposes of the particular tax exemption.
80. This reasoning also appears to be applicable to letters (b) and (c), since both tax exemptions indicate in a sufficiently precise and unconditional manner the activities to which the respective exemption applies. From the judgment in *Kügler* it may also be taken that neither the power of national authorities to recognise the establishments concerned for the purposes of the tax exemption nor the possibility under Article 13A(2) of making the grant of the exemptions referred to in that provision subject to certain conditions is apt to preclude the direct effect of the tax exemptions provided for in Article 13A(1).
81. Accordingly, it is to be held that the exemptions provided for in Article 13A(1)(b) and (c) of the Sixth Directive may be relied upon by a taxable person in order to oppose national rules incompatible with that provision.
V ? Conclusions
82. It is accordingly submitted that the Court should answer the questions referred as follows:
(1) Psychotherapeutic treatment, given in an out-patient facility by a foundation employing qualified psychologists who are licensed medical practitioners but who are not registered as doctors, qualifies as medical care, and therefore not as closely related activities to such care, within the meaning of Article 13A(1)(b) 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. It is for the national court to establish, in the light of all relevant factors, whether the taxable person is a duly recognised establishment of a similar nature within the meaning of Article 13A(1)(b) of the Sixth Directive.
(2) The exemption envisaged by Article 13A(1)(c) of the Sixth Directive 77/388/EEC is not

dependent on the legal form of the taxable person supplying the medical or paramedical services referred to in that provision.
(3) The exemptions provided for in Article 13A(1)(b) and (c) of the Sixth Directive 77/388/EEC may be relied upon by a taxable person in order to oppose national rules incompatible with that provision.
1 – Original language: German.
2 – 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).
3 – BGBl. I 1979, p. 1953.
4 – Case C-384/98 *D* v *W* [2000] ECR I-6795, paragraphs 17 and 18.
5 – Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 23.
6 – On this point, it referred to Case 353/85 *Commission* v *United Kingdom* [1988] ECR 817, paragraphs 32 and 33, according to services under letter (b) encompassed a whole range of medical care normally provided on a non-profit-making basis in establishments pursuing social purposes, whereas services under letter (c) were provided outside hospitals and similar establishments within the framework of a confidential relationship between the patient and the person providing the care.
7 – Cited above, footnote 5, paragraph 23.
8 – Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 25, with further references.
9 – Cited above, footnote 5, paragraph 25.
10 – Case C-349/96 [1999] ECR I-973, paragraph 30.
11 – Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20.
12 –
13 –
14 – Cited above, footnote 8, paragraph 36.
15 – Cited above, footnote 6, in particular paragraph 35.
16 – See *Commission* v *France* (cited above, footnote 5), paragraph 23.
17 – Cited above, footnote 8, paragraph 30.
18 – See above, paragraphs 44 f.
19 – Cited above, footnote 8, paragraph 57.
20 – Cited above, footnote 8, paragraph 58.
21 – Letter (g) concerns the supply of services and of goods closely linked to welfare and social security work, and the same question thus arises in its context as to recognition by authorities responsible for the provision of social security as within the context of letter (b).
22 – See above, paragraphs 44 f.
23 – Cited above, footnote 8.
24 – Cited above, footnote 8, paragraph 27.
25 – Cited above, footnote 8, paragraph 29.
26 – Cited above, footnote 8, paragraphs 29 f.
27 – In this regard, the Commission referred to Joined Cases 231/87 and 129/88 *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and Others* v *Comune di Carpaneto Piacentino and Another* [1989] ECR 3233, paragraph 32.
28 – Cited above, footnote 8.
29 – See above, paragraph 52.
30 – Cited above, footnote 8, paragraph 51.
31 – Cited above, footnote 8, paragraph 52, under reference to Case 8/81 *Becker* [1982] ECR 53, paragraph 33.
32 – Cited above, footnote 8, paragraph 53.
33 – Cited above, footnote 8, in particular paragraph 58.
34 – Cited above, footnote 8, paragraph 60.