Conclusions
OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 8 July 2004(1)

Joined Cases C-453/02 and C-462/02

Finanzamt Gladbeck
v
Edith Linneweber (C-453/02)

and
Finanzamt Herne-West

Savvas Akritidis (C-462/02)

(Reference for a preliminary ruling from the Bundesfinanzhof (Germany))

Finanzamt Gladbeck
v
Edith Linneweber (C-453/02)

and
Finanzamt Herne-West

Savvas Akritidis (C-462/02)

(Reference for a preliminary ruling from the Bundesfinanzhof (Germany))

(Tax law – Sixth VAT Directive – Article 13B(f) – Games of chance – Card games and gaming machines – Principle of fiscal neutrality – Similarity of games of chance)

I – Introduction

1. The questions referred to the Court by the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling in these two joined cases concern the interpretation of Article 13B(f) of Sixth Directive 77/388/EEC (2) ('Sixth Directive').

2. These proceedings concern the extent to which a Member State may, under that provision, differentiate in the levying of value added tax between, on the one hand, games of chance

organised lawfully or unlawfully outside a licensed public casino and, on the other hand, games of chance organised in a licensed public casino.

3. The Court is thus called upon to clarify further its ruling in the *Fischer* judgment (3) on the scope of the principle of fiscal neutrality with regard to the levying of VAT on games of chance.

II – Legislative background

A – *Community law*

4. Under the heading 'Other exemptions' Article 13B of the Sixth Directive provides inter alia for the following:

'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;

…'

B – *National law*

5. Pursuant to Paragraph 4(9)(b) of the German Umsatzsteuergesetz (Turnover Tax Law) 1993 ('UStG') the following is exempt from tax:

'turnover within the scope of the Rennwett- und Lotteriegesetz (Betting and Lotteries Act) and the turnover of licensed public casinos which arises through operation of the casino. ...'

III – Facts, proceedings and questions referred

A – *Case C-453/02*

6. Mrs Linneweber is the universal heir of her husband, the (original) taxpayer, who died in 1999. The latter provided, with official approval, gaming and entertainment machines for consideration in restaurants and amusement arcades owned by him.

7. Mrs Linneweber and the taxpayer declared the income from the operation of the gaming machines as tax-exempt turnover, whereas the Finanzamt (Tax Office) took the view that that income did not fall within the tax exemption under Paragraph 4(9)(b) of the UStG.

8. The Finanzgericht Finance Court at Münster, to which an application was subsequently made, ruled in favour of the exemption of the transactions in question, relying on the Court's judgment in the *Fischer* case (4) and the interpretation therein of the principle of fiscal neutrality.

9. However, the Bundesfinanzhof, the referring court, before which the appeal against that ruling was brought, considers the exemption of the transactions under Article 13B(f) of the Sixth Directive allowed by the Finanzgericht to be open to question. The referring court points out that in the *Fischer* judgment the Court focused on the unlawful organisation of games of chance, whereas the present case concerns officially approved gaming machines. However, the gaming machines in public casinos generally differed considerably from the gaming machines installed in restaurants and commercial amusement arcades, especially with regard to stakes, winnings and the percentage of the stakes distributed as winnings.

10. The referring court questions the relevance in Community law of the distinction between lawful and unlawful games of chance. In its view, it is also conceivable that Article 13B(f) of the Sixth Directive must be interpreted as meaning that a Member State may not impose VAT on the (lawful or unlawful) operation of a game of chance when the *corresponding* activity carried on by a licensed public casino is exempted.

11. In order to clarify the scope of the exemption, the Bundesfinanzhof referred the following questions to the Court for a preliminary ruling by order of 6 November 2002.

1.Is Article 13B(f) of Directive 77/388/EEC to be interpreted as precluding a Member State from making the organisation of gambling subject to value added tax if it is exempt when organised by a licensed public casino?

2.Does Article 13B(f) of Directive 77/388/EEC prohibit a Member State from making the operation of a gaming machine subject to value added tax if the operation of a gaming machine by a licensed public casino is exempt, or must the game of chance machines operated outside casinos

also be comparable for that purpose in essential respects, for example as regards the maximum stake and the maximum winnings, with the gaming machines in the casinos?
3.Is the installer of the machine permitted to rely on the exemption laid down in Article 13B(f) of Directive 77/388/EEC?
B – *Case C-462/02*
12. Mr Akritidis ran the 'Monte-Carlo' casino in Herne-Eickel from 1987 to 1991, providing roulette and card games under a commercial licence. He was permitted inter alia to run memory card-games using a 'card rack' next to the gaming table. He failed, however, to comply with the official requirements in respect of both roulette and the card games. For instance, the card rack was not used, and higher stakes were accepted.
13. In the tax notices of 1 April 1996 the Finanzamt initially included the unapproved roulette and card game turnover in the assessment to tax. In response to an objection from Mr Akritidis it then exempted the roulette on the basis of the Court's judgment in the *Fischer* case, but continued to treat the unlawfully organised card games as taxable.
14. The Finanzgericht, to which an application was then made, came to the conclusion, however, that the turnover on card games should similarly be exempted from turnover tax under Article 13B(f) of the Sixth Directive and that the trader could therefore rely directly on that provision in this respect.
15. The Finanzamt opposes this view in the appeal before the Bundesfinanzhof, the referring court. The Finanzamt argues that, as the card games organised by the applicant are comparable to the card games offered in public casinos to only a limited degree, the competitive situation found by the Court in the *Fischer* case did not exist. Mr Akritidis, on the other hand, claims that the card games organised by him are equivalent to those played in casinos and, like them, should therefore be exempt from tax.
16. Having regard to the *Fischer* judgment, in which the Court found that the (unlawful) game organised by Karlheinz Fischer resembled the roulette played in duly licensed public casinos, the referring court raises the question whether it is sufficient, for the exemption under Article 13B(f) of the Sixth Directive to apply, for card games to be organised both in and outside public casinos or whether they must be comparable in essential respects. There also seemed to be some doubt as to whether an individual was entitled to rely on the aforementioned provision of the directive.
17. Against that background the Bundesfinanzhof referred the following questions to the Court for a preliminary ruling by order of 6 November 2002:
1.Does Article 13B(f) of Directive 77/388/EEC prohibit a Member State from making the organisation of a card game subject to value added tax solely if the organisation of a card game by a licensed public casino is exempt, or must card games organised outside casinos also be comparable for that purpose in essential respects, for example as regards the game rules, the maximum stake and the maximum winnings, with card games in the casinos?
2.Is the installer of the machine permitted to rely on the exemption laid down in Article 13B(f) of Directive 77/388/EEC?

IV – Answers to the questions referred

A – *The scope of the principle of fiscal neutrality in respect of the taxation of games of chance (first and second questions in Case C-453/02 and first question in Case C-462/02)*
18. The first two questions in Case C-453/02 and the first question in Case C-462/02, which must be considered together here, essentially ask whether Article 13B(f) of the Sixth Directive precludes the levying of value added tax on the organisation of gambling where the organisation of games of chance of the same kind – such as the operation of a gaming machine or the organisation of a card game – by a licensed public casino is exempt from value added tax or only where the games of chance organised by a licensed public casino are also comparable, in terms of the essential characteristics of the game, to the games of chance organised outside such casinos.
1. Main arguments of the parties
19. Mr *Akritidis* has made no submissions in these joined proceedings.

20. Mrs *Linneweber* submits before this Court – contrary to her submission in the main action – that the taxation of turnover from the gaming machines operated by her husband does not breach Article 13B(f) because those machines differed fundamentally from the gaming machines installed in public casinos. She argues that it is for the Member States to lay down the conditions and limitations of the exemption of games of chance under Article 13B(f) of the Sixth Directive provided that, as the Court ruled in the *Fischer* judgment, the principle of fiscal neutrality is respected. That principle was, however, infringed only if a different turnover tax was imposed on comparable activities. Two services were comparable if – from the consumer's point of view – they were in sufficiently close competition with each other. The assessment of this aspect must take account of all factors affecting the benefit and value of the service to the consumer, and it is crucial in this context to look not only at the outward manifestation of the service in the abstract but also at the conditions under which it could be used, its exact nature and the advantages and disadvantages for the consumer associated with its use.

21. The differences between the gaming machines at issue in the main action and gaming machines in licensed public casinos as regards the places and times at which they were available, the users, the technical arrangements (minimum duration of games, maximum stakes, minimum distribution ratios) and the environment in which they were used were so great that, seen from the consumer's point of view, the two forms of gambling did not compete with each other and could therefore be treated differently in the light of the principle of fiscal neutrality. Even if the two forms of gambling were assumed to be comparable, equality of taxation was, however, achieved through the collection of the casino levy on slot machines in licensed public casinos.

22. The *German Government* similarly emphasises that the gaming machines and card games at issue in the two main actions differ significantly from the machines installed and card games organised in licensed public casinos (as regards, for example, rules of play, the chances of winning, the duration of games and the stakes). The distinction for tax purposes made between games of chance organised in licensed public casinos and those organised elsewhere was consequently not only an objective requirement but also compatible with Community law, and especially the principle of fiscal neutrality, and lay within the discretionary powers accorded to the Member States.

23. Although, as the *Fischer* judgment revealed, the principle of fiscal neutrality prohibited a general distinction for tax purposes between lawful and unlawful services, it did not require the imposition of identical taxes and levies on all lawful games of chance if those games were in fact different in nature. The German legislature had accordingly attached different legal consequences to different lawful types of gambling and gambling locations. In view of the major differences in the nature and scale of games of chance organised in licensed public casinos and those organised elsewhere there was no competition between them. To determine whether two games competed with each other, the principles developed by the Community institutions to determine the 'relevant product and geographical market' for the purposes of Article 82 EC could also be applied.

24. The German Government also takes the view that it is entitled to impose value added tax on games of chance organised outside public casinos because that tax is imposed on games of chance in public casinos in the form of the casino levy.

25. The *Commission* maintains that Article 13B(f) of the Sixth Directive focuses on the organisation of 'gambling' only in material terms, the criteria underlying taxation in Germany, i.e. the person of the organiser or the place at which games of chance are organised, being unimportant. The principle of fiscal neutrality prohibited, in particular, any difference in the treatment for VAT purposes of economic operators undertaking similar activities. In any case, it was evident from the *Fischer* judgment that the Member States could not deny tax exemption to lawful games of chance. According to the Sixth Directive, the sole determining factor was whether, notwithstanding any differences in procedures, one and the same game of chance was essentially involved. It was for the national court or the national authorities to determine this in individual cases.

2. Appraisal

26. As all the parties in the two actions have rightly stated, the *Fischer* judgment (5) reveals that, while the Member States are empowered by Article 13B(f) to lay down the conditions and limitations of the exemption of gambling from tax, they must observe the principle of fiscal neutrality on which the common system of value added tax is based.

27. It is settled case-law that, as the principle of fiscal neutrality prohibits in particular different treatment for VAT purposes of similar and therefore competing goods or services, such goods or services must be subject to the same tax rate. (6)

28. Accordingly, it should first be borne in mind that the principle of fiscal neutrality is linked to the similarity of the activities rather than to the person or legal form of the economic operator carrying on those activities. (7)

29. Rules like those laid down in the German Umsatzsteuergesetz, according to which, as the referring court's order reveals, the exemption of gambling activities depends on whether they are carried on by licensed public casinos, are therefore bound to sit uneasily with that principle.

30. Although the German Government has indicated that the German Umsatzsteuergesetz assumes a distinction between activities carried on within public casinos and those carried on elsewhere, it has emphasised, especially during the hearing, that this distinction is ultimately based on the considerable differences that actually exist between the games of chance – including the environment in which they are played and their accessibility in terms of location – and is therefore compatible with the principle of fiscal neutrality.

31. I question the soundness of this line of argument for a number of reasons.

32. For one thing, it is evident from the referring court's order, as the Commission has pointed out, that there is in principle nothing to stop public casinos offering games of chance for which a commercial licence is required and which are thus permissible outside public casinos.

33. It also emerges from the *Fischer* judgment, however, that it must not be generally assumed that a distinction between games of chance organised within public casinos and games of chance organised elsewhere corresponds to the distinction permitted for tax purposes in the light of the principle of fiscal neutrality. I have a number of observations to make on that judgment below.

34. The *Fischer* case concerned the question of the equal treatment for tax purposes of a game of chance organised outside licensed public casinos, that game resembling roulette as operated in duly licensed public casinos.

35. It should be remembered that in that case the organisation of roulette outside the licensed public casino was also unlawful and that, in the final analysis, the Court based its answer to the question as to the compatibility of the taxation of that game of chance with the principle of fiscal neutrality primarily on the lawfulness/unlawfulness of a game of chance. Thus, referring to the judgment in Case C-111/92, (8) it ruled that 'the principle of fiscal neutrality precludes a generalised distinction from being drawn in the levying of VAT between unlawful and lawful transactions.' (9)

36. From this it follows, on the one hand, that games of chance may not be treated differently for tax purposes solely because they differ in terms of lawfulness. This is of relevance in Case C-462/02, which concerns a card game offered unlawfully outside licensed public casinos.

37. On the other hand, the proposition that games of chance differ for the purposes of the principle of fiscal neutrality for the simple reason that they are organised by or in public casinos must, however, also be refuted on the basis of the *Fischer* judgment. For the Court ruled in that judgment that a Member State may not impose VAT on a game of chance – albeit one that is organised outside a licensed public casino – if the organisation of such a game of chance by a licensed public casino is exempt. (10)

38. The Court could not have given this ruling if it were indeed true that the games of chance offered by public casinos already differed significantly from those offered by commercial operators because of the difference in accessibility, the gambling environment, the 'gambling culture' or the different circle of user.

39. The central question still to be answered, however, is whether and under what conditions the games of chance at issue in the main actions – gaming machines and card games – are to be

regarded, as the *Fischer* judgment has it, as games of chance organised by licensed public casinos and exempted from tax.

40. What all forms of gambling have in common where tax law is concerned, as I have already stated in my Opinion in the *Town & County Factors* case, (11) is at least the essential characteristic that they are geared to the payment of winnings which are linked with the gambler's 'consideration', his stake, by means of an element of chance, i.e. the possibility of winning. To what extent, however, are games of chance to be distinguished from one another in the present context because of differences in form and design?

41. It should first be noted that not all forms of gambling can be regarded as similar services for the purposes of fiscal neutrality and should, as such, be taxed at the same rate.

42. This would deprive the Member States of practically all discretion in laying down the 'conditions and limitations' of exemption pursuant to Article 13B(f). Yet that discretion is specifically intended to enable the Member States to impose VAT on certain forms of gambling. (12)

43. In other words, a Member State may indeed limit the taxation of games of chance – or, conversely, their exemption from tax – to certain forms of gambling. It thus cannot be forced by the principle of fiscal neutrality to adopt an all-or-nothing solution, which would mean that once it exempts one game of chance or one form of gambling it would have to exempt all other games of chance or forms of gambling.

44. However, the various different games of chance or forms of gambling are by their very nature difficult to distinguish from one another, and it is thus hard to determine whether or not games of chance are similar. While I am inclined to regard, say, card games, roulette and gaming machines as different forms of gambling when compared with one another, the question does not arise in such general terms in the present instance, since the *Linneweber* case concerns gaming machines and the *Akritidis* case concerns card games.

45. On the other hand, it would doubtless be going too far simply to regard all card games, for example, as comparable to one another, the possible options being too numerous for it to be assumed without more that all forms of games of chance based on cards are similar services for the purposes of the principle of fiscal neutrality.

46. To my mind, however, minor differences in the arrangement or structure of the card games to be compared in a given instance do not matter.

47. As innumerable variants of games of chance are conceivable, the principle of fiscal neutrality would be largely frustrated if the Member States were permitted to make distinctions based on minor differences in the structure, procedures and rules of a game as regards the imposition of VAT. There is no denying that, as Mrs Linneweber has stated, the Court focused on the specific design of the structure and course of the various games in the *Glawe* and *Town & County Factors* judgments, (13) but those cases, unlike the ones here under discussion, did not concern the question of the similarity of games of chance for the purposes of fiscal neutrality and the question of taxation as such: the aim was to calculate the *taxable amount* and especially to assess the consideration actually received, as a function of the specific design of the game of chance.

48. When it comes to assessing the similarity of games of chance for the purposes of fiscal neutrality, what needs to be borne in mind is that this principle entails the equal treatment of 'similar goods [and services], which are thus in competition with each other' and, therefore, is also, as the Court has already ruled, an expression of the principle of the elimination of distortion in competition. (14)

49. Accordingly, in the judgments in Cases C-481/98 (15) and C-384/01 (16) the Court assessed the similarity of activities to see whether the activities in question were in competition with each other and different fiscal treatment therefore posed the risk of distorting competition.

50. Contrary to the Commission's arguments, the fact that the cases referred to in the previous paragraph concern a reduced tax rate does not preclude the applicability of that case-law to the current two cases, since the question there is at least whether or not certain supplies of goods or services must be afforded equal fiscal treatment in accordance with the principle of fiscal

neutrality.

51. If, then, the similarity of goods or services depends on whether or not they are in competition with each other, there is a strong argument for an analogy with the Court's case-law on the second paragraph of Article 90 EC. In that case-law the Court states that, when the similarity of goods is being assessed, it must be considered 'whether they have similar characteristics and meet the same needs from the point of view of consumers, the test being not whether they are strictly identical but whether their use is similar and comparable.' (17)

52. By focusing on the consumer's decision to purchase, the Court adopted this approach, for example, in the case of *Commission* v *France* in order to consider whether, in keeping with the principle of fiscal neutrality, reimbursable and non-reimbursable medicinal products must be regarded as similar products in competition with each other. (18)

53. If this is applied to forms of gambling, they are thus to be regarded as similar provided that they 'meet the same needs' of the consumer, a gambler, and their use is thus comparable, i.e. if, for example, differences between two games of chance of the same type, e.g. two card game variants, do not influence the consumer's decision to participate in one or other game of chance. In such a case, as the use of the games of chance in question is, from the consumer's point of view, comparable, taxing them at different rates might lead to distortions of competition.

54. It should be added that in an assessment of the question whether differences along these lines carry any weight – as generally when turnover is assessed under the common system of VAT – an overall view must be taken which avoids artificial distinctions and focuses primarily on the average consumer's point of view. (19)

55. Whether in a specific case the gaming machines and card games operated outside public casinos are comparable in terms of their use by the average consumer to the gaming machines and card games offered by such public casinos and meet the same needs or whether, on the other hand, they differ substantially from one another is, however, for the national court to assess.

56. Given otherwise the same basic type of game of chance – card game or gaming machine – and bearing in mind that the appeal of gambling primarily lies in the possibility of winning, the potential scale of the winnings and, generally, the risk inherent in gambling are likely to have a relevant influence on the average consumer's decision to gamble.

57. As regards, finally, the arguments presented by Mrs Linneweber and the German Government, according to which restricting the exemption to games of chance organised in public casinos is compatible with the principle of fiscal neutrality because those games are subject to the casino levy, which also helps to cover turnover tax, suffice it to say that the Court rejected this argument in the *Fischer* judgment. (20)

58. In the light of the foregoing considerations the answer to the first two questions in Case C-453/02 must be that Article 13B(f) of the Sixth Directive precludes the taxation of the operation of a gaming machine if the operation of a similar gaming machine by a licensed public casino is exempt from VAT. In assessing the similarity of gaming machines, the national court must focus on whether the use of the gaming machines operated in public casinos is comparable from the average consumer's point of view to the use of gaming machines operated elsewhere, those machines therefore being in competition with each other, factors which must be taken into account in this regard being in particular the potential scale of winnings and the gambling risk.

59. Similarly, the answer to the first question in Case C-462/02 must be that Article 13B(f) of the Sixth Directive precludes the taxation of the organisation of a card game if the organisation of a similar card game by a licensed public casino is exempt from VAT. In assessing the similarity of card games, the national court must focus on whether the use of the card games organised in public casinos is comparable from the average consumer's point of view to the use of card games organised elsewhere, those card games therefore being in competition with each other, factors which must be taken into account in this regard being in particular the potential scale of winnings and the gambling risk.

60. As regards, finally, the argument presented by the German Government at the hearing that the duration of the effect of that judgment should possibly be curtailed, especially because it was

confident that the German turnover tax rules complied with Community law, there do not appear to me to be adequate grounds for such a time-limit. As the Commission has rightly commented, the Court's judgment in the *Glawe* case (21) does not justify any legitimate expectation of the general consistency with Community law of the German turnover tax rules as they relate to the taxation of games of chance, since that judgment concerned only the calculation of the taxable amount. Nor – in view of the discretion which the Commission enjoys in this sphere – could such an expectation be justified by the fact that the Commission had not yet initiated proceedings against the Federal Republic of Germany for infringing the Treaty in the area of the taxation of games of chance.

B – *The direct effect of tax exemption pursuant to Article 13B(f) of the Sixth Directive (third question in Case C-453/02 and second question in Case C-462/02)*

1. Main arguments of the parties

61. In the view of the *German Government* the exemption of betting, lotteries and other forms of gambling from tax for which Article 13B(f) provides is, on the one hand, not unconditional and, on the other hand, too imprecise to justify unambiguous and thus directly applicable obligations. Nor does the principle of fiscal neutrality do anything to change the ambiguity of Article 13B(f) of the Sixth Directive.

62. Although the *Commission* admits that the Member States enjoy considerable latitude in the taxation of gambling, a Member State could not dismiss the claim of a taxpayer able to prove that he was exempt under the directive by stating that appropriate national legislation had not been adopted. The Commission refers in particular to the *Kügler* judgment (22) in this context and argues on that basis that restrictions of an exemption rule of a contingent nature as in the present case cannot preclude direct effect.

63. Mrs *Linneweber* stated at the hearing that she essentially shared the Commission's view in this respect.

2. Appraisal

64. In asking the third question in Case C-453/02 and the second question in Case C-462/02, the Bundesfinanzhof is seeking to establish whether in circumstances such as those in the two main actions an individual may rely before a national court on the tax exemption for which Article 13B(f) of the Sixth Directive provides.

65. It is settled case-law that wherever the provisions of a directive appear to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied on by individuals against the State and the rights laid down therein must be protected. (23)

66. What must first be noted here is that the fact that a provision of Community law is in need of interpretation – in the light, for example, of a principle such as that of fiscal neutrality – does not in itself preclude that provision from being sufficiently precise and definite for an individual to be able to rely on it before a national court. (24) The procedure for a preliminary ruling on the interpretation of Community law is intended rather to ensure the uniform assertion – particularly against conflicting national law – of directly effective rights granted to the individual in Community law. (25)

67. It is true that the Member States have some discretion in the limitation of the scope of the exemption pursuant to Article 13B(f). (26)

68. However, the Court has ruled in settled case-law that, even when a directive allows the Member States a fairly wide discretion, individuals may not be denied the right to rely on provisions of the directive to the extent that, owing to their particular subject-matter, they are capable of being severed from the general body of provisions and applied as such. (27)

69. Provided that, when laying down the conditions and limitations of the tax exemption under Article 13B(f), a Member State observes the discretion accorded to it by that provision, there is therefore no doubt that an individual who does not fall within the scope of the tax exemption thus defined may not rely on that provision as a means of objecting to his assessment to tax. (28)

70. Conversely, however, the possibility of an individual relying on this provision in order to prevent the application of national rules cannot be precluded where those national rules go beyond

or are inconsistent with the discretion accorded to the Member States.

71. As I have already stated above, Article 13B(f) must be taken to mean that the Member States must observe the principle of fiscal neutrality when laying down the conditions and limitations of the exemption of gambling from tax. (29)

72. If, then, a Member State has omitted to exempt gambling from tax in accordance with the principle of fiscal neutrality, it cannot, as the Commission has rightly argued, rely on its own omission in order to refuse a taxpayer entitlement to an exemption which he may claim under the Sixth Directive. (30)

73. Whether this is the case in the main actions here in question is for the national court to determine with the aid of the indications given in the answers to the first two questions in Case C-453/02 and the first question in Case C-462/02.

74. Thus the answer to the third question in Case C-453/02 and the second question in Case C-462/02 is that an individual may rely before a national court on the tax exemption pursuant to Article 13B(f) of the Sixth Directive in order to oppose national rules which are incompatible with that provision.

V – Conclusion

75. In view of the foregoing it is proposed that the Court should answer the questions referred to it as follows:

A – *In Case C-453/02*

(1)Article 13B(f) of the Sixth Directive precludes the taxation of the operation of a gaming machine if the operation of a similar gaming machine by a licensed public casino is exempt from value added tax. When assessing the similarity of gaming machines, the national court must consider whether the use of the gaming machines operated in public casinos and those operated elsewhere is comparable for the average consumer and they are therefore in competition with each other, and the factors which must be taken into account in this respect include, in particular, the potential scale of winnings and the gambling risk.

(2)An individual may rely before a national court on exemption from tax pursuant to Article 13B(f) of the Sixth Directive in order to oppose national rules which are incompatible with that provision.

B – *In Case C-462/02*

(1)Article 13B(f) of the Sixth Directive precludes the taxation of the organisation of a card game if the organisation of a similar card game by a licensed public casino is exempt from value added tax. When assessing the similarity of card games, the national court must consider whether the use of the card games organised in public casinos and those organised elsewhere is comparable for the average consumer and they are therefore in competition with each other, and the factors which must be taken into account in this respect include, in particular, the potential scale of winnings and the gambling risk.

(2)An individual may rely before a national court on exemption from tax pursuant to Article 13B(f) of the Sixth Directive in order to oppose national rules which are incompatible with that provision.

1 – Original language: German.

2 – Council Directive 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 – Judgment in Case C-283/95 [1998] ECR I-3369.

4 – Judgment in Case C-283/95 (cited in footnote 3).

5 – Judgment in Case C-283/95 (cited in footnote 3), paragraph 27.

6 – See, for example, the judgments in Case C-384/01 *Commission* v *France* [2003] ECR I-4395, paragraph 25, Case C-267/99 *Christiane Adam* [2001] ECR I--7467, paragraph 36, and Case C-481/98 *Commision* v *France* [2001] ECR I-3369, paragraph 22.

7 – For this aspect see, in particular, the judgments in Case C-144/00 *Hoffmann* [2003] ECR I-2921, paragraph 27, Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 30, and Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20.

8 – Judgment in Case C-111/92 *Lange* [1993] ECR I-4677, paragraphs 16 and 17.

9 – Judgment in Case C-283/95 (cited in footnote 3), paragraph 28.
10 – Judgment in Case C-283/95 (cited in footnote 3), paragraph 31.
11 – Opinion in Case C-498/99 *Town & County Factors* (judgment [2002] ECR I-7173, paragraph 70).
12 – See my Opinion in Case C-498/99 (cited in footnote 11), paragraph 69, and, earlier, the Opinion of Advocate General Jacobs in Case C-38/93 *Glawe* (judgment [1994] ECR I-1679, paragraph 10).
13 – See also my comments in my Opinion in Case C-498/99 (cited in footnote 11), paragraphs 68 to 74, and the judgment in Case C-38/93 (cited in footnote 12).
14 – As expressly stated in the judgment in Case C-481/98 (cited in footnote 6), paragraph 22; see also paragraph 27 above.
15 – Judgment in Case C-481/98 (cited in footnote 6), paragraphs 27 and 28.
16 – Judgment in Case C-384/01 (cited in footnote 6), paragraph 30.
17 – Inter alia the judgments in Case C-302/00 *Commission* v *France* [2002] ECR I? 2055, paragraph 23, and Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I?2229, paragraph 27.
18 – Judgment in Case C-481/98 (cited in footnote 6), paragraph 27.
19 – See the judgment in Case C-349/96 *Card Protection Plan* [1999] ECR I-973, paragraph 29.
20 – See the judgment in Case C-283/95 (cited in footnote 3), paragraphs 29 and 30.
21 – See paragraph 47 above.
22 – Judgment in Case C-141/00 (cited in footnote 7), paragraph 57.
23 – See inter alia the judgments in Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 98, Case C?141/00 (cited in footnote 7), paragraph 51, and Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 29.
24 – See, for example, the recent judgment in Case C-102/02 *Beuttenmüller* [2004] ECR I?0000, especially paragraph 37.
25 – See, in this respect, the judgment in Case 26/62 *Van Gend & Loos* [1963] ECR 1, 24.
26 – See paragraphs 26 and 42 et seq. above.
27 – See the judgments in Case C-346/97 *Braathens* [1999] ECR I-3419, paragraph 30, and Case 8/81 *Becker* [1982] ECR 53, paragraph 30.
28 – See the judgment in Case C-141/00 (cited in footnote 7), paragraph 55.
29 – See paragraph 26 above.
30 – See the judgment in Case C-141/00 (cited in footnote 7), paragraph 60.