OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 19 July 2012 (1)

Case C?174/11

Finanzamt Steglitz

v

Ines Zimmermann

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

(Sixth Council Directive 77/388/EEC – VAT – Exemptions – Article 13(A)(1)(g) – Services linked to welfare and social security work that are supplied by bodies governed by public law or by other organisations recognised as charitable – National legislation under which the exemption of out-patient care services is subject to certain conditions which are not, however, applicable when the services in question are supplied by certain associations approved by the State, or by the members of those associations)

1. Value added tax (VAT) was originally meant and introduced as a simple tax on the supply of goods and services. However, it is arguable that the VAT system and some of its rules have turned out to be rather complicated. Indeed, one judge of the Court of Appeal (England and Wales) has observed in that regard that ‘beyond the everyday world … lies the world of [VAT], a kind of fiscal theme park in which factual and legal realities are suspended or inverted’. (2)

2. Be that as it may, in the present case the Bundesfinanzhof (Federal Finance Court, Germany) seeks guidance on the interpretation of Article 13(A)(1)(g) and/or (2)(a) of the Sixth Directive. (3) The reference has been made in proceedings between Ms Ines Zimmermann and the Finanzamt Steglitz (Tax Office, Steglitz) (‘the Finanzamt’) concerning the VAT due for the years 1993 and 1994.

3. The Court is asked to clarify whether a Member State may – in the context of an application of Article 13(A)(1)(g) of the Sixth Directive – make the exemption of out-patient care services for those who are sick or in need of care dependent on the fact that, in the case of such organisations, ‘the costs of the care have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year’. (4)

4. In particular, as I will show, serious doubts arise as to whether such a condition is consistent with the principle of fiscal neutrality, in so far as it does not apply to all providers of out-patient care services equally.

I – **Legal framework**

A – *European Union law*

5. Article 13(A)(1)(g) of the Sixth Directive provides that Member States are to 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:

'the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned'.

6. According to Article 13(A)(2)(a) of the Sixth Directive, '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 [VAT],

– 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 [VAT]'.

B – *National law*

7. Under Paragraph 4(16)(e) of the Umsatzsteuergesetz 1993 (Law on turnover tax 1993, 'UStG') in the version applicable in the material years (that is, 1993 and 1994), the following transactions covered by Paragraph 1(1)(1) to 1(1)(3) of the UStG were exempt: 'transactions closely linked with the operation of … organisations providing out-patient care for those who are sick or in need of care where:

(e) in the case of organisations for the temporary admission of those in need of care and organisations providing out-patient care for those who are sick or in need of care, the costs of the care have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year'.

8. Under the first sentence of Paragraph 4(18) of the UStG, the following transactions are exempt: 'the services of officially recognised voluntary welfare associations, and corporations, associations of persons and funds serving purposes of voluntary welfare which are affiliated as members of a welfare association, where

(a) that operator serves, solely and directly, public-interest, charitable or ecclesiastical purposes,

(b) the services directly benefit the group of persons who are beneficiaries under the statute, act of foundation or other constitution, and

(c) the consideration paid for the services in question is lower than the average rates demanded by commercial undertakings for similar services.'

9. The threshold of two thirds, provided for in Paragraph 4(16)(e) of the UStG ('the two thirds threshold'), was lowered to 40% as of 1 January 1995.

10. Paragraph 23 of the Umsatzsteuer-Durchführungsverordnung 1993 (VAT Implementing Regulation 1993; 'UStDV') lists eleven associations which are classified as officially recognised welfare associations for the purposes of Paragraph 4(18) of the UStG.

II – **Facts and the questions referred**

11. Ms Zimmermann, who is the applicant and respondent in the appeal on a point of law in the main proceedings, runs an out-patient care service in Berlin. She is a registered nurse and in 1992 worked at a welfare centre as a staff nurse. In addition, from the beginning of 1993 she treated individual patients on a freelance basis and on 1 June 1993 registered an out-patient care service. Following her application of 27 August 1993, she was admitted to the health insurance schemes on 1 October 1993 for home nursing services, (5) home-care services (6) and domestic help. (7) In the VAT returns for the material years, she treated her transactions as exempt pursuant to Paragraph 4(16)(e) of the UStG.

12. In 1999, the Finanzamt, the defendant and appellant in the appeal on a point of law in the main proceedings, found that Ms Zimmermann (together with her staff) had treated a total of 76 people in 1993, 52 of whom (= 68%) were private patients. Thereupon, the Finanzamt refused exemption for the services provided by Ms Zimmermann in 1993 pursuant to Paragraph 4(16)(e) of the UStG, on the ground that under that provision in at least two thirds of the cases the costs should have been borne wholly or mainly by the statutory social security or social welfare authorities.

13. The Finanzamt refused exemption for the services provided by Ms Zimmermann in 1994 under Paragraph 4(16)(e) of the UStG because that provision related to circumstances in the previous year. However, the VAT exemption under Paragraph 4(14) of the UStG applied in so far as Ms Zimmermann had provided care of a therapeutic nature; the Finanzamt estimated the proportion of those services at one third. (8)

14. Following an unsuccessful complaint, Ms Zimmermann brought an action against the Finanzamt. In the course of the direct action proceedings, she submitted a letter, dated 19 October 2005, sent to her by the Berlin Senate Administration for Health, Social Affairs and Consumer Protection. It states: '... I can confirm to you that you provided the same services and carried out the same activities in the field of home nursing as the care centres (welfare centres) from the League of Voluntary Welfare Associations in Berlin. The description of duties and the substance of the activities carried out by the private service providers were identical to those of the voluntary welfare centres. According to my information, they were identical at least since 1988. I would point out that from 1 January 1992 VAT exemption has been made dependent on certain requirements in Paragraph 4(16)(e) of the UStG. I cannot, and do not wish to, assess whether those requirements are satisfied. Irrespective of that provision, however, I believe that you and your

undertaking have been recognised for the purposes of social security law as a charitable organisation.'

15. The Finanzgericht (Finance Court) granted the application for the most part. As grounds, it stated that Ms Zimmermann's transactions performed in the material year 1993, up to 1 October, were exempt under the first sentence of Paragraph 4(14) of the UStG in so far as they were apportionable to care of a therapeutic nature; the Finanzgericht estimated the proportion of those services at 75% on the basis of calculations submitted by Ms Zimmermann in the direct action proceedings.

16. According to the Finanzgericht, Ms Zimmermann could claim exemption under Paragraph 4(16)(e) of the UStG for the period from 1 October 1993 to 31 December 1994. From that period, at least two thirds of those transactions were apportionable to persons, the costs of whose care were borne wholly or mainly by the statutory social security or social welfare authorities. Paragraph 4(16)(e) of the UStG was to be interpreted in conformity with the Sixth Directive to the effect that only the period from October 1993 was relevant.

17. With its appeal on a point of law, the Finanzamt alleges an infringement of Paragraph 4(16)(e) of the UStG. It claims that the Bundesfinanzhof should annul the previous decision and dismiss the application, in so far as the Finanzgericht granted the application for the period from 1 October 1993 to 31 December 1994 on the basis of Paragraph 4(16)(e) of the UStG. Ms Zimmermann claims that the Bundesfinanzhof should dismiss the appeal on a point of law.

18. Against that background, the referring court decided to stay the proceedings and to refer the following questions to the Court:

'(1) Does Article 13(A)(1)(g) and/or (2)(a) of the [Sixth Directive] permit the national legislature to make the exemption of out-patient care services for those who are sick or in need of care dependent on the fact that, in the case of such organisations, "the costs of the care have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year" (Paragraph 4(16)(e) of the [UStG])?

(2) Is it relevant to the answer to this question, having regard to the principle of the neutrality of VAT, that the national legislature treats the same services as exempt under different conditions where they are carried out by officially recognised voluntary welfare associations, and corporations, associations of persons and funds serving purposes of voluntary welfare which are affiliated as members of a welfare association (Paragraph 4(18) of the [UStG])?'

III – **Appraisal**

A – *Principal arguments of the parties*

19. Ms Zimmermann explains that public organisations (charitable associations) and for-profit organisations compete on the market for out-patient care services. She submits that a provision such as the one at issue in the main proceedings is of such a kind as to ensure the control of prices approved by the public authorities of the Member States where the following conditions are met: (i) the costs borne by the statutory social security or social welfare authorities correspond to the agreed tariffs; and (ii) the costs borne by the social security authorities are generally lower than the amounts charged to private patients or to private insurance companies.

20. Ms Zimmermann submits essentially that, in order to assess whether there is an unlawful distortion of competition, the national courts should establish whether the services provided, which are, from the patient's or the final consumer's perspective, identical or similar, are subject to

different tax treatment. In this respect, the person, the legal form or the qualification of the operator providing the care for the purposes of turnover tax should play no role.

21. The German Government submits that the way in which the legislation organises the official recognition of organisations as charitable takes sufficient account of the following aspects, which follow from the case?law: (9) (i) the possible existence of specific legal provisions; (ii) the public interest character of the activities of the taxable person; (iii) whether other taxable persons carrying out the same activities already have similar recognition; (iv) whether a large proportion of the costs of the services in question is eventually borne by sickness insurance funds or by other organisations of social security; (v) the principle of neutrality in the sense of competitive neutrality.

22. According to the German Government, the limits of the margin of discretion as regards the principle of fiscal neutrality have been respected. In particular, in the context of Article 13(A)(1)(g) of the Sixth Directive, it is an application of the principle of equal treatment in the framework of the recognition of organisations as charitable in order to assimilate them to public organisations. On this view, the principle of neutrality may not be considered in the usual sense that the contents of services which are identical must be taxed in an identical way. Rather, it must be considered in the sense that identical taxable persons need to be subject to the same conditions in order to benefit from the exemption. Moreover, according to the German Government, a provision relating to the recognition of an organisation by a Member State which results in distortions of competition at the expense of private companies is permissible.

23. Therefore, the German Government considers that, once it is accepted that Paragraph 4(18) of the UStG – unlike point 16 of that paragraph – applies only to non-profit legal persons whose charitable character was officially recognised, the German provisions do not treat identical taxable persons in a different manner, but merely lay down different conditions for the recognition as an organisation having a charitable character of different taxable persons who are subject to different material and legal framework conditions.

B – *Analysis*

1. The first question

24. First of all, as regards the legal situation under national law, the referring court states in no uncertain terms that, in the present case, the requirements set out in Paragraph 4(16)(e) of the UStG are not satisfied.

25. However, the referring court harbours doubts as to whether that outcome is correct under the Sixth Directive.

26. Therefore, by its first question, it decided to ask the Court whether Article 13(A)(1)(g) of the Sixth Directive precludes the exemption of out-patient care services, provided by private organisations, from being subject to a condition such as the one in the main proceedings. (10)

27. I shall start by recounting the relevant case?law, which is already quite extensive and in the light of which it will be necessary to consider the questions referred.

28. As the Court recently recalled in *Future Health Technologies*, (11) ‘the exemptions under [Article 13(A) of the Sixth Directive (12)] are not aimed at exempting from VAT every activity performed in the public interest, but only those which are listed and described in great detail in it’.

29. It also follows from the case?law relating to the Sixth Directive that the terms used to specify the exemptions in Article 13 are to be interpreted strictly, since they constitute exceptions

to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 of the Sixth Directive should be construed in such a way as to deprive the exemptions of their intended effect. (13)

30. It should be noted that the rules for interpreting the exemptions in Article 13 of the Sixth Directive set out in point 29 above apply to the specific conditions laid down for those exemptions to apply and in particular to those concerning the status or identity of the economic agent performing the services covered by the exemption. (14)

31. Accordingly, the Court has already held that Article 13(A)(1)(g) of the Sixth Directive on the exemption from VAT of supplies linked to welfare and social security work is to be interpreted as meaning that the expression ‘organisations recognised as charitable by the Member State concerned’ (15) does not exclude private, profit-making entities such as, for instance, natural persons running a ‘business’. (16)

32. Article 13(A)(l)(g) of the Sixth Directive does not specify the conditions and procedures for recognising organisations other than those governed by public law as charitable. It is thus in principle for the national law of each Member State to lay down the rules according to which such recognition may be granted to such organisations. (17)

33. Moreover, the adoption of national rules in this area is provided for in Article 13(A)(2)(a) of the Sixth Directive, under which ‘the Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1) ... (g), ... subject in each individual case to one ... of the conditions’ referred to later therein. (18)

34. The case?law also makes clear that although the introductory sentence of Article 13(A)(1) of the Sixth Directive states that Member States are to lay down the conditions for exemptions in order to ensure the correct and straightforward application of the exemptions and to prevent any possible evasion, avoidance or abuse, those conditions cannot affect the definition of the subject-matter of the exemptions envisaged. (19)

35. It follows from the case?law (20) that Article 13(A)(1)(g) of the Sixth Directive grants the Member States a discretion to recognise as charitable certain organisations not governed by public law.

36. However, the fact remains that, where a taxable person challenges the recognition of an organisation as charitable, it is for the national courts to examine whether the competent authorities have observed the limits of the discretion granted by Article 13(A)(1)(g) of the Sixth Directive in accordance with general principles of EU law, in particular the principle of equal treatment. (21)

37. In that connection, the principle of fiscal neutrality precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes. (22) Indeed, that principle constitutes the logical basis of VAT. In that regard, it follows from the order for reference, and it is not disputed, that the services which Ms Zimmermann provided, at least those provided since 1 October 1993, were essentially the same as those which are automatically exempted under Paragraph 4(18) of the UStG.

38. Finally, it is also apparent from the case?law that, in order to determine whether establishments governed by private law may be recognised for the purpose of applying the

exemption provided for in Article 13(A)(1)(g) of the Sixth Directive, the national authorities may, in accordance with EU law and subject to review by the national courts, take into consideration, inter alia and in addition to the public interest of the activities of the taxable person in question and the fact that other taxable persons carrying on the same activities already have similar recognition, *the fact that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies*. (23)

39. In that regard, Paragraph 4(16)(e) of the UStG was introduced by the German legislature in order to 'improve the welfare structures for the care of the sick and those that require care'. (24) The threshold of two thirds laid down in that paragraph seeks to ensure that the tax advantage contributes significantly to alleviating the burden on social security organisations. (25)

40. Therefore, it is clear that Paragraph 4(16)(e) may be read in conjunction with the requirement in Article 13(A)(1)(g) of the Sixth Directive, according to which the provider of the services which are enumerated therein must be an '[organisation] recognised as charitable by the Member State concerned'.

41. In addition to the case?law cited in point 38 above, the Court held in *L.u.P.* (26) that Article 13(A)(1)(b) of the Sixth Directive precludes national legislation which makes the exemption of medical tests carried out by a laboratory governed by private law outside a centre for treatment subject to the condition that they be carried out under medical supervision. It also held, however, *that Article 13(A)(1)(b) permits such legislation to make the exemption of those tests subject to the condition that at least 40% of those services must be intended for persons insured by a social security authority*.

42. It follows that criteria of that type – which are based on a particular definition of the group of beneficiaries of the services – must, according to that case?law, be assessed in the light of Article 13(A)(1) of the Sixth Directive.

43. To my mind the crux of the present case lies essentially in establishing whether – by subjecting the exemption under Article 13(A)(1)(g) of the Sixth Directive to conditions such as those in Paragraph 4(16) of the UStG – the Federal Republic went beyond the margin of discretion afforded to it under the Sixth Directive. (27)

44. The referring court points out that one of the questions of interpretation of EU law raised before it is the fact that it is uncertain whether the two thirds threshold contained in Paragraph 4(16)(e) of the UStG may be based on Article 13(A)(1)(g) or on Article 13(A)(2)(a) of the Sixth Directive.

45. The criterion at issue in the present case is slightly different from the one at issue in *L.u.P.* (28) The criterion in the present case is not based only on the composition of the group of beneficiaries of the services, but also requires that, for a certain minimum proportion of the beneficiaries for whom social security or welfare contributes to the coverage of medical and pharmaceutical costs, the organisation in question bears these costs in their entirety or 'a large part thereof'.

46. The German provision at issue could, at least in theory, be interpreted as also containing a criterion relating to prices, which would have to be assessed separately under the third indent of Article 13(A)(2)(a) of the Sixth Directive. However, contrary to the claims of Ms Zimmermann and the German Government, I consider that it is not useful for the purposes of resolving the case in the main proceedings to rely on that article. The Commission is correct that, in view of the fact that the referring court did not deem it necessary to provide a more in-depth assessment in this regard, a separate analysis of Article 13(A)(2)(a) would appear artificial and, in any case, unnecessary for

the purposes of resolving the case at hand. Moreover, the case in the main proceedings does not in any event revolve around issues of the establishment of prices.

a) Whether the limits of the Member State's margin of discretion were respected – the two thirds threshold

47. As I noted in point 41 above, in *L.u.P.* (29) the Court already accepted that Article 13(A)(1)(b) of the Sixth Directive permits national legislation to make the exemption of the medical tests in question subject to the condition that at least 40% of those services must be intended for persons insured by a social security authority. The Court considered that that choice fell within the margin of discretion enjoyed by the Member States at the stage of determining to what extent they will recognise an organisation as charitable. (30)

48. To my mind the Court has, in fact, already recognised that provisions which lay down a certain share threshold (such as the two thirds) are, in principle, lawful in this context. I agree with the Commission that, to the extent that it is relevant in the present case and irrespective of that fact that it applies to a different social system (welfare), the two thirds criterion does not differ from the criterion assessed by the Court in *L.u.P.* save for one point only: that is, the required proportion of beneficiaries of services for whom the social systems bear the entirety or a large part of costs.

49. Therefore, I consider that setting the threshold at two thirds remains within the limits of what the Member States may require in order to recognise certain entities as charitable. (31)

50. In my view, by setting the threshold at two thirds, the German legislature has chosen a percentage which ensures a sufficient level of integration of the service provider in the social security system. That, in turn, allows the provider's charitable character to be safeguarded and his services to be regarded as having (sufficiently) close links to the social welfare and security.

51. It may be added that, in the case?law, where the Court refers to the bearing of costs by the sickness insurance funds as a criterion for determining whether an organisation will be officially recognised it also always refers to whether the costs are 'largely' met by health insurance schemes. (32) Therefore, it would appear that, in the context of its margin of discretion, the German legislature opted for a threshold which is simple but appropriate.

b) Whether the limits of the Member State's margin of discretion were respected – the previous calendar year

52. At the outset, I agree with the Commission that the reference to the previous calendar year creates a number of difficulties. The choice of the previous calendar year naturally implies a certain amount of inaccuracy in so far as it is not the year in which the transactions concerned were carried out.

53. However, suffice it to say that the fact that the two thirds threshold refers to the 'previous calendar year' does not exceed the Member States' discretion.

54. On the one hand, it is arguable that the above conclusion is supported by the fact that in *L.u.P.* (33) the Court referred to the same criterion and nowhere in the judgment did it dispute the reference to the 'previous calendar year' in the provision laying down the 40% limit (34) at issue in that case. On the other hand, it is also true that in *L.u.P.* (35) the Court did not *expressly* comment on the requirement laid down in Paragraph 4(16)(c) of the UStG that the 40% limit must be satisfied in the 'previous calendar year'.

55. Be that as it may, I agree with the German Government and the Commission that the fact

that Paragraph 4(16)(e) of the UStG makes a reference to the previous calendar year – aside from the obvious practical reasons – has the advantage that it complies with the principle of legal certainty.

56. Indeed, it would otherwise prove difficult if taxable persons constantly referred to the current year. If that were the case, the taxable person would not and could not know when providing the service whether or not he will carry out an exempted transaction, unless he knew the share of the costs to be borne in the course of the current year.

57. The approach which I advocate here is also supported by the referring court, which considers in the order for reference that the focus on the circumstances in the previous calendar year in Paragraph 4(16)(e) (36) serves to ensure legal certainty and may be based in EU law on the introductory sentence to Article 13(A)(1) of the Sixth Directive, according to which regard must be had, inter alia, to the 'straightforward application of such exemptions'.

58. It follows from all of the foregoing considerations that Article 13(A)(1)(g) of the Sixth Directive permits, in principle, the national legislature to make the exemption of out-patient care services for those who are sick or in need of care dependent on the fact that, in the case of such organisations, the costs of the care have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year.

59. The fact remains, however, that that criterion may only be applied in so far as it complies with the principle of fiscal neutrality, which is specifically addressed by the referring court in the second question. (37)

2. The second question

60. By its second question the referring court wishes to know whether it is relevant to the answer to the first question, having regard to the principle of fiscal neutrality, that the national legislature treats the same services as exempt under different conditions where they are carried out by officially recognised voluntary welfare associations, and corporations, associations of persons and funds serving purposes of voluntary welfare which are affiliated as members of a welfare association. (38)

61. At the outset, it is clear that the principle of fiscal neutrality is inherent in the common system of VAT (39) and constitutes nothing less than a fundamental principle thereof. (40)

62. In that regard, it must be recalled that the principle of fiscal neutrality was intended to reflect, in matters relating to VAT, the general principle of equal treatment. (41)

63. To my mind, it should be pointed out in this respect that the principle of equal treatment is a general principle of EU law – and is now also enshrined in Article 20 of the Charter of Fundamental Rights – and that the principle of fiscal neutrality simply constitutes a manifestation of that principle.

64. Indeed, the Court has already had the opportunity to rule that if a provision of national law transposing an exemption under the Sixth Directive contains a condition which is contrary to the principle of fiscal neutrality, it is necessary to not apply that condition. (42)

65. Case-law also makes clear that when the Member States exercise their power under Article 13(A)(1)(g) to lay down the conditions to which the exemptions are subject and, therefore, to determine whether or not transactions are subject to VAT, they must respect the principle of fiscal neutrality. (43)

66. In *Kügler* the Court stressed that the 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. It follows that that principle would be disregarded if the possibility of relying on the exemption which is envisaged for the provision of medical care referred to in Article 13(A)(1)(c) were dependent on the legal form in which the taxable person carries on his activity. (44)

67. Moreover, case?law states that the principle of fiscal neutrality precludes in particular treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subjected to a uniform rate. (45)

68. It may be inferred from what the Court stated in *L.u.P.* (46) that compliance with the principle of fiscal neutrality requires, first, that all of the categories of establishments governed by private law referred to in Article 13(A)(1)(g) of the Sixth Directive be subject to the same conditions for the purpose of their recognition for the provision of similar services.

69. *In fine* it will obviously be for the national court (47) to ascertain whether the national legislation complies with that requirement or whether, on the contrary, it restricts the application of the conditions in question to certain types of establishments whilst excluding others.

70. However, it is already clear from the order for reference that the referring court is inclined to take the view that in the present case that principle has not been complied with.

71. As I will show in the following paragraphs, I can only agree with the referring court that, having regard to the requirement of the neutrality of VAT – here in the form of neutrality as regards competition – in the present case Ms Zimmermann should, in principle, not be refused exemption under Article 13(A)(1)(g) of the Sixth Directive on the ground that from 1 January 1992 the national legislature required, in Paragraph 4(16)(e) of the UStG in the version applicable in the material years, that the costs of the care have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year.

72. The order for reference makes clear that, according to the explanatory memorandum, both Paragraph 4(16)(e) and Paragraph 4(18) of the UStG seek to transpose the provisions of Article 13(A)(1)(g) of the Sixth Directive.

73. However, Paragraph 4(16)(e) of the UStG lays down conditions governing the exemption for care services which competitors providing similar services are not required to satisfy for exemption under Paragraph 4(18).

74. Indeed, in the case of care services provided by the League of Voluntary Welfare Associations, it is irrelevant, for the purposes of exemption under Paragraph 4(18) of the UStG, whether the costs of the care were borne in a certain proportion of cases by the statutory social security or social welfare authorities; nor are the circumstances in the previous calendar year relevant.

75. In other words, the organisations covered by Paragraph 4(18) of the UStG – contrary to

those falling under Paragraph 4(16) – are exempted from VAT irrespective of the composition of the group of beneficiaries of their services.

76. Therefore, we are faced with a situation where – taking account of the competition existing between similar providers – the recognition of certain organisations under Article 13(A)(1)(g) of the Sixth Directive (those under Paragraph 4(16) of the UStG) is not subject to the same conditions as those for services which are similar (those under Paragraph 4(18)).

77. It may be pointed out, in that respect, that on 15 March 2007 (48) the Fifth Chamber of the Bundesfinanzhof rightly came to the conclusion in *L.u.P.*, after it received the Court's answer to its preliminary question, that the national rules in Paragraph 4(14) of the UStG and Paragraph 4(16)(b) and (c) of the UStG were not compatible with the EU-law principle of fiscal neutrality, because under that provision not all of the categories of establishments governed by private law within the meaning of Article 13(A)(1)(b) of the Sixth Directive were subject to the same conditions for the purpose of their recognition for the provision of similar services.

78. I consider that there is nothing in the documents before the Court to imply that the above distinction may nevertheless be considered compatible with the principle of fiscal neutrality and the German Government's arguments are not convincing in this respect.

79. The German Government essentially argues that it should be allowed to apply different rules to different taxable persons. Indeed, in an administrative decision of 13 May 2003, entitled 'Brief information on turnover tax No 10', (49) the Oberfinanzdirektion Düsseldorf (Principal Revenue Office, Düsseldorf) took the view that, as regards exemption, different conditions apply to out-patient care services. It stated that an exemption under Paragraph 4(18) of the UStG could be granted even if the requirements laid down in Paragraph 4(16)(e) of the UStG were not satisfied.

80. However, to my mind, that argument goes against the principle of fiscal neutrality and against the Court's judgment in *L.u.P.* (50) It follows from that principle and from that case?law that, as a general rule, Member States may not apply different rules to different taxable persons.

81. The German Government argued that institutions of public law may be treated differently from entities of private law. However, it is important to point out – a point which was necessary to clarify at the hearing and which was then confirmed by the German Government – that the officially recognised voluntary welfare associations, (51) referred to in Paragraph 4(18) of the UStG, are governed by private law and not public law and therefore they are not subject to a separate exemption under Paragraph 4(16)(a), which concerns bodies governed by public law.

82. It should be pointed out that the objective pursued by Article 13(A)(1)(b) and (c) of the Sixth Directive is to reduce healthcare costs. (52) Indeed, so far as concerns the objectives pursued by the exemptions under Article 13(A)(1)(g) of the Sixth Directive, it is clear from that provision that those exemptions, by treating certain supplies of services in the general interest in the social sector more favourably for the purposes of VAT, are intended to reduce the cost of those services and to make them more accessible to the individuals who may benefit from them. (53)

83. I consider (as does the Commission) that while, admittedly, the above objective to reduce the cost of such services justifies, in principle, the use of a criterion such as the two thirds laid down by Paragraph 4(16)(e) of the UStG, the fact remains that that objective does not explain why persons in Ms Zimmermann's situation are subject to it, whereas entities mentioned in Paragraph 4(18) of the UStG are not.

84. The German Government argues that the condition in Paragraph 4(16) of the UStG seeks to ensure that the provider is indeed a charitable organisation and serves to put it on the same

footing as public organisations. It contends that the purpose of the rules in question is to use the tax exemption to bring persons within the sickness insurance scheme.

85. While I consider that to be understandable, the fact remains that both groups of taxable persons (under Paragraphs 4(16)(e) and 4(18)) should be subject to the same rules.

86. Indeed, as the Court held in *Rank Group*, 'the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established.' (54)

87. Finally, the referring court is correct to point out that the Sixth Directive does not contain any provision permitting the Member States to make exemption of the same services dependent on whether the provider is a certain association or a member of such an association.

88. As a concluding remark, I would say that if Germany chooses to introduce rules for the recognition of organisations as charitable – even though the case?law makes clear that the Sixth Directive does not require that such a recognition be granted in accordance with a formal procedure or that it be provided for expressly in national tax provisions (55) – it may do so. However, those rules must comply with the principle of fiscal neutrality.

89. It follows from all the foregoing considerations that the principle of fiscal neutrality precludes the application of the condition at issue in the main proceedings (56) if, under the applicable national provisions, the same services are treated as exempt under different conditions where they are carried out by officially recognised voluntary welfare associations, and corporations, associations of persons and funds serving purposes of voluntary welfare which are affiliated as members of a welfare association.

IV – **Conclusion**

90. For the reasons given above I am of the view that the questions referred by the Bundesfinanzhof (Germany) should be answered as follows:

1. Article 13(A)(1)(g) 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 permits, in principle, the national legislature to make the exemption of out-patient care services for those who are sick or in need of care dependent on the fact that, in the case of such organisations, the costs of the care have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year.

The fact remains, however, that that criterion may only be applied in so far as it complies with the principle of fiscal neutrality.

2. The principle of fiscal neutrality precludes the application of that criterion if, under the applicable national provisions, identical or similar services are treated as exempt under different conditions such as is the case in the main proceedings.

1 – Original language: English.

2 – *Royal & Sun Alliance Insurance Group plc* v *Customs and Excise Commissioners* [2001] STC

1476 (CA) at [54] per Sedley LJ. In my view, it should be added, however, that often the complexities surrounding its application and interpretation are not due to VAT itself, but result from attempts to play around with it.

3 – 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).

4 – Hereafter ‘the condition at issue in the main proceedings’.

5 – Paragraph 37 of the Fifth Book of the Sozialgesetzbuch (German Social Security Code, ‘SGB V’), in the version applicable at the material time (of 20 December 1988, part I, p. 2477).

6 – Paragraphs 53 to 56 of the SGB V.

7 – Paragraph 38 of the SGB V.

8 – VAT assessment notices for 1993 and 1994 of 27 April 1999.

9 – The German Government refers to: Case C?498/03 *Kingscrest Associates and Montecello* [2005] ECR I?4427, paragraphs 53 and 41 et seq., and Case C?141/00 *Kügler* [2002] ECR I?6833, paragraph 57 et seq. It also refers to Case C?45/01 *Dornier* [2003] ECR I?12911, paragraph 72 et seq.

10 – According to which the costs of the care must have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year.

11 – Case C?86/09 [2010] ECR I?5215, paragraph 29. See by analogy, in particular, Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraph 17; Case C?307/01 *D’Ambrumenil and Dispute Resolution Services* [2003] ECR I?13989, paragraph 54; and Case C?473/08 *Eulitz* [2010] ECR I?907, paragraph 26 and the case?law cited.

12 – Now Article 132 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

13 – See *Future Health Technologies*, cited in footnote 11, paragraph 30. See by analogy, in particular, Case C?445/05 *Haderer* [2007] ECR I?4841, paragraph 18 and the case?law cited; Case C?461/08 *Don Bosco Onroerend Goed* [2009] ECR I?11079, paragraph 25 and the case?law cited; as well as *Eulitz*, cited in footnote 11, paragraph 27 and the case?law cited. See also Case C?262/08 *CopyGeneA/S* [2010] ECR I?5053, paragraphs 25 and 26.

14 – See *Eulitz*, cited in footnote 11, paragraph 42. See, to that effect, Case C?216/97 *Gregg* [1999] ECR I?4947, paragraphs 16 to 20; *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 23; and *Haderer*, cited in footnote 13, paragraph 19.

15 – Note that, in the English version, the corresponding provision in Directive 2006/112 – Article 132(1)(g) – no longer uses the word ‘charitable’ and, instead, refers to ‘… bodies recognised by the Member State concerned as being *devoted to social wellbeing*’ (emphasis added).

16 – See *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 35 et seq., and *Gregg*, cited in footnote 14, paragraph 17 et seq.

17 – See *Dornier*, cited in footnote 9, paragraphs 64 and 81; *Kingscrest Associates and Montecello*

, cited in footnote 9, paragraph 49; Case C?106/05 *L.u.P.* [2006] ECR I?5123, paragraph 42; and *CopyGeneA/S*, cited in footnote 13, paragraph 63.

18 – See *Dornier*, cited in footnote 9, paragraph 65, and *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 50.

19 – See, inter alia, *Kingscrest Associates and Montecello*, cited in footnote 9, paragraphs 22 to 24 and the case?law cited, and Case C?401/05 *VDP Dental Laboratory* [2006] ECR I?12121, paragraph 26.

20 – See *Kügler*, cited in footnote 9, paragraph 54, and *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 51.

21 – See, to that effect, *Kügler*, cited in footnote 9, paragraph 56; *Dornier*, cited in footnote 9, paragraph 69; *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 52; and *L.u.P.* , cited in footnote 17, paragraph 48.

22 – See, inter alia, *Kügler*, cited in footnote 9, paragraph 30; Case C?481/98 *Commission* v *France* [2001] ECR I?3369, paragraph 22; Case C?109/02 *Commission* v *Germany* [2003] ECR I?12691, paragraph 20; *Kingscrest Associates and Montecello*, cited in footnote 9, paragraphs 41 and 54; Case C?309/06 *Marks & Spencer* [2008] ECR I?2283, paragraph 47; and Case C?41/09 *Commission* v *Netherlands* [2011] ECR I?831, paragraph 66.

23 – See *Kügler*, cited in footnote 9, paragraphs 57 and 58; *Dornier*, cited in footnote 9, paragraphs 72 and 73; *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 53 (concerning Article 13(A)(1)(g) of the Sixth Directive); and *L.u.P.*, cited in footnote 17, paragraph 53 (concerning Article 13(A)(1)(b) of the Sixth Directive).

24 – In the original, ‘[um] die bestehenden Versorgungsstrukturen bei der Pflege kranker und pflegebedürftiger Personen zu verbessern’. See *Bundestags-Drucksache* 12/1506, p. 178 in conjunction with p. 65.

25 – Reference is made here to the judgment of the Bundesfinanzhof of 24 January 2008, V R 54/06, *Bundessteuerblatt 2008*, part II, p. 643, under II. l.c., referring to the ruling of the Bundesverfassungsgericht of 31 May 2007, 1 BvR 1316/04, *Neue Juristische Wochenschrift 2007*, p. 3628.

26 – Cited in footnote 17, paragraph 55.

27 – Cf., for instance, Case C?124/96 *Commission* v *Spain* [1998] ECR I?2501, where the Court held essentially that the third indent of Article 13(A)(2)(a) of the Sixth Directive does not imply that a Member State, by making the exemption envisaged in Article 13(A)(1)(m) subject to one or more conditions laid down in Paragraph 2(a) of that provision, may alter the scope of the latter. Moreover, Article 13(A)(2)(a) excludes a restriction of the exemption to private sports bodies or establishments of a social nature which charge membership fees not exceeding a certain amount without taking into account the nature and particular circumstances of each sporting activity.

28 – Cited in footnote 17.

29 – Ibid.

30 – See *Kügler*, cited in footnote 9, paragraph 54, and *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 51.

31 – It may be recalled here that, in the meantime, that threshold of two thirds has been reduced to 40%.

32 – See *Kügler*, cited in footnote 9, paragraph 57 et seq.; *Dornier*, cited in footnote 9, paragraph 72 et seq.; and *Kingscrest Associates and Montecello*, cited in footnote 9, paragraphs 53 and 41 et seq.

33 – Cited in footnote 17.

34 – Laid down in Paragraph 4(16)(c) of the UStG 1980/1991/1993.

35 – In particular, in paragraph 41 et seq.

36 – And, in fact, in Paragraph 4(16)(b) to (d) of the UStG.

37 – See *L.u.P.*, cited in footnote 17, paragraph 50.

38 – Paragraph 4(18) of the UStG.

39 – See, inter alia, Case C?283/95 *Fischer* [1998] ECR I?3369, paragraph 27, and *Gregg*, cited in footnote 14, paragraph 19.

40 – See Case C?29/08 *SKF* [2009] ECR I?10413, paragraph 67 and the case?law cited.

41 – See, inter alia, Case C?174/08 *NCC Construction Danmark* [2009] ECR I?10567, paragraph 41; *CopyGene A/S*, cited in footnote 13, paragraph 64; and Joined Cases C?259/10 and C?260/10 *Rank Group* [2011] ECR I?10947, paragraph 61. See also Case C?240/05 *Eurodental* [2006] ECR I?11479, paragraph 55.

42 – Cf. Joined Cases C?453/02 and C?462/02 *Linneweber and Akritidis* [2005] ECR I?1131, paragraph 37.

43 – See, by analogy, *Fischer*, cited in footnote 39, paragraph 27, and *Linneweber and Akritidis*, cited in footnote 42, paragraph 24.

44 – Cited in footnote 9, paragraph 30. See, to that effect, *Gregg*, cited in footnote 14, paragraph 20.

45 – See Case C?267/99 *Adam* [2001] ECR I?7467, paragraph 36, and Case C?109/02 *Commission* v *Germany*, cited in footnote 22, paragraph 20.

46 – Cited in footnote 17, paragraph 50.

47 – Cf. *Kügler*, cited in footnote 9, paragraph 57; *Dornier*, cited in footnote 9, paragraph 74; and *CopyGene A/S*, cited in footnote 13, paragraph 65.

48 – V R 55/03 (BFHE 217, 48, BStBl II 2008, 31). However, contrast that with the judgment of the Bundesfinanzhof in Case *Czukas* of 24 January 2008, V R 54/06.

49 – Kurzinformation Umsatzsteuer Nr. 10 (*Umsatzsteuer-Rundschau* 2005, 516).

50 – Cited in footnote 17.

51 – And corporations, associations of persons and funds serving purposes of voluntary welfare

which are affiliated as members of a welfare association.

52 – See, inter alia, *L.u.P.*, cited in footnote 17, paragraph 31.

53 – *Kingscrest Associates and Montecello*, cited in footnote 9, paragraph 30. See also *Dornier*, cited in footnote 9, paragraph 43 (concerning Article 13(A)(1)(b) and (c) of the Sixth Directive); *D'Ambrumenil and Dispute Resolution Services*, cited in footnote 11, paragraph 58 (Article 13(A)(1)(b)); and *L.u.P.*, cited in footnote 17, paragraph 25 (Article 13(A)(1)(b) and (c)).

54 – Cited in footnote 41, paragraph 36.

55 – See *Dornier*, cited in footnote 9, paragraph 67.

56 – That is, where a Member State – in the context of an application of the exemption in Article 13(A)(1)(g) of the Sixth Directive – makes the exemption of out-patient care services for those who are sick or in need of care dependent on the fact that, in the case of such organisations, *the costs of the care have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year*.