OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 20 June 2013 (1)

Case C?319/12

Minister Finansów

v

MDDP Sp. z o.o. Akademia Biznesu, Sp. komandytowa

(Request for a preliminary ruling from the Naczelny S?d Administracyjny (Poland))

(Taxation – Value added tax – Article 132(1)(i) of Directive 2006/112/EC – Tax exemption for educational services by commercial bodies – Direct effect)

I – **Introduction**

1. The law on value added tax (VAT) is not always readily understandable. Thus the dispute underlying this request for a preliminary ruling is at first surprising, in that the taxable person is seeking a ruling that its activity is *not* exempt from tax. The taxable person's reason for doing so is in order to benefit from the the right to deduct input tax, which in principle applies only to taxed activities. It can therefore in particular be advantageous to taxable persons for their own activity to be taxed if their customers are themselves entitled to deduct input tax. (2)

2. This request for a preliminary ruling is first seeking to clarify the tax exemption for educational services, with reference to the scope of Member States' discretion to determine which private educational organisations are exempt from VAT. Since the provisions of EU law to be interpreted for that purpose are applicable not just to education but also, similarly, to other areas such as health, social welfare and culture, the answer from the Court of Justice may have wide-ranging implications.

3. The other question, which concerns the consequences of incorrect exercise of discretion enjoyed by a Member State in determining the organisations that are exempt from tax, has even wider implications. In particular, it has to be clarified here whether a taxable person may rely subsequently on a tax liability for its transactions required by EU law in order to be able to deduct input tax, without being subject to an obligation for retrospective taxation of its transactions which it previously treated as tax-free according to the provisions of national law.

II – **Legal framework**

A – *European Union law*

4. The collection of VAT in the Union is governed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (3) (‘the VAT Directive’). Chapter 2 of Title IX includes ‘Exemptions for certain activities in the public interest’. Part of the chapter is Article 132(1)(i), according to which the Member States exempt the following transactions from VAT:

‘the provision of children’s or young people’s education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects’.

5. In accordance with Article 133 of the VAT Directive Member States may make, inter alia, the granting of this exemption ‘to bodies other than those governed by public law … subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit; …

…’

6. Article 134 of the VAT Directive provides for a restriction on, inter alia, the exemption under Article 132(1)(i):

‘The supply of goods or services shall not be granted exemption … in the following cases:

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

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

7. The above provisions correspond to the provisions of Article 13 (A)(1)(i) and (2)(a) and (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 (4) (‘the Sixth Directive’), in force until 31 December 2006.

8. The right to deduct input tax in accordance with Article 168 of the VAT Directive assumes that the taxable person uses his goods and services ‘for the purposes of [his] taxed transactions’:

‘In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…’

B – *National law*

9. According to Article 43(1)(1) in conjunction with Item 7 of Annex 4 to the *Ustawa z dnia 11 marca 2004 r. o podatku od towarów i us?ug* ('the Polish Law on taxation of goods and services'), educational services for 2010, the year at issue here, are exempt from tax irrespective of the person providing them.

III – **Main proceedings and proceedings before the Court of Justice**

10. The private company MDDP Sp. z o.o. Akademia Biznesu Sp. komandytowa ('MDDP') provides training in Poland on subjects including taxation and human resources. The purpose of its activity is the regular generation of profit.

11. MDDP applied to the Polish Minister for Finance for binding information on the treatment of its activity for the purposes of VAT. In its opinion, the Polish Law on taxation of goods and services was an impediment to the right to deduct input tax, contrary to Union law, since the tax exemption provided for under Polish law for its training courses was incompatible with the VAT Directive. The directive did not allow tax exemption for educational services whose sole purpose was the regular generation of profit. However, if it was necessary for MDDP's services to be taxable, it was also entitled to deduct input tax.

12. The Minister for Finance rejected that approach. MDDP's action against that decision in the court of first instance was successful. In terms of that judgment, MDDP was entitled to deduct input tax even though it had claimed tax exemption under Polish law in the past.

13. The Naczelny S?d Administracyjny (Supreme Administrative Court), which is now seised of the case, has doubts on the lower court judgment and is therefore referring the following questions to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU:

'(1) Should point (i) of Article 132(1), Article 133 and Article 134 of [the VAT Directive] be interpreted as precluding the exemption from VAT of educational services provided for commercial purposes by bodies not governed by public law laid down by Article 43(1)(1) of [the Polish Law on taxation of goods and services] in conjunction with Item 7 of Annex 4 to that Law, in the version in force in 2010?

(2) If the answer to the first question is in the affirmative, does this mean that due to the incompatibility of the exemption with the provisions of [the VAT Directive], Article 168 of the directive grants taxable persons both the right to apply the tax exemption and to deduct input VAT?'

14. Before the Court of Justice MDDP, the Hellenic Republic, the Republic of Poland, the Portuguese Republic and the European Commission have made written submissions. The Minister for Finance, MDDP, the Republic of Poland, the United Kingdom of Great Britain and Northern Ireland and the Commission made oral submissions at the hearing on 15 May 2013.

IV – **Legal assessment**

A – *Tax exemption for educational services*

15. By its first question, the referring court is enquiring whether the VAT Directive precludes the Member States from also granting tax exemption for educational services under Article 132(1)(i) to private organisations operating purely *for commercial purposes.* In the absence of any further explanation of that concept by the referring court, I shall assume below that it means the same as an activity being pursued with a view to the generation of profit.

16. The background to this question is that in Polish law any organisation that provides educational services is exempt from taxation.

1. Sole Discretion of Member States?

17. The question referred would immediately have to be answered in the negative if the decision concerning the private organisations to be exempted from VAT under Article 132(1)(i) lay in the sole discretion of the Member States.

18. According to the wording of the provision, however, the educational services referred to in Article 132(1)(i) of the VAT Directive are exempt from taxation only if they are provided either by bodies governed by public law that have educational responsibilities or by other organisations recognised by the Member State concerned as having similar objects. Hence the ‘other’, that is to say, private organisations, have to satisfy the condition that they have a similar object to the bodies governed by public law referred to.

19. Since Article 132(1)(i) of the VAT Directive does not set conditions for recognition of that similar object, it is indeed in principle for the law of each Member State to lay down the rules for such recognition. (5) In that respect, as with the recognition of tax-exempt bodies in other cases under Article 132 of the VAT Directive, (6) the Member States enjoy discretion. These legislative arrangements for tax exemption are probably due to the fact that the Member States have very different educational systems. Despite the differences between Member States’ educational systems, however, the tax exemptions for educational services under Article 132(1)(i) and (j) of the VAT Directive are to be applied as equally as possible. (7)

20. However, it is not possible to accept the view of the Republic of Poland that the Member States have a discretion to regard all bodies that provide educational services as bodies with similar objects. Such an approach misconstrues the requirements laid down in Article 132(1)(i) of the VAT Directive as regards the person providing the educational services. If Member States were to be allowed to exempt the educational services of every person, the requirement of a similar object expressly referred to in Article 132(1)(i) of the VAT Directive would become meaningless, contrary to the obvious intention of the Union legislature.

21. The Court of Justice too has already indicated that not all bodies can be granted tax exemption for educational services. In one decision, for instance, it ruled out the possibility of a company which organises training and university stays abroad being a body with a similar object within the meaning of the tax exemption under the present Article 132(1)(i) of the VAT Directive. (8)

22. Hence the view of the referring court that the Member States do not have sole discretion to decide on the private organisations to be exempted under Article 132(1)(i) of the VAT Directive must be accepted.

2. Limits of discretion

23. The question therefore arises whether the limits of the Member States’ discretion are exceeded if private organisations providing educational services for commercial purposes are eligible for the tax exemption under Article 132(1)(i) of the VAT Directive.

24. The referring court has expressed doubt in so far as, according to their title, the tax exemptions in Article 132 of the VAT Directive relate only to activities in the public interest. However, the Court of Justice has already established generally that the commercial nature of an

activity does not in principle preclude its being an activity in the public interest within the meaning of the article. (9)

25. That also applies specifically to the tax exemption for educational services under Article 132(1)(i).

26. First, the term ‘organisation’ is broad enough also to include natural persons and private companies with a profit-making purpose. (10) Secondly, the restriction to private organisations with a similar object to bodies governed by public law, as provided for in Article 132(1)(i) of the VAT Directive, also does not exclude commercial activities.

27. The Republic of Poland and the Portuguese Republic have rightly pointed out that Article 132(1)(i) of the VAT Directive, unlike some other tax exemptions in that article, does not impose a restriction in regard to the commercial nature or profit-making purpose of an organisation. That is the case, however, with the tax exemptions in (l), (m) and (q), whose scope does not include profit-making bodies or commercial activities. *A contrario*, it must therefore be concluded that commercial bodies the sole purpose of whose activity is to generate profit are in principle also eligible for the exemption for educational services under (i). (11)

28. The inclusion of commercial undertakings in the tax exemption for educational services is also not inconsistent with the aim of that exemption. (12) The Court of Justice has held, in regard to university education, that that object can be seen as ensuring that access to educational services is not hindered by the increased costs that would result if the services were subject to VAT. (13) Although the criteria by which tax-exempt private organisations are to be determined cannot be directly inferred from that object, the achievement of the object however appears to me to be essentially unrelated to the question of whether or not such educational services are provided for commercial purposes.

29. In so far as the Commission has argued in its written observations against the inclusion of commercial bodies in the tax exemption based on Articles 133 and 134 of the VAT Directive, two points need to be made.

30. First, the Court of Justice has already made it clear that Article 133 allows the Member States to lay down other conditions for the tax exemptions referred to there *in addition* to the rules and conditions for recognition of private organisations for the purposes of tax exemption. (14) Conversely, the Member States also have discretion not to apply any of the conditions of Article 133 to private bodies. (15) It is precisely on the basis of the condition laid down in Article 133(a) of the VAT Directive, that the Court has concluded that the existence of a profit-making object cannot preclude tax exemption. According to that provision, the Member States may, inter alia, make tax exemption for educational services subject to the condition that the private organisation does not systematically aim to make a profit. However, that possibility would be meaningless if it were already laid down as a condition for the recognition of private organisations for tax exemption. (16)

31. Secondly, Article 134 of the VAT Directive does not exclude the possibility of private organisations that provide educational services for commercial purposes being eligible for tax exemption. It is true that, unlike Article 133, that provision mandatorily excludes certain transactions inter alia from the tax exemption for educational services. (17) However, according to its internal logic, especially in the light of the condition in (a), it is applicable only to transactions that are ‘closely related’ to the exempted educational services within the meaning of Article 132(1)(i) of the VAT Directive, (18) that is to say, not to transactions exempted in the core area. Hence no conclusions as to the possibility of exempting commercial undertakings can be drawn from the fact that transactions made in competition with taxed transactions by commercial undertakings are not exempt from tax, as provided for in Article 134(b) of the VAT Directive.

32. It must therefore be concluded that it does not exceed the limits of Member States’ discretion under Article 132(1)(i) of the VAT Directive if national law also excludes private organisations that provide educational services for commercial purposes from taxation.

3. Answer to the first question referred

33. On that basis the first question should be answered in the negative.

34. However, that conclusion is not sufficient to give the referring court a helpful answer for the main proceedings, since, as is apparent from the wording of the second question referred, the referring court ultimately has to consider the question whether Article 132(1)(i) of the VAT Directive is to be interpreted as meaning that it precludes the tax exemption for educational services governed by Polish law.

35. It is true that it has now been established in sections 1 and 2 above that the Republic of Poland is not prevented from exempting educational services provided by private organisations for commercial purposes from tax in accordance with Article 132(1)(i) of the VAT Directive. However, it may not do so in a manner that imposes no conditions at all for the recognition of the organisations in question. It follows that the Polish law applicable in the main proceedings has not correctly implemented the tax exemption provided for under Article 132(1)(i) of the VAT Directive.

36. Accordingly, the answer to the first question should be that Articles 132(1)(i), 133 and 134 of the VAT Directive are to be interpreted as meaning that they do not preclude the inclusion of educational services provided by private organisations for commercial purposes in the tax exemption. However, they do preclude those provisions being implemented in such a way that no conditions at all are imposed for the recognition of such an object in the case of private organisations.

B – *Direct effect of the VAT Directive*

37. Consequently, the second question referred is also to be answered. By that question the referring court is enquiring whether, in circumstances where a national exemption is incompatible with the VAT Directive according to Article 168 of the Directive, a taxable person is entitled both to take advantage of the exemption and to exercise the right to deduct input tax. (19)

38. In my Opinion in the first *VDP Dental Laboratory* case, I expressed the view that an ‘asymmetrical reliance’ on the Sixth Directive is not possible. A taxable person could not both rely on the Directive, which does not provide for tax exemption for certain transactions, in order to be able to deduct input tax, and at the same time take advantage of the tax exemption under national law which is contrary to EU law. That would be inconsistent with the central principle of the VAT system that input tax can essentially be deducted only on taxed output transactions. (20)

39. The Court of Justice appeared to endorse that view in its judgment, ruling that a taxable person may rely directly on the Sixth Directive in order to have VAT levied on its activity and hence be entitled to deduct input tax. However, the judgment does not directly discuss the possibility of an ‘asymmetrical reliance’. (21)

40. MDDP is now disputing that, arguing that in a situation in which a taxable person relies on his right to deduct input tax in accordance with the VAT Directive output transactions cannot be taxed under national law, since national law specifically provides for tax exemption for that purpose. As a result, the recipients of the service themselves would not agree to the payment they make being subsequently increased by reason of the application of VAT. It is true that the application of VAT would be consistent with the VAT Directive, but Article 288 TFEU provides for such a result to be binding only on the Member States and it cannot therefore have direct effect on a taxable person. The Commission has also endorsed that opinion during the proceedings before the Court of Justice.

41. With those arguments in mind, I shall consider my position in what follows, with reference to the present case. I shall do so by taking into account the settled case-law of the Court, according to which, wherever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the State has failed to transpose the directive into national law within the time limit or has transposed it incorrectly. (22)

42. Accordingly, it first has to be determined which of the provisions of the VAT Directive has been incorrectly transposed into national law (see point 1 below), then whether and to what extent that provision is unconditional and sufficiently precise so far as its subject matter is concerned (see point 2 below) and finally what are the legal consequences of a taxable person relying on that provision in the present case (see point 3 below).

1. Incorrectly implemented provision

43. It first has to be determined which of the provisions of the VAT Directive has been incorrectly transposed.

44. In that regard it must be noted that in the present case Article 168 of the VAT Directive, which governs the right to deduct input tax and which is mentioned in the second question referred, may not be relied upon, since there is no indication that that provision has been incorrectly implemented in Polish law. Rather, Polish law appears to provide, in accordance with Article 168 of the VAT Directive, that the right to deduction of input tax is in principle available only for taxed output transactions.

45. The VAT Directive has been incorrectly implemented only as regards Article 132(1)(i) of the VAT Directive, since Polish law has defined the group of persons benefiting from the tax exemption too widely by including every person in the tax exemption for educational services.

46. It is true that the Polish rules could also be regarded as incorrectly implementing Article

2(1)(c) of the VAT Directive, which provides that every service is in principle subject to VAT. However, the Court of Justice has already made it clear that Article 132 of the VAT Directive governs not only the activities to be exempted from tax but also the activities that *cannot* be exempted from tax. (23)

47. Hence, if a national tax exemption is not compatible with the VAT Directive a taxable person may rely only on the fact that the services he provides are liable to VAT, not on an independent right to deduct input tax directly derived from the VAT Directive. That right to deduct input tax is, in other words, simply the result of placing reliance on the fact that the services in question are liable to VAT. If a taxable person can rely on the fact that the services he provides are subject to VAT under national law, he will then be entitled to benefit from the right under national law to deduct input tax implemented in accordance with the Directive, which presupposes that output transactions are taxed.

48. That distinction between the tax exemption to be implemented and the right to deduct input tax to be implemented does not conflict with case-law to date. Until now the Court has not established in similar cases which of the provisions referred to has direct effect, but has derived rights for the individual vis-à-vis a Member State from a combination of those provisions. (24)

49. The Commission cannot successfully object that according to the case-law a directive cannot create obligations for an individual, (25) since that is not the position in this case. An incorrectly implemented tax exemption does not create an obligation for a taxable person to pay tax on his services. He has merely the right, in certain circumstances, to rely on the fact that the services he provides are liable to VAT.

50. In so far as the Commission also refers to the *RBS Deutschland Holdings* judgment in support of its view, it need only be pointed out that that judgment concerns the interpretation of the present Article 169(a) of the VAT Directive. Unlike Article 168, which falls to be applied in the present case, that special regime providing for the deduction of input tax precisely does not require use for the purposes of taxed transactions. Furthermore, the *RBS Deutschland Holdings* case involved transactions that were actually not taxed by reason of differences of legal opinion between two Member States concerning the place of performance, and not a service that was legally exempt from tax. (26)

51. Since a directive can have direct effect only in regard to an incorrectly implemented provision, it must therefore be concluded that, where a national exemption is incompatible with the VAT Directive, Article 168 of the directive does not permit a taxable person both to benefit from the tax exemption and to exercise the right to deduct input tax.

52. Hence the second question referred by the national court has already been answered. However, in order to give the referring court a helpful answer for the main proceedings it still has to be considered whether a taxable person such as MDDP can rely on the incorrectly implemented Article 132(1)(i) of the VAT Directive at all in the present situation in order to have its educational services made liable to VAT and to benefit from the resulting input tax deduction.

2. Unconditional and sufficiently precise content

53. The question therefore now arises whether the content of the incorrectly implemented Article 132(1)(i) of the VAT Directive is unconditional and sufficiently precise as regards the tax exemption of educational services by private organisations.

54. The first of those conditions is satisfied. The content of Article 132(1)(i) of the VAT Directive is unconditional, since it does not provide the Member States with an option but requires each

Member State to grant the tax exemption laid down by that provision.

55. The question whether Article 132(1)(i) of the VAT Directive is also sufficiently precise as regards the persons to be exempted is more difficult to answer, since, as explained, the tax exemption also requires each Member State to determine which private organisations have a similar object to bodies governed by public law. (27)

56. Essentially, in order for a provision of a directive to have direct effect, it should require no further intervention by the Union institutions or Member States. (28) In so far as the Member States have a margin of discretion, individuals cannot in principle rely on a provision of a directive. (29)

57. However, depending on the exercise of the Member State's discretion, Article 132(1)(i) of the VAT Directive allows the exemption and taxation of educational services for a specific group of organisations to be reconciled with the requirements of that provision. (30) On that basis, Article 132(1)(i) of the VAT Directive is sufficiently precise in regard to the private bodies exempted from tax only in so far as it defines the limits of the Member States' discretion. In other words, there are private organisations whose similar object the Member States must recognise, whilst with others they cannot. However, in so far as these are private organisations which Member States have a discretion to recognise in accordance with Article 132(1)(i), that provision is not sufficiently precise to have direct effect.

58. The fact that, in other cases where the Member States had a discretion to determine the scope of tax exemptions, the Court has appeared to accept that the relevant provision of EU law is also sufficiently precise to have direct effect even within the area of the Member State's discretion seems at first sight to contradict that.

59. For instance, the Court has found that a taxable person can in principle rely directly on tax exemption for medical treatment according to the present Article 132(1)(b) of the VAT Directive if Member States have laid down rules for the recognition of non-taxable bodies that are incompatible with EU law, despite their discretion on that point. (31) The Court has taken a similar view in relation to the present Article 135(1)(g) of the VAT Directive, which exempts the management of special investment funds from tax. Although that provision allows Member States a discretion in defining the special investment funds that benefit, it has direct effect in so far as the definition of the special investment funds by the Member States does not conform to EU law. (32) The Court has also decided that Article 135(1)(i) of the VAT Directive, which allows Member States to exercise their discretion in restricting tax exemption for gambling, has direct effect in the case of a national restriction that is not compatible with Union law. (33)

60. However, all those cases concern restrictions on the scope of a tax exemption in which the Member States did indeed exercise their discretion, but did not do so in accordance with the principle of fiscal neutrality, in that they excluded from tax exemption taxable persons who were to be treated on an equal basis to their competitors. (34) In such cases direct effect therefore requires that persons who were previously unfairly excluded are exempt.

61. The situation in the present case, however, is different. Polish law does not provide for any restriction on tax exemption for educational services contrary to EU law which could be set aside by the direct effect of Article 135(1)(i) of the VAT Directive. Rather, the exemption under the Polish Law on taxation of goods and services cannot be reconciled with EU law, since it does not provide for any restriction of any kind. A Member State thus exceeds the limits of the discretion granted by Article 132(1)(i) of the VAT Directive in such a case only in so far as, in exercising its discretion, it exempts taxable persons whom it should not have exempted, that is to say taxable persons who could in no circumstances have been regarded as bodies with a similar object.

62. It must thus be concluded that the content of Article 132(1)(i) of the VAT Directive as regards tax exemption for educational services by private organisations is indeed unconditional, but as far as the present case is concerned it is sufficiently precise only to the extent that it does not permit the exemption of all private organisations from tax under national law.

3. Legal consequences of the plea in law relied on

63. In the present case, the legal consequences of the plea in law based on Article 132(1)(i) of the VAT Directive depend on the answer to the question whether a taxable person seeking to rely on the direct effect of that provision *could* have been regarded by the Member State in the exercise of its discretion as a body with a similar object. If so, a plea based on that provision would not lead to the provisions of national law requiring to be set aside. It is only if the Member State, in exercising its discretion, could not have regarded the taxable person as a body with a similar object that a taxable person may then rely on Article 132(1)(i) of the VAT Directive as against the provisions of national law, so that his services are then taxable.

64. It is true that, in some cases relating to the present Article 132(1)(b) and (g) of the VAT Directive, the Court of Justice has found that the recognition of private organisations regulated by the Member State was incompatible and, furthermore, concluded that the provisions were directly applicable, but it did not derive any direct legal consequences in EU law from that. Instead it left it to the national court in each case to consider, on the basis of all relevant factors and in particular the factual circumstances of the main proceedings, whether the taxable person satisfied the conditions for a body to be granted recognition. (35) Hence the incorrect exercise of legislative discretion by the Member State is replaced by the individual discretion of the national court which is called upon to give a ruling in the matter.

65. Applied to the present case, that approach would mean that, if MDDP were to rely on the direct effect of Article 132(1)(i) of the VAT Directive, the national court would have to consider whether, *in the opinion of that court*, MDDP is to be recognised as a body with a similar object. If the national court were to decide that it was not, MDDP could rely on the educational services it provides being taxable.

66. The reason for this different approach may lie in the fact that, as regards the grant by Member States of recognition to taxable persons for the purposes of the tax exemptions laid down in Article 132(1) of the VAT Directive, the Court has not yet clearly established how the Member States are to exercise their discretion: through an abstract legal rule or by exercising discretion on a case-by-case basis. On the one hand, the Court has stated that the rules for such recognition are to be laid down in national law. (36) On the other hand, the Court has given the impression that it is for the national authorities themselves to exercise discretion on a case-by-case basis in determining the bodies to be given recognition. (37)

67. In my opinion, the exercise of Member States' discretion in the recognition of private organisations for the tax exemptions under Article 132(1) of the VAT Directive cannot be left to

either the national authorities or the national courts. Their consideration is necessarily related to the specific case and can be no substitute for an abstract rule on recognition. As Advocate General Ruiz-Jarabo Colomer has rightly stated, such classification criteria have to be neutral, abstract and defined in advance. (38)

68. Furthermore, the Court has only recently indicated that the procedure followed by the tax authorities in assessing similar and competing bodies needs to be consistent. (39) Such consistency cannot be achieved if each national authority or court takes a discretionary decision on individual cases, which will almost inevitably result in taxable persons being treated differently.

69. Hence, if a Member State has exercised its discretion as regards the recognition of private organisations for the purposes of Article 132(1)(i) of the VAT Directive by way of a legal rule which contravenes EU law, that error can be rectified only by an abstract legal rule and not in the form of a power of discretion exercised by a national court.

70. Therefore the referring court has to consider in the main proceedings only whether it is outside the scope of the Polish legislature's discretion to exempt an organisation such as MDDP from tax under Article 132(1)(i) of the VAT Directive. It is for the national court to examine the object and conditions of MDDP's activity in comparison with Polish bodies governed by public law providing educational services. However, it must be noted that the exemption of a body such as MDDP would not be outside the scope of the Polish legislature's discretion if the only reason for refusing to accept that the objects were similar was that the activity was for commercial purposes, since, as explained above, that is not an impediment to recognition under Article 132(1)(i) of the VAT Directive. (40)

71. If the referring court were none the less to decide that there were no circumstances in which the Polish legislature could recognise a body such as MDDP as similar, MDDP could then plead in the present case that the tax exemption made available under national law was not to apply to it, since it was incompatible with Article 132(1)(i) of the VAT Directive. In that case its educational services would be subject to VAT and MDDP could thus claim deduction of input tax in accordance with the Polish rules.

72. Furthermore, MDDP might also be entitled in some circumstances to claim compensation, as the Court indicated in a previous similar case, *Stockholm Lindöpark*. (41) In particular, MDDP might have suffered a loss for which it was to be compensated, in that the recipients of its services would not agree to a payment subsequently increased by taxation.

4. Answer to the second question referred

73. Consequently, the answer to the second question should be that, where a national exemption is incompatible with the VAT Directive, a taxable person is not entitled both to take advantage of the tax exemption and to exercise the right to deduct input tax. In a case such as the present one, direct reliance on Article 132(1)(i) of the VAT Directive will result in the educational services being taxable only if the recognition of the taxable person concerned as an organisation with a similar object exceeded the limits of the Member State's discretion.

V – **Conclusion**

74. I therefore consider that the Court should answer the questions referred by the Naczelny S?d Administracyjny as follows:

(1) Articles 132(1)(i), 133 and 134 of the VAT Directive are to be interpreted as meaning that they do not preclude the inclusion of educational services provided by private organisations for

commercial purposes in the tax exemption. However, they do preclude those provisions being implemented in such a way that no conditions at all are imposed for the recognition of such an object in the case of private organisations.

(2) A taxable person is not entitled both to take advantage of the tax exemption and to exercise the right to deduct input tax. In a case such as the present one, direct reliance on Article 132(1)(i) of the VAT Directive will result in the educational services being taxable only if the recognition of the taxable person concerned as an organisation with a similar object exceeded the limits of the Member State's discretion.

1 – Original language: German.

2 – On the advantages of taxation, see the detailed explanation in the Opinion of Advocate General Sharpston in Cases C?434/05 and C?445/05 *Horizon CollegeandHaderer* [2007] ECR I?4793, point 20 et seq.

3 – OJ 1998 L 347, p. 1.

4 – OJ 1977 L 145, p. 1.

5 – See, to that effect, Case C?45/01 *Dornier* [2003] ECR I?12911, paragraph 64, and Case C?106/05 *L.u.P.* [2006] ECR I?5123, paragraph 42, which concerned Article 13(A)(1)(b) of the Sixth Directive; see also Case C?498/03 *Kingscrest Associates and Montecello* [2005] ECR I?4427, paragraph 49, and Case C?174/11 *Zimmerman* [2012] ECR, paragraph 26, which concernecd Article 13(A)(1)(g) and (h) of the Sixth Directive.

6 – See *L.u.P.* (cited in footnote 5), paragraph 42, and Case C?262/08 *CopyGene* [2010] ECR I?5053, paragraph 63, which concerned Article 13(A)(1)(b) of the Sixth Directive; see also Case C?141/00 *Kügler* [2002] ECR I?6833, paragraph 54; *Kingscrest Associates and Montecello* (cited in footnote 5), paragraph 51; and *Zimmermann* (cited in footnote 5), paragraph 26, which concerned Article 13(A)(1)(g) and (h) of the Sixth Directive.

7 – See, to that effect, Case C?473/08 *Eulitz* [2010] ECR I?907, paragraph 36, on the interpretation of 'school or university education' in Article 13(A)(1)(j) of the Sixth Directive.

8 – Case C?200/04 *iSt* [2005] ECR I?8691, paragraphs 45 to 47, which concerned Article 13(A)(1)(i) of the Sixth Directive.

9 – See Case C?144/00 *Hoffmann* [2003] ECR I?2921, paragraph 38, and *Kingscrest Associates and Montecello* (cited in footnote 5), paragraph 31, which concerned Article 13(A) of the Sixth Directive.

10 – Case C?216/97 *Gregg* [1999] ECR I?4947, paragraph 15 et seq., and *Kingscrest Associates and Montecello* (cited in footnote 5), paragraph 35.

11 – See, to that effect, *Kingscrest Associates and Montecello* (cited in footnote 5), paragraph 37.

12 – On this condition for the exercise of discretion by the Member States, see the Opinion of Advocate General Geelhoed in Case C?144/00 *Hoffman* [2003] ECR I?2921, point 66, which concerned Article 13(A)(1)(n) of the Sixth Directive.

13 – See Case C?287/00 *Commission* v *Germany* [2002] ECR I?5811, paragraph 47, which concerned Article 13(A)(1)(i) of the Sixth Directive.

14 – See *Dornier* (cited in footnote 5), paragraphs 64 to 66; *Kingscrest Associates and Montecello* (cited in footnote 5), paragraph 38; *L.u.P.* (cited in footnote 5), paragraphs 41 to 43; and *Zimmermann* (cited in footnote 5), paragraph 27, which concerned Article 13(A)(2)(a) of the Sixth Directive.

15 – See the Opinion of Advocate General Poiares Maduro in *L.u.P.* (cited in footnote 5), point 39, which concerned Article 13(A)(1)(b) of the Sixth Directive.

16 – See *Kingscrest Associates and Montecello* (cited in footnote 5), paragraph 40, which concerned Article 13(A)(2)(a) and (1)(g) and (h) of the Sixth Directive.

17 – See the systematic distinction already made in the Opinions of Advocate General Jacobs in Case C?174/00 *Kennemer Golf* [2002] ECR I?3293, point 38, and Advocate General Léger in Case C?394/04 *Ygeia* [2005] ECR I?10373, point 31, which concerned Article 13(A)(2) of the Sixth Directive.

18 – See, to that effect, Case C?394/04 *Ygeia* [2005] ECR I?10373, paragraph 26, and Case C?415/04 *Kinderopvang Enschede* [2006] ECR I?1385, paragraphs 22 and 25, which concerned Article 13(A)(2)(b) of the Sixth Directive.

19 – On that point, see also the first question referred in Case C?144/13 *VDP Dental Laboratory* (pending before the Court).

20 – See my Opinion in Case C?401/05 *VDP Dental Laboratory* [2006] ECR I?12121 points 95 to 97; see also the Opinion of Advocate General Fennelly in Case C?134/97 *Victoria Film* [1998] ECR I?7023, point 46.

21 – *VDP Dental Laboratory* (cited in footnote 20), paragraph 41.

22 – See, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 103/88 *Costanzo* [1989] ECR 1839, paragraph 29; *Kügler* (cited in footnote 6), paragraph 51; and most recently Case C?142/12 *Marinov* [2013] ECR, paragraph 37; see also Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 12.

23 – *Zimmermann* (cited in footnote 5), paragraph 51, which concerned Article 13(A) of the Sixth Directive.

24 – Case C?150/99 *Stockholm Lindöpark* [2001] ECR I?493, paragraph 35, and *VDP Dental Laboratory* (cited in footnote 20), paragraph 40.

25 – Case 152/84 *Marshall* [1986] ECR 723, paragraph 48.

26 – Case C?277/09 *RBS Deutschland Holdings* [2010] ECR I?13805, paragraphs 37 and 41.

27 – See point 19 above.

28 – See, to that effect, Case C?203/10 *Auto Nikolovi* [2011] ECR I?1083, paragraph 62.

29 – Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraphs 25 to 29.

30 – See also to that effect *CopyGene* (cited in footnote 6), paragraph 77 et seq., which concerned Article 13(A)(1)(b) of the Sixth Directive.

31 – *Dornier* (cited in footnote 5), paragraph 81 et seq.

32 – Case C?363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I?5517, paragraphs 59 to 62.

33 – Joined Cases C?453/02 and C?462/02 *Linneweber and Akritidis* [2005] ECR I?1131, paragraph 37, and Joined Cases C?259/10 and C?260/10 *Rank Group* [2011] ECR I-10947, paragraph 68.

34 – *Dornier* (cited in footnote 5), paragraph 69 et seq.; *Linneweber and Akritidis* (cited in footnote 33), paragraph 37; and *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (cited in footnote 32), paragraph 48.

35 – *Kügler* (cited in footnote 6), paragraphs 55 to 61; *Dornier* (cited in footnote 5), paragraph 81 et seq.; and *Zimmermann* (cited in footnote 5), paragraph 32.

36 – See *Dornier* (cited in footnote 5), paragraph 64; *L.u.P*. (cited in footnote 5), paragraph 42; and *CopyGene* (cited in footnote 6), paragraph 63, which concerned Article 13(A)(1)(b) of the Sixth Directive; *Kingscrest Associates and Montecello* (cited in footnote 5), paragraph 49; and *Zimmermann* (cited in footnote 5), paragraph 26, which concerned Article 13(A)(1)(g) and (h) of the Sixth Directive.

37 – See *CopyGen*e (cited in footnote 6), paragraph 64 et seq., on Article 13(A)(1)(b) of the Sixth Directive; *Kügler* (cited in footnote 6), paragraph 56 et seq.; and *Zimmermann* (cited in footnote 5), paragraphs 31 and 33, which concerned Article 13(A)(1)(g) of the Sixth Directive.

38 – Opinion of Advocate General Ruiz-Jarabo Colomer in *Kingscrest Associates and Montecello* (cited in footnote 5), point 36, which concerned Article 13(A)(1)(g) and (h) of the Sixth Directive.

39 – *CopyGene* (cited in footnote 6), paragraph 73, which concerned Article 13(A)(1)(b) of the Sixth Directive.

40 – Point 23 et seq.

41 – *Stockholm Lindöpark* (cited in footnote 24), paragraph 34 et seq.