OPINION OF ADVOCATE GENERAL

BOT

delivered on 29 September 2016 (1)

Case C?592/15

Commissioners for Her Majesty’s Revenue and Customs

v

British Film Institute

(Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom))

(Value added tax — Sixth Directive 77/388/EEC — Article 13A(1)(n) — Exemptions for the supply of certain cultural services — Discretion of Member States as to the cultural services which may fall within the scope of the exemption)

1. In the present case, the Court is requested to define the scope of Article 13A(1)(n) of Sixth Directive 77/388/EEC. (2) That provision states that Member States are to exempt ‘certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned’.

2. The referring court, the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), seeks to ascertain whether that provision leaves some latitude to the Member States to choose which cultural services may be eligible for such exemption. That court also seeks to ascertain whether that provision is of direct effect and may, therefore, be relied on directly by taxable persons before national courts where the Member State concerned has failed to transpose the Sixth Directive into national law by the end of the period prescribed.

3. In this Opinion, I shall explain why I consider that Article 13A(1)(n) of the Sixth Directive must be interpreted as meaning that the concept of ‘certain cultural services’ leaves it to the Member States to decide which cultural services may be exempt from value added tax (VAT). I shall explain that it is for the national court to decide, taking account of the nature of the services in question, whether excluding the respondent in the main proceedings, British Film Institute, from entitlement to VAT exemption complies with the principle of fiscal neutrality, and, in particular, whether it entails infringement of the principle of equal treatment in relation to other operators supplying the same services in comparable situations and enjoying exemption from VAT for those supplies.

4. I shall then state why, in my view, that provision may not be relied on directly by a taxable person before the national court.

I – **Legal framework**

A – *European Union law*

5. Article 13A of the Sixth Directive provides as follows:

‘1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

…

(m) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education;

(n) certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned;

…’

6. The Sixth Directive was repealed, with effect from 1 January 2007, by Directive 2006/112/EC. (3) It essentially reproduces the provisions of the Sixth Directive.

7. Article 132 of that directive reads as follows:

‘1. Member States shall exempt the following transactions:

…

(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education;

(n) the supply of certain cultural services, and the supply of goods closely linked thereto, by bodies governed by public law or by other cultural bodies recognised by the Member State concerned;

…’

B – *National law*

8. Before 1 June 1996, United Kingdom of Great Britain and Northern Ireland made no provision for the exemption of supplies of cultural services. It is only after that date, which corresponds to the date of entry into force of Group 13 of Schedule 9 of the Value Added Tax Act 1994 that the United Kingdom’s domestic legislation exempted from VAT supplies of certain cultural services. Thus, items 1 and 2 of that act provide that the supply by a public body or by an eligible body of a right of admission to a museum, gallery, art exhibition or zoo, or a theatrical, musical or choreographic performance of a cultural nature is exempt from VAT.

9. In accordance with note 1 of that act, a public body means a local authority, a government department within the meaning of section 41(6) of that act, or a non-departmental public body which is listed in the 1995 edition of the publication prepared by the Office of Public Service and known as ‘Public Bodies’. Moreover, under note 2 of the Value Added Tax Act 1994, ‘eligible body’ means any body (other than a public body) which is precluded from distributing, and does not

distribute, any profit it makes, which applies any profits made from supplies of a description falling within item 2 of that act to the continuance or improvement of the facilities made available by means of the supplies and which is managed and administered on a voluntary basis by persons who have no direct or indirect financial interest in its activities.

10. Under note 3 of that act, item 1 thereof does not include any supply the exemption of which would be likely to create distortions of competition such as to place a commercial enterprise carried on by a taxable person at a disadvantage. In addition, note 4 of the Value Added Tax Act 1994 states that item 1(b) of that act includes the supply of a right of admission to a performance only if the performance is provided exclusively by one or more public bodies, one or more eligible bodies or any combination of public bodies and eligible bodies.

II – **The facts of the main proceedings**

11. British Film Institute is a non-profit-making body whose role is to promote cinema in the United Kingdom. In 1951, it was agreed that that body could run the National Film Theatre and, from April 2011, it was agreed that it would take on the activities of the UK Film Council.

12. Between 1 January 1990 and 31 May 1996 (‘the period in question’), British Film Institute accounted for VAT at the standard rate on supplies of the right of admission to films shown at the National Film Theatre and at various film festivals.

13. Taking the view that that supply of services amounted to ‘cultural services’ within the meaning of Article 13A(1)(n) of the Sixth Directive, and that, accordingly, those services should have been exempt from VAT, British Film Institute submitted a claim for reimbursement of the VAT paid during the period in question. By letter of 23 November 2009, Her Majesty’s Revenue and Customs rejected that claim. That decision was upheld by the appellant in the main proceedings on review on 3 February 2010.

14. British Film Institute then appealed against that decision to the First-tier Tribunal (Tax Chamber) (United Kingdom). By decision of 5 December 2012, the First-tier Tribunal held that Article 13A(1)(n) of the Sixth Directive was of direct effect, so that the supplies of the respondent in the main proceedings of admissions to showings of films during the period in question were exempt under that provision.

15. Her Majesty’s Revenue and Customs appealed against the decision of 5 December 2012 to the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom). By decision of 12 August 2014, the Upper Tribunal dismissed the appeal. Her Majesty’s Revenue and Customs were then granted permission to appeal to the Court of Appeal (England and Wales) (Civil Division), which decided to stay the proceedings and to refer questions to the Court of Justice on the relevant provisions of European Union law.

III – **The questions referred**

16. The Court of Appeal (England and Wales) (Civil Division) decided to refer the following questions to the Court for a preliminary ruling:

‘(1) Are the terms of Article l3A(1)(n) of the Sixth Directive, in particular the words “certain cultural services”, sufficiently clear and precise such that Article 13A(1)(n) is of direct effect so as to exempt the supply of those cultural services by bodies governed by public law or other recognised cultural bodies, such as the supplies made by the Respondent [in the main proceedings], in the absence of any domestic implementing legislation?

(2) Do the terms of Article 13A(1)(n) of the Sixth Directive, in particular the words “certain cultural services”, permit Member States any discretion in their application by means of implementing legislation and, if so, what discretion?

(3) Do the same conclusions as above apply to Article 132(1)(n) of [Directive 2006/112]?’

IV – **My analysis**

17. Given that, in this case, the period in question was between January 1990 and 31 May 1996 and that Article 413 of Directive 2006/112 states that that directive is to enter into force on 1 January 2007, I take the view that that directive is not applicable to the facts of the main proceedings. Accordingly, it is not necessary to reply to the last question put by the referring court, relating to Article 132(1)(n) of that directive.

18. By its second question, which in my view it is appropriate to consider first, the referring court asks, in essence, whether Article 13A(1)(n) of the Sixth Directive must be interpreted as meaning that the concept of ‘certain cultural services’ encompasses all cultural services or leaves it to the Member States to decide which cultural services may be exempt from VAT.

19. In my view, the argument by the respondent in the main proceedings that Article 13A(1)(n) of the Sixth Directive requires Member States to exempt all supplies of cultural services can be dismissed at the outset. The choice of the term ‘certain’ instead of ‘all’ shows sufficiently on its own that the Union legislature wished not to make that exemption a general exemption in respect of all those services, but to provide for such exemption in respect of some of them.

20. In that regard, there is no doubt that, by using the term ‘certain’, the Union legislature intended to leave it to the Member States to decide which supplies of cultural services may be exempt from VAT.

21. As the European Commission states, it is apparent from the preparatory work which led to the adoption of the Sixth Directive that, initially, it was proposed to draw up an exhaustive list of the supplies of cultural services subject to VAT exemption. That exemption related specifically to the supply of services by theatres, cinema clubs, concert halls, museums, libraries, public parks, botanical or zoological gardens, educational exhibitions, and operations within the framework of activities in the public interest of a social, cultural or educational nature. (4) Clearly, that proposal was not adopted by the Union legislature.

22. Moreover, I note that, in the First report from the Commission to the Council on the application of the common system of value added tax in accordance with Article 34 of the Sixth Directive (77/388/EEC) of 17 May 1977, (5) the Commission, which had highlighted the imprecision of the wording of Article 13A(1)(m) and (n) of the Sixth Directive, stated as follows: ‘it seems paradoxical to introduce cases of compulsory exemption and leave the substance to the discretion of each Member State’. The proposed amendments to the Sixth Directive which followed that report therefore included a change to that wording. Once again, the Commission proposed an exhaustive list of the supplies of cultural services subject to VAT exemption. (6) That change was not however accepted by the Member States.

23. The broad discretion given to Member States in relation to exempting supplies of cultural services is not surprising. Cultural traditions and regional heritage are very varied within the European Union and sometimes within the same Member State. There are as many cultures as there are Member States. It is therefore entirely logical that Member States are the best placed to identify the supplies of cultural services that are most appropriate to serve the public interest, since

I would recall that Article 13A of the Sixth Directive refers to exemptions for certain activities in the public interest.

24. I would add that, contrary to the submission of the respondent in the main proceedings at the hearing, in the context of its reply, I do not think that, in order to be eligible for the exemption provided for in Article 13A(1)(n) of that directive, solely the nature of the body supplying the services matters, namely a body governed by public law or other cultural bodies recognised by the Member State. Indeed, the respondent in the main proceedings appears to argue that, provided that the supply of services in question has been effected by that type of body, that body is automatically eligible for exemption. However, whilst the status of supplier of cultural services is indeed a condition for the grant of that exemption, the nature of the supply of services referred to in that provision is another such condition. It is therefore insufficient that the body which supplies the cultural services is a body governed by public law or is recognised as a cultural body by the Member State concerned in order for the supply to be exempt from VAT; it is also necessary that the supply, as we have already seen, is recognised as eligible by that State.

25. For that reason, the Court has repeatedly held that the exemptions referred to in Article 13 of the Sixth Directive constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another. (7) It is also settled case-law that the terms used to specify those exemptions are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. (8)

26. How, then, is it possible to reconcile the Member States' broad discretion with respect to exempting certain cultural services with that case-law?

27. In my opinion, it would be pointless, precisely for the reasons mentioned previously, to give a definition of the concept of 'certain cultural services'. However, I take the view that the exercise of the Member States' broad discretion is necessarily shaped by the objectives pursued by the Sixth Directive and the principles governing VAT.

28. Thus, I would point out that Article 13 of that directive, which provides for VAT exemptions, is an exception to the principle set out in Article 2 thereof, which states, inter alia, that the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is subject to VAT. (9) The general rule is therefore that those supplies are subject to VAT.

29. Furthermore, the Court has held that the purpose of Article 13A of the Sixth Directive is to exempt from VAT certain activities which are in the public interest and not all such activities. (10)

30. It is therefore undeniable that, although the Member States do indeed have broad discretion to choose the supplies of cultural services that may be exempt from VAT, they are not permitted, however, to exempt all supplies falling within that category.

31. Moreover, I would point out that all the exemptions listed in Article 13A(1)(h) to (p) of that directive cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions is therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes. (11)

32. In addition, where national legislatures decide which supplies of cultural services may be eligible for VAT exemption, they must do so in compliance with the principle of fiscal neutrality, a fundamental principle of the common system of VAT established by the relevant European Union

legislation. (12) 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. (13) Similarly, the principle of fiscal neutrality includes the principle of elimination of distortion in competition as a result of differing treatment for VAT purposes. Therefore, distortion is established once it is found that supplies of services are in competition and are treated unequally for the purposes of VAT. (14)

33. In the main proceedings, I think that it is therefore for the referring court to decide, taking account of the nature of the services in question, whether excluding the respondent in the main proceedings from entitlement to VAT exemption entails infringement of the principle of equal treatment in relation to other operators supplying the same services in comparable situations and who are eligible for the exemption provided for in Article 13A(1)(n) of the Sixth Directive. In my opinion, in view of the role of the respondent in the main proceedings, which is to promote cinema in the United Kingdom, that examination must be carried out, in particular, in the light of item 1, Group 13, of Schedule 9 of the Value Added Tax Act 1994 which provides for such exemption in respect of the supply, by public bodies or eligible bodies, of a right of admission to a theatrical, musical or choreographic performance of a cultural nature.

34. That said, it is now appropriate to consider the first question referred. By that question, the referring court asks the Court, in essence, whether, in circumstances such as those in the main proceedings, Article 13A(1)(n) of the Sixth Directive may be relied on directly by a taxable person before the national court.

35. According to settled case-law, wherever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State. (15)

36. With respect specifically to the content of Article 13A(1)(n) of the Sixth Directive, it must be stated that that provision gives no indication whatsoever of which activities may be eligible for VAT exemption. On the contrary, as we have seen, that provision gives Member States broad discretion in that regard. I therefore have difficulty in accepting the proposition that national courts or other authorities may apply that provision automatically if specific measures have not been implemented by the Member States in order to specify its content. The situation would be different if, as is the case with Article 13A(1)(g) or Article 13B(d) of that directive, which the Court has held to have direct effect, (16) the terms used were clear and precise, leaving little room for doubt as to interpretation, thus making it possible to identify easily the taxable person eligible for exemption.

37. In my view, Article 13A(1)(n) of the Sixth Directive therefore has no direct effect. Consequently, I consider that that provision may not be relied on by a taxable person before a national court where the Member State concerned has failed to transpose that directive into national law by the end of the period prescribed.

V – **Conclusion**

38. In the light of the foregoing, I propose that the Court should answer the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) as follows:

(1) Article 13A(1)(n) 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, as amended by Council Directive 92/77/EEC of 19 October 1992, must be interpreted as meaning that the concept of ‘the supply of certain cultural

services' leaves it to the Member States to decide which supplies of cultural services may be exempt from value added tax.

It is for the national court to decide, taking account in particular of the nature of the services in question, whether excluding the respondent in the main proceedings from entitlement to exemption from value added tax complies with the principle of fiscal neutrality, and, in particular, whether it entails infringement of the principle of equal treatment in relation to other operators supplying the same services in comparable situations and enjoying exemption from value added tax for those supplies.

(2) Article 13A(1)(n) of Sixth Directive 77/388, as amended by Directive 92/77, may not be relied on directly by a taxable person before the national court where the Member State concerned has failed to transpose that directive into national law by the end of the period prescribed.

1 – Original language: French.

2– Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 92/77/EEC of 19 October 1992 (OJ 1992 L 316, p. 1; 'the Sixth Directive').

3– Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

4– See proposal for a Sixth Council Directive on the harmonisation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment, COM(73) 950 final of 20 June 1973 (*Bulletin of the European Communities*, Supplement 11/73, p. 42).

5– COM(83) 426 final.

6– See proposal for a 19th Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC — common system of value added tax: uniform basis of assessment (COM(84) 648 final (OJ 1984 C 347, p. 5).

7– See, in particular, judgment of 28 July 2011, *Nordea Pankki Suomi* (C?350/10, EU:C:2011:532, paragraph 22 and the case-law cited). For recent case-law on Article 132 of Directive 2006/112, see judgment of 26 May 2016, *National Exhibition Centre* (C?130/15, not published, EU:C:2016:357, paragraph 28).

8– See judgment of 28 July 2011, *Nordea Pankki Suomi* (C?350/10, EU:C:2011:532, paragraph 23 and the case-law cited). See, also, judgment of 26 May 2016, *National Exhibition Centre* (C?130/15, not published, EU:C:2016:357, paragraph 29).

9– See, in particular, judgment of 18 January 2001, *Stockholm Lindöpark* (C?150/99, EU:C:2001:34, paragraph 19).

10– See judgment of 9 February 2006, *Stichting Kinderopvang Enschede* (C?415/04, EU:C:2006:95, paragraph 14 and the case-law cited). See, also, judgment of 21 February 2013, *Žamberk* (C?18/12, EU:C:2013:95, paragraph 18 and the case-law cited).

11– See judgment of 21 March 2002, *Kennemer Golf* (C?174/00, EU:C:2002:200, paragraph 19).

12– See judgment of 23 April 2015, *GST — Sarviz Germania* (C?111/14, EU:C:2015:267, paragraph 34 and the case-law cited).

13– See judgment of 10 November 2011, *The Rank Group* (C?259/10 and C?260/10, EU:C:2011:719, paragraph 36).

14– See judgment of 19 July 2012, *A* (C?33/11, EU:C:2012:482, paragraph 33 and the case-law cited).

15– See judgments of 6 November 2003, *Dornier* (C?45/01, EU:C:2003:595, paragraph 78 and the case-law cited), and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 48 and the case-law cited).

16– See, respectively, judgments of 10 September 2002, *Kügler* (C?141/00, EU:C:2002:473, paragraph 52 et seq.), and of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 17 et seq.).