Provisional text

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 7 November 2019(1)

Case C?488/18

Finanzamt Kaufbeuren mit Außenstelle Füssen

v

Golfclub Schloss Igling e. V.

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Exemptions — Article 132(1)(m) — Supply of services closely linked to sport — Direct effect — Extent of Member States' margin of appreciation — Principle of fiscal neutrality — Principle of equal treatment — Notion of non-profit organisations)

1. The request for a preliminary ruling concerns the interpretation of Article 132(1)(m) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'Directive 2006/112').

2. This request was made in proceedings between Finanzamt Kaufbeuren mit Außenstelle Füssen (Tax Office, Kaufbeuren, Füssen Branch, Germany) and Golfclub Schloss Igling e.V. ('Golfclub'), concerning the refusal by the tax office to exempt from value added tax (VAT) certain services closely linked to the practice of golf provided by Golfclub.

3. The main issue raised by this case is whether, although the wording of Article 132(1)(m) of Directive 2006/112 refers simply to 'certain services closely linked to sport', this provision can nonetheless be considered to be sufficiently precise and unconditional and, therefore, to have direct effect.

I. EU law

A. Directive 2006/112

4. Articles 132 of Directive 2006/112 provides:

'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. **German law**

5. In accordance with Section 4(22) of the Umsatzsteuergesetz (Law on Turnover Tax, 'UStG'), in the version published on 21 February 2005 (BGB1. 2005 I, p. 386), the following transactions are exempt from tax:

'(a) conferences, courses and other events of a scientific or educational nature organised by legal persons governed by public law, higher schools of administration and economics, Volkshochschulen or bodies pursuing objectives of public utility or those of a professional organisation, if the major part of the revenue is used to cover expenses

(b) other cultural and sporting events organised by the operators referred to in (a), where the fee consists of participation fees.'

6. Sections 51, 52, 55, 58, 59, 60 et 61 of the Abgabenordnung (Fiscal Code, 'the AO'), stated:

'Section 51

General

(1) The following provisions shall apply where the Code grants tax privileges to a corporation on account of its serving directly and exclusively public-benefit, charitable or religious purposes (tax-privileged purposes). A corporation shall be understood to mean a corporation, an association or a pool of assets as defined in the Corporation Tax Act. Functional subdivisions (departments) of corporations shall not be treated as independent taxable entities.

…

Section 52

Public-benefit purposes

(1) A corporation shall serve public-benefit purposes if its activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. It shall not be deemed an advancement of the general public if the group of persons benefiting from such advancement is circumscribed, for instance by membership of a family or the workforce of an enterprise, or can never be other than small as a result of its definition, especially in terms of geographical or professional attributes. Advancement of the general public may not be contended merely because a corporation allocates its funds to a public-law entity.

(2) Subject to the provisions of subsection (1) above, the following shall be recognised as advancement of the general public:

…

21. the advancement of sport (chess shall be considered to be a sport);

…

Section 55

Altruistic activity

(1) Advancement or support shall be provided altruistically if it does not primarily serve the corporation's own economic purposes, for instance commercial or other gainful purposes, and the following requirements are met:

1. The funds of the corporation may be used only for the purposes set out in the statutes. Members or partners (members for the purposes of these provisions) may receive neither profit shares nor in their capacity as members any other allocations from the funds of the corporation. The corporation may use its funds neither for the direct nor for the indirect advancement or support of political parties.

2. On termination of their membership or on dissolution or liquidation of the corporation, members may not receive more than their paid-up capital shares and the fair market value of their contributions in kind.

3. The corporation may not provide a benefit for any person by means of expenditure unrelated to the purpose of the corporation or disproportionately high remuneration.

4. Where the corporation is dissolved or liquidated or where its former purpose ceases to apply, the assets of the corporation in excess of the members' paid-up capital shares and the fair market value of their contributions in kind may be used only for tax-privileged purposes (the principle of dedication of assets). This requirement shall also be met if the assets are to be assigned to another tax-privileged corporation or to a legal person under public law for tax-privileged purposes.

5. Subject to section 62, the corporation shall in principle use its funds promptly for the tax-privileged purposes set out in its statutes. The use of funds for the acquisition or creation of assets serving the purposes set out in the statutes shall also constitute an appropriate use. Funds shall be deemed to have been used promptly where they are used for the tax-privileged purposes set out in the statutes by no later than two calendar or financial years following their accrual.

…

Section 58

Activities having no detrimental effect on tax privilege

Tax-privileged status shall not be precluded in the event that

…

8. a corporation holds social events which are of secondary significance in comparison with its tax-privileged activities,

9. a sports association promotes paid in addition to unpaid sporting activities,

…

Section 59

Preconditions for tax privileges

Tax privileges shall be granted if it is stated in the statutes, the act of foundation or other articles of association (statutes for the purposes of these provisions) describing the purpose the corporation pursues that this purpose fulfils the requirements of sections 52 to 55 and that it is pursued exclusively and directly; actual management activity must conform to these statute provisions.

Section 60

Requirements to be met by the statutes

(1) The purposes set out in the statutes and the means by which they are to be achieved shall be so precisely defined as to ensure that it can be ascertained on the basis of the statutes whether the preconditions for tax privileges have been fulfilled. The statutes shall contain the criteria referred to in Annex 1.

(2) The statutes shall conform to the prescribed requirements, in respect of corporation tax and trade tax, during the entire assessment period, and, in respect of other taxes, at the time the tax liability arises.

Section 61

Dedication of assets in the statutes

(1) A sufficient dedication of assets for tax purposes (section 55(1) number 4) shall be deemed to exist if the purpose for which the assets are to be used if the corporation is dissolved or liquidated or if its former purpose ceases to apply is so precisely defined in the statutes as to ensure that it can be ascertained on the basis of the statutes whether such purpose is tax-privileged.

(2) (rescinded)

(3) If the provision on the dedication of assets is subsequently amended so that it no longer conforms to the requirements of section 55(1) number 4 it shall be deemed from the outset to have been insufficient for tax purposes. Section 175(1), first sentence, number 2 shall apply with the proviso that tax assessment notices may be issued, cancelled or amended in so far as they relate to taxes which have arisen within the 10 calendar years preceding the amendment of the provision on the dedication of assets.'

II. **Background to the dispute**

7. Golfclub is a registered association, which was not recognised as charitable within the meaning of Section 51 et seq of the AO in the year at issue (2011). According to its articles of association, its purpose is to nurture and promote the sport of golf. To this end, it manages a golf course and its associated facilities, which it leases to Golfplatz-Y-Betriebs-GmbH (Golfplatz). According to Article 13(3) of the association's statutes, in the event of voluntary or forced dissolution, its assets are transferred to a person or institution designated by the general meeting.

8. On 25 January 2011, Golfplatz was acquired by Golfclub for EUR 380 000. In order to finance this operation, Golfclub has contracted loans from its members with an annual interest rate of 4% and repaid at a rate of 5% per year.

9. During the same year, Golfclub collected revenue for a total of EUR 78 615.02 from the following activities:

(i) the use of the golf course;

(ii) the rental of golf balls;

(iii) the hiring of caddies;

(iv) the sale of golf clubs;

(v) the organisation and holding of golf tournaments and events for which Golfclub has received entry fees for participation.

10. The tax office refuses to exempt these activities from VAT on the ground that under Section 4(22) of the UStG, only participation fees are exempted and that, even for the organisation and holding of golf tournaments, this exemption may not be applied, since Golfclub cannot qualify as a charitable organisation within the meaning of Section 51 et seq. of the AO. Indeed, its articles of association did not provide sufficiently precise rules as regards the statutory allocation of its assets in the event of a dissolution and the acquisition of Golfplatz demonstrates that it does not exclusively pursue a non-profit purpose.

11. The decision adopted by the tax office regarding Golfclub was annulled by the Finanzgericht München (Finance Court Munich, Germany) on the ground that Golfclub is a non-profit organisation within the meaning of Article 132(1)(m) of Directive 2006/112 and that this provision, which has direct effect, requires Member States to exempt all activities closely linked to the practice of a sport by a non-profit organisation.

III. **Facts and requests for a preliminary ruling**

12. The tax office brought an action for review against the Finanzgericht's judgment in front of the referring Court. The latter believes that the outcome of the dispute depends, on the one hand, on whether Article 132(1)(m) of Directive 2006/112 has direct effect and, therefore, that non-profit organisations may rely directly on that provision in the event of an incorrect transposition of the said directive. On the other hand, the dispute turns on the meaning of the concept of 'non-profit organisations' used by that same provision.

13. As regards the first issue, the national court explains that it has doubts as to whether Article 132(1)(m) of Directive 2006/112 has direct effect since, in its judgment of 15 February 2017, *British Film Institute* (C?592/15, EU:C:2017:117, paragraphs 23 and 24), the Court of Justice held that Article 13A(1)(n) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ('the Sixth Council Directive') has no direct effect. Indeed, to reach this solution, the Court relied in particular on the fact that this provision referred, as does Article 132(1)(m), to 'certain services' and, therefore, granted discretion to the Member States to decide which benefits to exempt. This led the Court to conclude that this provision did not fulfil the conditions such as would enable it to be directly effective before national courts.

14. With regard to the second issue, the national court wonders whether the concept of 'non-profit organisation' used in Article 132(1)(m) of Directive 2006/112 should be regarded as an autonomous concept of European Union law and, if it does, whether that notion should be interpreted as requiring, in order for an organisation to be so qualified, that its articles of association state that in the event of a transfer to another organisation, the latter must also pursue

a non-profit purpose.

15. In those circumstances, the Bundesfinanzhof (Federal Finance Court, Germany), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Does Article 132(1)(m) of [Directive 2006/112], under which Member States are to exempt ‘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’, have direct effect, with the result that, in the absence of transposition, that provision may be relied on directly by non-profit-making organisations?

2. If the first question is answered in the affirmative: Is ‘non-profit-making organisation’ within the meaning of Article 132(1)(m) of [Directive 2006/112]:

– a concept that must be interpreted under EU law autonomously, or

– are the Member States authorised to make the existence of such an organisation subject to conditions such as paragraph 52, in conjunction with paragraph 55, of the Abgabenordnung (German General Tax Code) (or Paragraph 51 et seq. of the General Tax Code in their entirety)?

3. If it is a concept that must be interpreted under EU law autonomously: Must a non-profit-making organisation within the meaning of Article 132(1)(m) of [Directive 2006/112] have rules that apply in the event that the organisation is dissolved, under which it has to transfer its existing assets to another non-profit-making organisation in order to promote sport and physical education?’

IV. **Analysis**

16. As requested by the Court, I shall confine my observations in this Opinion to the first question.

17. By the first question, the referring court asks whether Article 132(1)(m) of Directive 2006/112 has direct effect and, therefore, may be relied upon before national courts by individuals.

18. As a preliminary point, it should be recalled that a provision may be relied upon before national courts by individuals against a Member State, in particular where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly, if that provision is unconditional and sufficiently precise. (2)

19. A provision of EU law is to be considered as unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure by the institutions of the European Union or by the Member States. (3) To be considered as sufficiently precise, a provision must describe the obligation that it states in unequivocal and unconditional terms. (4)

20. In the case of Article 132(1)(m) of Directive 2006/112, the existing case-law already provides guidance on how the question asked by the referring court needs to be answered.

A. **Analysis in the light of the existing case-law of the Court of Justice**

21. The early case-law of the Court regarding Article 132(1)(m) of Directive 2006/112 ? such as the judgments of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C?253/07, EU:C:2008:571), of 21 February 2013, *Žamberk* (C?18/12, EU:C:2013:95), and the judgment of 19 December 2013, *The Bridport and West Dorset Golf Club* (C?495/12, EU:C:2013:861) ? might at first blush give the impression that Member States are required to

exempt any service closely linked to the practice of sport provided by non-profit organisations. I consider, however, that a more detailed analysis of these judgments demonstrates that this is not in fact the case.

22. In its judgment of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C?253/07, EU:C:2008:571, paragraph 27), the Court held that 'Article 13A(1)(m) of the Sixth Directive is not intended to confer the benefit of the exemption under that provision only on certain types of sport but covers sport in general …'. In this case the central issue was whether the affiliation fees paid by hockey clubs to England Hockey in return for the services supplied by that organization were liable to VAT.

23. In the course of answering the first question posed by the referring court, the Court first held that the supply of services for the purposes of what is now Article 132(1)(m) of Directive 2006/112 covers services supplied, from a formal perspective, not only to natural persons, but also to corporate persons and to unincorporated associations, provided that, in particular, their true beneficiaries are persons taking part in sport. Indeed, if it were otherwise it would mean that 'the exemption provided for by that provision would depend on the existence of a legal relationship between the service supplier and the persons taking part in sport within such a structure.' Such a conclusion would run counter to the entire purpose of that exemption.

24. The Court then went to address the second question, namely, whether the Member States are entitled to limit the scheme of exemption under Article 132(1)(m) of Directive 2006/112 only to services supplied to individuals taking place in sport. It held, at paragraph 39, that this Directive did not permit Member States 'to exclude a certain group of recipients of those services from the benefit of the exemption in question', as Member States were given no such discretion in that regard.

25. Similarly, in its judgment of 21 February 2013, *Žamberk* (C?18/12, EU:C:2013:95), the Court ruled, at paragraph 21, that Article 132(1)(m) of Directive 2006/112 'is not intended to confer the benefit of the exemption under it only on certain types of sport'. The Court thus ruled, at paragraph 25, that 'non-organised and unsystematic sporting activities which were not aimed at participation in sports competitions *may* nonetheless be categorised as taking part in sport within the meaning of that provision.' (5) In any event, the permissive language ('may') used by the Court in that paragraph in itself suggests that Member States enjoy a discretion in the matter. If the provision in question was considered to be unconditional one might have assumed that the Court would have said so by employing imperative words such as 'must'.

26. Pausing at this point, it may be conceded that in these two cases the Court seems to have proceeded on the tacit assumption that Article 132(1)(m) was itself directly effective. Yet it must also be observed that the question of direct effect was not explicitly before the Court and the Court was not required in either case to address that point.

27. Accordingly, since the questions asked in *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C?253/07, EU:C:2008:571) *and Žamberk* (C?18/12, EU:C:2013:95) did not expressly concern either the existence of a certain discretion for Member States to decide which services exempted or the unconditional nature of Article 132(1)(m), I consider that no conclusion can be drawn from these judgments so far as the present issue of direct effect of this provision is concerned. For my part, I think that these decisions should be understood as not excluding on an *ex ante* basis certain sporting activities from the scope of this provision simply because they did not meet the particular criterion which was at issue in each of these respective cases.

28. In its judgment of 19 December 2013, *The Bridport and West Dorset Golf Club* (C?495/12, EU:C:2013:861, paragraph 32), the Court held in response to the first five questions posed by the

referring court, that ‘Article 134(b) of Directive 2006/112 must be interpreted as not excluding from the exemption in Article 132(1)(m) of that directive a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body.’ Yet the provision which was at issue in *Bridport and West Dorset Golf Club* was *not* Article 132(1)(m), but Article 134(b) of Directive 2006/112. (6) Since Article 134(b) limits Member States from exempting on the ground of Article 132(1)(m) certain supplies of services closely linked to sport or physical education, the Court implicitly but necessarily based its reasoning on the premise that the conditions for the application of that provision were met.

29. Therefore, it cannot be said that the Court actually addressed the quite separate question of whether Article 132(1)(m) was itself directly effective. It follows, therefore, that no conclusions can be drawn from this judgment, either, at least as far as the key issue in the present case is concerned.

30. In any event, this case by case analysis of the earlier case-law now scarcely matters because since then the Court has expressly adopted a position in at least two judgments, namely, the judgments of 13 July 2017, *London Borough of Ealing* (C?633/15, EU:C:2017:544) and of 15 February 2017, *British Film Institute* (C?592/15, EU:C:2017:117), from which it can be clearly seen that Article 132(1)(m) leaves Member States a discretion regarding the extent of their power to exempt certain services closely linked to sport. The very existence of such a discretion in itself means that the provisions of Article 132(1)(m) cannot be regarded as unconditional in nature. Since the requirement of unconditionality is a prerequisite to the application of the direct effect doctrine, it follows that Article 132(1)(m) cannot be regarded as directly effective. This point can be illustrated by a consideration of these two decisions.

31. First, in its judgment of 15 February 2017, *British Film Institute* (C?592/15, EU:C:2017:117), the Court ruled that Article 13A(1)(n) of the Sixth Directive — which has since been replaced by the identical provisions of Article 132(1)(n) of Directive 2006/112 ? ‘must be interpreted as not being of direct effect, so that in the absence of transposition that provision may not be relied on directly by a body governed by public law or other cultural body’.

32. The Court noted in particular that the expression ‘certain cultural services’, used by that provision, ‘does not require the exemption of all cultural services, so that the Member States may exempt ‘certain’ of them while subjecting others to VAT’. (7) The Court took this view because, first, ‘such an interpretation does not correspond to the ordinary meaning of the term ‘certain’ used in Article 13A(1)(n) of the Sixth Directive, and deprives of effectiveness the use of that term in that provision’. (8) Secondly, as for Article 13A(1)(n) of the Sixth Directive, the EU legislature expressly rejected the European Commission’s original proposal to specify, in a harmonised manner, the services concerned. (9) Thirdly, the EU legislature’s decision to leave the Member States a discretion to determine which services should be exempted could be explained by the great diversity of cultural traditions and regional heritage within the Union, and sometimes within the same Member State. (10)

33. Critically, however, the Court concluded that the existence of the discretion to exempt ‘certain’ cultural services meant that this provision did not satisfy the conditions necessary for the application of the direct effect doctrine. (11)

34. Second, in its judgment of 13 July 2017, *London Borough of Ealing* (C?633/15, EU:C:2017:544, paragraph 19), the Court rejected the argument that the requirement that Member States subject to VAT all supplies of services closely linked to the practice of sport for the purpose of Article 132(1)(m) of Directive 2006/112 was directly effective on the ground that this ‘would … be contrary to the wording of Article 132(1)(m) … where there is mention of “certain” supplies of

services closely linked to sport or physical education'.

35. All of these considerations are perfectly applicable in the case of Article 132(1)(m) of Directive 2006/112 since this provision also refers to the power to exempt 'certain' services closely linked to sport or physical education. The fact that Member States are given a discretion in the matter is inconsistent with the requirement of unconditionality, itself a prerequisite to the application of the direct effect doctrine. I consider, therefore, that in view of the reasoning of this Court in both *British Film Institute* and *London Borough of Ealing* (C?633/15, EU:C:2017:544), Article 132(1)(m) of Directive 2006/112 cannot be considered as sufficiently precise and unconditional so as to have direct effect.

B. **Analysis in the light of the commonly accepted methods of interpretation**

36. Any analysis of Article 132(1)(m) of Directive 2006/112 in the light of the methods of interpretation traditionally used by the Court, based on the wording, context and objective of the provision at issue, also leads to the same conclusion.

1. ***Wording of Article 132(1)(m)***

37. Article 132(1)(m) of Directive 2006/112 provides that Member States shall exempt from VAT 'the supply of certain services closely linked to the practice of sport or physical education by non-profit organisations to persons practicing sport or physical education'.

38. Since this wording of that provision lays down that Member States should exempt *certain* services *?* and not, be it noted, *all* services *?* closely linked to the practice of sport, it is clear that Member States enjoy a certain discretion in the matter. They can accordingly determine which of the services related to the practice of sport or physical education provided by non-profit organisations they wish to exempt.

39. In its written observations, the Netherlands Government claims, however, that the term 'certain' should be understood not in the sense of 'some but not all', but instead as emphasising that this exemption only applies to services closely linked to the practice of sport provided by non-profit organisations.

40. I find myself unable to accept this argument. Indeed, it should be recalled that given that terms used to specify the exemptions provided for by Article 132 of Directive 2006/112 constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, these terms must accordingly be interpreted strictly.

41. Clearly, that rule of strict interpretation does not mean that the terms used to specify this exemption should be construed in such a way as to deprive them of their intended effects. (12) It nevertheless implies that, when the wording of an exemption ? such as the one provided in Article 132(1)(m) of Directive 2006/112 ? is clear, its literal interpretation should prevail.

42. Here, for the argument put forward by the Netherlands Government to be sustainable, it would, I think, have been necessary for the end of the sentence to have been structured differently and, in particular, for the terms 'provided by non-profit organisations' to have been mentioned separately. Had the Union legislature intended that this provision should bear the interpretation urged by the Netherlands Government, it might, for example, have provided as follows: 'certain services closely linked to the practice of sport or physical education, *namely those* provided by non-profit organisations to persons practising sport or physical education' are exempted. (13)

43. Accordingly, in view of the rule of interpretation just mentioned, the argument of the

Netherlands Government cannot prevail.

44. It also bears observing that, as the Court has consistently held, provisions of Union law should be interpreted not only in light of their wording, but also in light of their context and objectives. (14) Any analysis of the objectives pursued by Art. 132(1)(m) of Directive 2011/112, and of its context also leads to the same conclusion.

2. ***Objectives pursued by Article 132(1)(m)***

45. It is true that the recitals of Directive 2006/112 offer little guidance regarding the objectives pursued by Article 132(1)(m). (15) Since this provision exempts certain services related to sport, it can, however, be assumed that this exemption is aimed at encouraging sporting activity by the general public, in particular as it contributes to public health goals. (16)

46. Such an objective does not imply, however, that the Union legislature's intention was to exempt *all* services closely linked to the practice of sport provided by non-profit organisations. It is true that the Court has held that the concept of sport refers to an activity characterised by a 'not negligible physical element'. (17) However, not all physical activities contribute to the general public interest objective of maintaining the physical condition of the population to the same extent. Similarly, not all services closely linked to the practice of sport or physical education are likely to serve this objective. Therefore, in light of that objective, the Union legislature may well have considered, in accordance with the principle of subsidiarity enshrined in Article 5(1) TEU, that Member States were best placed to decide which services closely linked to sport should be exempted by their own transposing legislation.

47. Several considerations might well have led the Union legislature to that conclusion.

48. First, as with cultural services, there is a great diversity of both sporting practice and attitudes to different sports among the Member States. Bullfighting is, for example, regarded by some as one of the great glories of Spain, but this sport is at best tolerated in some Member States(18) and viewed with disfavour in others. Combat and contact sports present their own issues both in terms of the safety and physical well-being of participants. Much the same can be said of certain extreme sports. Yet again certain other sports may be thought to raise issues of animal welfare on which there may well be a diversity of views in different Member States. A further consideration is that while some sports are deeply embedded in the cultural and sporting life of particular Member States — one thinks here of bullfighting in Spain, pétanque in France, cricket in the United Kingdom and Gaelic football and hurling in Ireland — these sports are also largely unknown and are but rarely played within the European Union outside the relevant Member State in question.

49. All of this means that Member States may well have their own distinctive views on the utility of these sports and the extent to which public participation in particular sports should be encouraged or financially supported.

50. Second, with regard to a particular sport, the question of whether certain services closely related to that sport should be exempted might be a complex one. For example, sailing may be considered as a sport in a racing context, but when practised in a different way, it might be considered simply to constitute a leisure activity or even to amount to a means of transport. Similarly, although pony trekking or guided horse rides are part of equitation, — as is, for example, sometimes proposed to children during the holidays — this might not be enough for these services to be considered as related to participating in a sport, as required by Article 132(1)(m) of Directive 2006/112. In some circumstances and under some conditions, this might be regarded simply as a leisure activity and not a sport as such.

51. Third, the exemption provided for in Article 132(1)(m) of Directive 2006/112 is likely to have significant economic repercussions on the sports services of each national market, since the exemption can only be granted to non-profit organisations. (19) Consequently, the Union legislature, by granting some discretion to Member States to decide which services to exempt, may have considered that Member States were better placed to decide on the impact that these exemptions would have on local competition.

52. It follows, therefore, that the Union legislature might have seen fit to defer to the judgment of Member States in these matters, which in turn might explain why this provision did not impose an unconditional obligation on the Member States to exempt all sporting activities.

3. *Context in which Article 132(1)(m) is used*

53. The context in which Article 132(1)(m) is used might also be thought to leave little room for doubt about the interpretation that shall be given to Article 132(1)(m). Most of the specific exemptions referred to in Article 132 apply not only in respect of certain activities but also, unlike the exemptions referred to in Article 135, to activities carried out by certain categories of suppliers. (20) If, therefore, Article 132(1)(m) had the meaning for which the Netherlands Government contends, the Union legislature should have used the term ‘certain’ in each of these exemptions. However, this term is only used in relation to two of these exemptions, namely Article 132(1)(n), regarding the supply of cultural services, and Article 132(1)(m).

54. It follows that both the wording and the context in which Article 132(1)(m) was adopted demonstrate that this provision must be interpreted as granting to Members States a certain discretion to determine, among the services related to the practice of sport or physical education provided by non-profit organisations, those that they wish to exempt.

C. **Impact of the principle of equal treatment on the interpretation of Article 132(1)(m)**

55. Nor is the existence of a certain discretion granted to Member States negated by the principle of equal treatment, sometimes referred to, in the context of VAT, as the principle of fiscal neutrality. (21)

56. The principle of equal treatment requires that comparable situations should not be treated differently and that different situations should not be treated identically, unless such treatment is objectively justified on a particular ground. (22)

57. According to settled case-law, the comparable nature of several situations, which is required in order for a difference of treatment to fall within the scope of the principle of equal treatment, must be assessed in the light of the subject-matter and purpose of the provisions in question, as well as the principles and objectives of the field to which the act in question relates. (23) The extent of the competences held by the person concerned must also be considered when

applying the principle of equal treatment. (24)

58. Consequently, where a provision of EU law leaves some discretion to the Member States to specify the conditions for its application, it is only if the objective pursued by that provision requires that certain goods or services shall be treated in the same way that the principle of equality may restrict the discretion that these Member States possess. (25) Failing that, the principle of equal treatment cannot be invoked in order to contend that this provision must be interpreted, contrary to its wording, as leaving no discretion to those Member States. Indeed, if this were not the case, it would mean that the extent of any harmonisation achieved by any act of Union law would always be complete.

59. Since the objective pursued by Article 132(1)(m) of Directive 2006/112 does not require that all services closely linked to the practice of sport or physical education are to be considered in the same way, the principle of equal treatment does not require that all those services be treated identically. It is only when a Member State has exercised the discretion thereby conferred on it by the Directive, that it might be argued, in view of the objectives pursued by that State in exercising such discretion, that the manner in which it was in fact exercised breaches the principle of equal treatment. (26)

60. Consequently, in the main proceedings, it is for the referring court to determine whether, having regard to the objectives pursued by the German legislature when it exercised the discretion conferred upon it by Article 132(1)(m) of Directive 2006/112, it has respected the principle of equal treatment by not exempting the activities at issue in the main proceedings.

D. **Exceptional reliance on Article 132(1)(m)**

61. As the Court’s case-law indicates, when a provision grants a certain discretion to Member States, a person may still, in some special circumstances, rely on that provision for the purpose of invoking the direct effect doctrine. (27) Nevertheless, he or she may only do so in so far as the Member State concerned has exceeded its discretion, (28) or if it has expressly renounced any intention of exercising the discretion thereby conferred. (29)

62. In the case of Article 132(1)(m) of Directive 2006/112, that discretion would be exceeded, for example, if a Member State refused to exempt a service on a ground which is not permitted, such as where the service is not supplied by non-profit-making organisations to persons taking part in sport or physical education or where the beneficiaries of the service are not members of a non-profit organisation, (30) or where the supplier of that service, although it is a non-profit organisation, is not a public law body, (31) or where the service is supplied to a corporation rather than to a natural person, (32) or, as explained previously, if in the light of the objectives pursued by the national legislation applying this discretion, that ground infringed the principle of equal treatment.

63. In the present case, the tax authorities have refused to exempt the services at issue ? except for the organisation of golf tournaments — on the ground that they are not one of those that Germany has chosen to exempt. This particular reason cannot in itself be said to exceed the scope of discretion granted by Article 132(1)(m) to Member States because, as I have already sought to explain, Member States are, in principle, entitled to decide which particular services closely linked to sport or physical education they choose to exempt. Therefore, Golfclub cannot directly rely on that provision, unless, as explained previously, it appears, in view of the objectives pursued by the Federal Republic of Germany when it exercised its discretion, that those services should have been considered to be in the same situation as those sporting services which were in fact exempted by German law. This, however, is ultimately a matter for the national court to determine.

64. Here I would also observe that this particular question was not directly argued before us, nor is the Court in possession of such information as would enable it to give useful indications to the referring Court in that regard.

65. I therefore propose that the first question be answered in the sense that Article 132(1)(m) of Directive 2006/112 should be interpreted as not having direct effect, so that provision may not be relied upon directly before the national courts by individuals, unless the Member State concerned has exceeded the scope of the discretion conferred on it by that provision of the directive. (33)

V. **Conclusion**

66. In the light of the foregoing considerations, I propose that the Court answer the first question asked by the Bundesfinanzhof (Federal Finance Court, Germany) as follows:

Article 132(1)(m) of Council Directive 2006/112/EC on the common system of value added tax, exempting ‘the supply of certain services closely linked to the practice of sport or physical education, provided by non-profit organisations to persons practicing sport or physical education’, is to be interpreted as not being of direct effect, so that provision may not be relied upon directly before the national courts by individuals, unless the Member State concerned has exceeded the scope of the discretion conferred on it by that provision of the directive.

1 Original language: English.

2 See, to that effect, judgments of 24 January 2012, *Dominguez* (C?282/10, EU:C:2012:33, paragraph 33*)*; of 12 December 2013, *Portgás* (C?425/12, EU:C:2013:829, paragraph 18*);* of 15 January 2014, *Association de médiation sociale* (C?176/12, EU:C:2014:2, paragraph 31*)*; of 15 May 2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328, paragraph 31*) and of* 7 July 2016, *Ambisig* (C?46/15, EU:C:2016:530, paragraph 16*)*.

3 See, to that effect, judgments of 15 May 2014, *Almos Agrárkülkereskedelmi* (C?337/13, EU:C:2014:328, paragraph 32*)*; of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraph 49*); and* of 13 February 2019, *Human Operator* (C?434/17, EU:C:2019:112), paragraph 38.

4 Judgments of 26 February 1986, Marshall (152/84, EU:C:1986:84, paragraph 52); and of 26 October 2006, Pohl-Boskamp (C?317/05, EU:C:2006:684, paragraph 41).

5 Emphasis added.

6 This is also the case for judgment of 12 January 2006, *Turn- und Sportunion Waldburg* (C?246/04, EU:C:2006:22, paragraph 36), which concerned the interpretation of Article 13(B)(b)

and (C) of the Sixth Directive and not Article 13(A)(1)(m) of this directive.

7 Paragraph 23 of judgment of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117).

8 Paragraph 16 of this judgment.

9 Paragraphs 19 to 21 of this judgment.

10 Paragraph 22 of this judgment.

11 Paragraphs 23 and 24.

12 See, to that effect, judgments of 18 November 2004, *Temco Europe* (C?284/03, EU:C:2004:730, paragraph 17); and of 21 February 2013, *Žamberk* (C?18/12, EU:C:2013:95, paragraph 19).

13 In addition, the preparatory work shows that the use of the word ‘certain’ is the result of the legislature’s express intention to grant Member States a certain discretion. Indeed, in its proposal for a Sixth Directive, the Commission initially proposed that Member states shall exempt ‘the supply of services, and supplies of goods incidental thereto, by non-profit-making sport or physical training organisations to their members; this exemption shall apply only to operations directly connected with the pursuit of sport and physical training activities by amateurs’. However, this proposal was expressly rejected by the Council which substituted it for the text corresponding to the current wording of Article 132(1)(m). Later, when the Commission suggested to the Council on 5 December 1984 to delete the word ‘certain’, the Council rejected this proposal again, leaving the wording of this provision as it was in the original version of 17 May 1977.

14 See, for example, judgment of 10 July 2019, *Bundesverband der Verbraucherzentralen und Verbraucherverbände* (C?649/17, EU:C:2019:576, paragraph 37).

15 According to Court’s case-law, ‘the principle of legal certainty and clarity requires that the interpretation which the Court is called upon to give should be based on the wording and apparent objectives of the relevant provisions’. See judgment of 5 May 1988, *Erzeugergemeinschaft Gutshof-Ei* (C-91/87, EU:C:1988:235, paragraph 8).

16 See, to that effect, judgments of 21 February 2013, *Žamberk* (C?18/12, EU:C:2013:95, paragraph 23), of 19 December 2013, *The Bridport and West Dorset Golf Club* (C?495/12, EU:C:2013:861, paragraph 20) and of 26 October 2017, *The English Bridge Union* (C?90/16, EU:C:2017:814, paragraph 23). In particular, in its judgment in *Žamberk* this Court rejected the argument that the exemption did not apply to ‘non-organised and unsystematic sporting activities’ such as — as in that case — casual swimming in a swimming pool complex.

17 See judgment of 26 October 2017, *The English Bridge Union* (C?90/16, EU:C:2017:814, paragraph 22.)

18 For example, under French law, bullfighting is only allowed in areas where there is an uninterrupted local tradition. See Article 521-1 of the French Criminal Code.

19 If distortion of competition is inherent in the fact that Article 132 of Directive 2006/112 provides some exemptions (judgment of 19 December 2013, *The Bridport and West Dorset Golf Club*, C?495/12, EU:C:2013:861, paragraph 37), this does not mean that the Union legislator sought in some way to prevent the Member States from determining the extent of such distortions when it granted them the discretion provided for by Article 132(1)(m).

20 See judgment of 14 December 2006, *VDP Dental Laboratory* (C?401/05, EU:C:2006:792, paragraph 28).

21 The use, in this context, of the expression ‘principle of fiscal neutrality’ is misleading, as it may be confused with the deduction mechanism provided for by the Sixth Directive in order to relieve the trader of the burden of VAT due or paid on his economic activities which are themselves subject to VAT. In this regard, the case-law has not always been consistent. Indeed, as I already underlined in my Opinion in *Grup Servicii Petroliere* (C?291/18, EU:C:2019:302), according to some judgments, the principle of neutrality is the ‘translation’ of the principle of equal treatment into the field of VAT (order of 18 November 2014, *MDDP*, C?319/12, EU:C:2014:2395, paragraph 38). In some other judgments, the Court considered it as a particular expression of the principle of equal treatment (judgment of 7 March 2013, *Efir*, C?19/12, not published, EU:C:2013:148, paragraph 35) which does not coincide with the latter (judgment of 25 April 2013, *Commission* v *Sweden*, C?480/10, EU:C:2013:263, paragraph 18). However, in its later judgment of 7 March 2017, *RPO* (C?390/15, EU:C:2017:174), the Grand Chamber has followed a more rigorous approach, considering that, in its second acceptance, the notion of fiscal neutrality is equal to the principle of equal treatment, but that, for tax measures, a broad discretion must nonetheless be given to the EU legislature.

22 See, for example, judgment of 7 March 2017, *RPO* (C?390/15, EU:C:2017:174, paragraph 41).

23 Judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C?127/07, EU:C:2008:728, paragraph 26). Consequently, for the principle of equal treatment to apply, it is not sufficient that the goods or services at issue are in competition with each other. They must be similar in the light of the subject-matter of the provisions in question and of the aim pursued by them, and, to this effect, the purpose of the principles and objectives of the field in question must be taken into account. See judgment of 7 March 2017, *RPO* (C?390/15, EU:C:2017:174, paragraph 42), departing from the judgment of 10 November 2011, *Rank Group* (C?259/10 and C?260/10, EU:C:2011:719, paragraph 36). Accordingly, in Union law, applying the principle of equal treatment is the same as conducting a consistency test.

24 See, by analogy, regarding the existence of a selective advantage in the field of State aid, judgment of 26 April 2018, *ANGED* (C?236/16, EU:C:2018:291, paragraph 29).

25 In other words, the principle of equal treatment does not determine the existence of a discretion left to Member States, but limits the way in which this discretion shall be exercised.

26 See, to that effect, judgments of 17 February 2005, *Linneweber and Akritidis* (C?453/02 and C?462/02, EU:C:2005:92, paragraph 37), and of 9 July 2015, *Salomie and Oltean* (C?183/14, EU:C:2015:454, paragraph 50).

27 Judgment of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C?363/05, EU:C:2007:391 paragraph 61).

28 See, to that extent, judgment of 12 October 2017, *Lombard Ingatlan Lízing* (C?404/16,

EU:C:2017:759, paragraph 38).

29 See, in this regard, judgment of 17 February 2005, *Linneweber and Akritidis* (C?453/02 and C?462/02, EU:C:2005:92, paragraph 35).

30 See judgment of 19 December 2013*, The Bridport and West Dorset Golf Club* (C?495/12, EU:C:2013:861, paragraphs 32 and 39).

31 See, to that extent, judgment of 13 July 2017, *London Borough of Ealing* (C?633/15, EU:C:2017:544, paragraph 33).

32 See judgment of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C?253/07, EU:C:2008:571, paragraph 35).

33 Article 132(1)(m), although leaving to the Member States the task of determining precisely which services are to be exempted, limits this discretion by requiring, in order for a service to be exempt, that it has been supplied by a non-profit organisation. I suggest that the Court should therefore take a position on whether a Member State *can* or whether it *must* refuse to exempt a service when the latter is provided by non-profit organisations whose articles of association do not exclude that, in case of dissolution, the profits may be transferred to its members or to a profit-making organisation.