Provisional text

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 23 September 2021(1)

Case C?228/20

I GmbH

v

Finanzamt H

(Request for a preliminary ruling from the Niedersächsisches Finanzgericht (Finance Court, Lower Saxony, Germany))

(Reference for a preliminary ruling – Value added tax – Directive 2006/112/EC – Article 132(1)(b) – Exemptions for certain medical activities in the public interest – Concept of 'duly recognised establishments' – Concept of 'social conditions comparable with those applicable to bodies governed by public law')

I. Introduction

1. In what circumstances is a privately run hospital entitled to avail of the VAT exemption provided in respect of medical treatment and care for public hospitals? This, as we shall see, is a question of no little difficulty, but it is in essence the issue which is raised by the present reference for a preliminary ruling which concerns the interpretation of Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive'). It is this provision which provides an exemption for certain health care activities performed by specific types of medical establishments.

2. The exemptions provided for in Article 132 of the VAT Directive are based on policy considerations which are not all necessarily perfectly consistent. As D. Berlin has observed, progress on the path of VAT harmonisation was often governed by immensely practical considerations which were often dictated in turn by the realities of national politics and regional specificities. (2)

3. The request in the present case was made by the Niedersächsisches Finanzgericht (Finance Court, Lower Saxony, Germany) in the context of a dispute between a private limited company, I, and the Finanzamt H (Tax Office of H, Germany) regarding the exemption from VAT for hospital services provided by I during the tax years 2009 to 2012. Noting that there was some

tension between the national legislation at issue and the wording of Article 132(1)(b) of the VAT Directive, the referring court decided to ask the Court about the interpretation which should be given to this provision.

4. At the outset, I cannot avoid saying that some of the Court's existing case-law on the topic is not perhaps always entirely consistent. As we shall also see, part of the difficulty here comes from the fact that some of the concepts contained in Article 132(1)(b) are themselves somewhat ill-defined and difficult to apply. The present case accordingly provides the Court with an opportunity to clarify this case-law by undertaking a comprehensive and systemic analysis of this provision. Before proceeding with this analysis, however, it is first necessary to present the relevant legislative framework.

II. **Legal framework**

A. **EU law**

5. Article 131 of the VAT Directive is the only article set out in Chapter 1 of Title IX of that directive, entitled respectively 'General Provisions' and 'Exemptions'. That article reads as follows:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other [EU] provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

6. Article 132(1) of the VAT Directive, which is contained in Chapter 2 thereof entitled 'Exemptions for certain activities in the public interest', of Title IX of that directive, provides:

'Member States shall exempt the following transactions:

…

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

…'

7. Article 133 of that directive provides:

'Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) 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, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

…'

B. **German law**

8. Paragraph 4(14)(b) of the Umsatzsteuergesetz (Law on Turnover Tax; 'the UStG'), in the version in force on 1 January 2009, provides:

'The following transactions falling under Paragraph 1(1)(1) of the UStG shall be exempt:

…

14. …

(b) hospital and medical care, including diagnosis, medical assessment, prevention, rehabilitation, obstetrics, and end-of-life care, as well as operations closely related thereto, provided by bodies governed by public law. The benefits referred to in the first sentence are also exempt if they are provided by:

(aa) approved hospitals within the meaning of Paragraph 108 of the Fünften Buches Sozialgesetzbuch [(The Fifth Book of the Social Code)];

…

(cc) bodies which have been engaged to supply care by providers of statutory accident insurance within the meaning of Paragraph 34 of the Siebten Buches Sozialgesetzbuch [(The Seventh Book of the Social Code)];

…'

9. Paragraph 108 of the SGB V, entitled 'Licensed Hospitals', states:

'Health insurance funds may procure hospital care only from the following hospitals (approved hospitals):

1. Hospitals that are recognised as university hospitals …,

2. Hospitals which are included in a *Land*-level hospital plan (plan-listed hospitals), or

3. Hospitals which have concluded a health care supply agreement with the Landesverbände der Krankenkassen (*Land*-level associations of health insurance funds) and the Verbände der Ersatzkassen (associations of substitute funds).'

10. It appears that under German law the difference between a health insurance fund and a

substitute fund is, for historical reasons, the way in which they are organised. This would not appear to be relevant for the present case.

11. Paragraph 109 of the SGB V, entitled ‘Conclusion of care supply contracts with hospitals’, provides that:

‘…

(2) There shall be no right to conclude a health care supply agreement as referred to in Paragraph 108(3) of the SGB V …

(3) A health care supply agreement as referred to in Paragraph 108(3) of the SGB V must not be concluded in the case where the hospital:

1. does not offer a guarantee of efficient and cost-effective hospital care;

2. [does not meet certain quality requirements]; or

3. is not necessary for the purposes of providing need-based hospital care for insured persons.

…’

12. Paragraph 1 of the Gesetz zur wirtschaftlichen Sicherung der Krankenhäuser und zur Regelung der Krankenhauspflegesätze (Krankenhausfinanzierungsgesetz) (Law on the financing of hospitals; ‘the KHG’, BGBl. I 1991, 886), entitled ‘Principle’, provides, in the version presented by the referring court as being applicable to the main proceedings, which is a matter for the said court to confirm:

‘(1) The purpose of this Law is to provide economic security for hospitals in order to ensure high-quality, patient-centred and need-based care for the population through efficient, high-quality and independently operated hospitals and to contribute towards socially sustainable healthcare charges.’

13. Paragraph 6 of the Law on the financing of hospital states that:

‘(1) The *Länder* shall draw up hospital plans and investment programmes aimed at reaching the objectives set out in Paragraph 1; the costs associated with these, in particular their impact on healthcare charges, shall be taken into account.

…

(4) Further details shall be determined by the law of the *Land*.’

14. In its written observations, the German Government stated that the Bundesministerium der Finanzen (Federal Ministry of Finance, Germany) had adopted a binding administrative circular that was applicable as of 1 January 2009. According to that circular, even private hospitals that were not approved hospitals within the meaning of Paragraph 108 of the SGB V could claim exemption from the tax if the services they offered corresponded to services provided by hospitals operated by public bodies or by hospitals approved within the meaning of Paragraph 108 of the SGB V and the costs were largely borne by health insurance funds or other social security bodies. This is the case if, during the past financial year, at least 40% of the hospitalisation or billing days over the year are attributable to patients for whom hospital services were billed for an amount that did not exceed the amount that would have been reimbursable by the social security bodies. (3)

15. Lastly, paragraph 30 of the Gewerbeordnung (Regulation on Trade, Commerce and Industry; ‘the GewO’), entitled ‘Private hospitals’, mentions:

‘(1) Entrepreneurs of private hospitals and private maternity hospitals as well as private mental hospitals shall require a license from the competent authority. The license shall be refused only if:

1. There are facts which show the unreliability of the entrepreneur in relation to the management or administration of the establishment or clinic;

1a. There are facts which show that the adequate medical and nursing care of the patients is not guaranteed;

2. according to the descriptions and plans to be submitted by the entrepreneur, the structural and other technical facilities of the establishment or clinic do not comply with the sanitary requirements;

3. the establishment or clinic is to be located only in a part of a building also occupied by other persons and its operation may cause considerable disadvantages or dangers for the co-inhabitants of this building; or

4. the establishment or clinic is intended to accommodate persons with contagious diseases or the mentally ill and its location may cause significant disadvantages or dangers to the owners or occupants of neighbouring properties.

(2) Before the concession is granted, the local police and municipal authorities shall be consulted on the matters referred to in sub-paragraph 1, No 3 and 4.’

III. **The facts of the main proceedings and the request for the preliminary ruling**

16. The applicant in the main proceedings is a private limited liability company incorporated under German law whose corporate purpose is, according to its articles of association, the planning, establishment and operation of a hospital specialising in neurology. The activities of that hospital have been state-approved within the meaning of Paragraph 30 of the GewO.

17. The patients of the applicant consist of self-funding persons who pay for their treatment in advance, privately insured persons, persons entitled to financial assistance, so-called ‘consular’ patients for whom the embassy of a foreign State issues a cost of treatment guarantee, members of the federal armed forces, patients affiliated to occupational insurance associations and patients covered by statutory health insurance.

18. The applicant initially invoiced its hospital and medical care services and closely related operations on the basis of fixed-rate daily fees, as was the usual practice among the hospitals provided for in Paragraph 108 of the SGB V. Elective medical services were charged separately in accordance with the Gebührenordnung für Ärzte (Regulation on Doctors’ Fees). In addition, patients accommodated in single or double rooms were charged an additional fee. Over the course of time, however, the applicant gradually switched its charging system to a diagnosis-related group (DRG) system. (4) Before the referring court, the applicant stated that, in 2011, only 15% to 20% of treatment days had been charged on the basis of the DRG system.

19. On 28 June 2012, the applicant concluded a framework agreement (within the meaning of Paragraph 4, point 14(b), second sentence, (cc), of the UStG) with a statutory provider of insurance against accidents. That agreement came into effect on 1 July 2012.

20. In its VAT tax returns for the years 2009 to 2012, the applicant treated the hospital services charged on the basis of fixed-rate daily fees and the user fees charged to non-resident doctors as transactions exempt from VAT. In the course of a tax audit, however, the relevant tax office took the view that the vast majority of the transactions carried out by the applicant before 1 July 2012 were not VAT-exempt, since it was not an approved hospital within the meaning of Paragraph 108 of the SGB V. That position was confirmed by a decision on the objection to the outcome of the audit, and in the action brought against that decision.

21. The applicant then commenced proceedings before the referring court in which it maintains that the transactions at issue should be exempt from VAT by virtue of Article 132(1)(b) of the VAT Directive in so far as they were carried out by an authorised hospital providing services under the same conditions as a body governed by public law. In order to demonstrate that this was the case, the applicant submits that its activity is in the public interest, since, first, it offers a range of services comparable to those of public establishments or establishments integrated into a *Land* hospital plan, second, it is one of the most renowned neurosurgery clinics in the world, and, third, it provides its services to all persons, irrespective of whether they are insured under a statutory or private insurance scheme, or whether they are not insured.

22. For its part, the referring court notes that, for the periods at issue, the applicant does not satisfy the conditions for an exemption under Paragraph 4(14)(b), second sentence, (aa) of the UStG or under Paragraph 4(14)(b), second sentence, (cc) of the UStG. First, the framework agreement concluded by the applicant with the accident insurance fund did not enter into force until 1 July 2012 and, second, the applicant does not satisfy the conditions laid down in Paragraph 108 of the SGB V which would entitle it to be treated as an approved hospital. The referring court has, however, doubts as to the compatibility of those conditions with Article 132(1)(b) of the VAT Directive.

23. In that regard, the national court tends to share the view of the Fifth and Eleventh Chambers of the Bundesfinanzhof (Federal Finance Court, Germany) that those requirements go beyond the requirements laid down in Article 132(1)(b) of the VAT Directive. Indeed, in view of the conditions laid down in Article 108 of the SGB V for qualification as an approved hospital within the meaning of that provision, it takes the view that any requirement that private hospitals must satisfy those conditions in order to qualify for exemption from VAT would restrict the advantage of the exemption to hospitals already included in a hospital plan or which had already concluded an agreement with an association of health insurance funds or an association of substitute funds. This is because other private hospitals would have little chance of being included in a hospital plan or of signing such an agreement if there are already sufficient hospital beds available for a particular speciality in a *Land*. As a result, similar medical services would be treated differently, depending on whether the hospital providing the services applied earlier or later for inclusion in a hospital plan or for the conclusion of a health care supply agreement with a *Land*-level association of health insurance funds or an association of substitute funds, which would be incompatible with the principle of fiscal neutrality.

24. If Paragraph 4(14)(b) of the UStG were to be held to be incompatible with Article 132(1)(b) of the VAT Directive, the referring court considers that the question would then arise whether the applicant could rely on that provision of that directive. For this to be the case, it is necessary that the hospital services provided by the applicant and the transactions closely connected with them were supplied under social conditions comparable to those applicable to bodies governed by public law.

25. In that regard, the national court notes that the Eleventh Chamber of the Bundesfinanzhof (Federal Finance Court) held that the German legislature had infringed Article 132 of the VAT

Directive only in so far as that provision makes the grant of the VAT exemption subject to the condition that the services in question be provided by an establishment which is an approved hospital within the meaning of Paragraph 108 of SGB V. It would not, however, be contrary to the provisions of Article 132(1)(b) of the VAT Directive that the national legislation subject this exemption – as it does in Paragraph 4(14)(b), second sentence, (aa) of the UStG, Paragraph 108(2) and (3) of the SGB V, Paragraphs 1 and 6 of the KHG and Paragraph 109 of the SGB V – to conditions relating to the performance of the hospital in terms of staff, premises and equipment and the cost-effectiveness of its management.

26. The referring court has doubts about this analysis. It takes the view that, in order to determine whether the transactions are carried out under 'social conditions comparable' within the meaning of Article 132(1)(b) of the VAT Directive, it is appropriate to apply different criteria than those put forward by the Eleventh Chamber of the Bundesfinanzhof, namely, whether or not the costs of the majority of patients are borne by social security bodies.

27. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Paragraph 4, point 14(b), of the [UStG] compatible with Article 132(1)(b) of the [VAT Directive], in so far as hospitals which are not bodies governed by public law qualify for exemption from tax on condition that they are approved within the meaning of Paragraph 108 of the [SGB V]?

(2) If Question 1 is to be answered in the negative: when do hospitals governed by private law provide hospital care under social conditions comparable with those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of the VAT Directive?'

IV. **Analysis**

A. **Preliminary remarks**

28. Since both the referring court and the parties have referred to the principle of fiscal neutrality, it may be convenient to commence by clarifying the meaning of that expression. Indeed, a quick overview of the Court's case-law shows that the expression 'principle of fiscal neutrality' is used in at least three different contexts. (5)

29. *First*, that expression is often used to describe the fact that a person who has had to pay VAT to acquire goods or services can then deduct it if these goods or services are in turn intended to be used for the purposes of a taxable activity. (6) This is clearly the primary meaning of that expression.

30. *Second*, the principle of fiscal neutrality is sometimes understood as reflecting, in VAT matters, the principle of equal treatment. (7) When it is used in that sense, such a principle can, of course, be invoked to challenge the validity of a provision of the VAT Directive. (8)

31. *Third*, the Court sometimes uses that expression to indicate that VAT should be neutral from a competitive point of view. (9) In essence, the idea is that similar goods or services which are in competition with each other should be treated in the same way. (10) That principle is, however, somewhat different from the principle of equal treatment since it does not constitute some kind of overarching rule of primary law that can determine the validity of a stated exemption. (11) Used in this (third) sense, the idea of fiscal neutrality is rather an interpretative principle which comes into play when other methods of interpretation do not lead to a conclusive result. (12)

32. In the present case, the fiscal neutrality arguments of the referring court and the parties

employ this term in this third sense, that is to say, as referring to the objective pursued by the VAT Directive: that the tax should, as far as possible, be neutral from a competitive perspective. As we shall see, however, the principle of equal treatment, as a general principle of law, is also relevant in the interpretation of these provisions of the VAT Directive.

B. **The first question**

33. By its first question, the national court wants to know whether Paragraph 4(14)(b) of the UStG, in the version applicable to the tax period at issue, is compatible with Article 132(1)(b) of the VAT Directive.

34. In this respect, it should be recalled, however, that, within the context of a preliminary ruling procedure, the Court does not have jurisdiction to rule on the conformity of national provisions with EU law but, in accordance with the first paragraph of Article 267 TFEU, only on the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union. (13)

35. Consequently, and in view of the clarifications provided by the German Government concerning its national legislation in its observations, I consider that the first question must be understood as relating, in substance, to the question of whether Article 132(1)(b) of the VAT Directive is to be interpreted as precluding national legislation, such as the one at issue in the main proceedings, which grants the VAT exemption to a private non-university hospital only where this hospital is either engaged to supply care by providers of statutory accident insurance or included in a *Land*-level hospital plan (plan-listed hospitals) or where it has concluded a health care supply agreement with a *Land*-level association of health insurance funds or an association of substitute funds) or where it has carried out, during the previous financial year, at least 40% of hospital services invoiced for an amount lower than the amount reimbursable by the social security bodies.

36. In that context, of course, the starting point is that the various exemptions contained in Article 132(1) of the VAT Directive are to be interpreted strictly. (14) This means that their interpretation should not produce effects beyond those necessary to achieve the objectives they pursue. These objectives are, in general, to exempt from VAT certain activities in the public interest with a view to facilitating access to certain services and the supply of certain goods by avoiding the increased costs that would result if they were subject to VAT. (15) The requirement of strict interpretation does not, however, mean that the terms used to specify the exemptions must be construed in such a way that would fall short of these objectives and, therefore, deprive those exemptions of their intended effect. (16)

37. Article 132(1)(b) of the VAT Directive provides that Member States shall exempt ‘hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature’. This is complemented by Article 132(1)(c) which states that Member States shall also exempt ‘the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned’.

38. As those two provisions are, in substance, simply consolidated versions of the earlier provisions of Article 13A(1)(b) and (c) of the 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, (17) they must be interpreted in the same way. Accordingly, the case-law of the Court of Justice relating to Article 13A(1)(b) and (c) of Directive 77/388 must be regarded as also being, in principle, applicable to Article 132(1)(b) and

(c) of the VAT Directive. (18)

39. It follows from that Court's case-law that the exemption provided for in what is now Article 132(1)(b) of the VAT Directive is intended, together with the exemption provided for in Article 132(1)(c) of that directive, to reduce the cost of health care (19) by defining the conditions under which all services which have as their purpose the diagnosis, the treatment and, in so far as possible, the cure of diseases or health disorders may be exempted. (20)

40. Although these two provisions have the same objective, they have, however, a different scope. While Article 132(1)(b) of the directive covers services provided in a *medical facility*, Article 132(1)(c) of the directive concerns services provided outside such a facility, whether in the private residence of the provider or in the patient's home or in any other place. (21)

41. More specifically, regarding the exemption that Article 132(1)(b) of the VAT Directive sets out, there are three requirements, (22) which respectively relate to:

– the nature of the service provided,

– the form of the establishment providing the service, and

– the manner in which the service is provided. (23)

42. Regarding the *first requirement*, it flows from the wording of Article 132(1)(b) of the VAT Directive, that, in order to be exempted, the services in question must fall within one of the following three categories:

– relate to the hospitalisation of a patient, that is to say, the admission and stay of a person in a hospital, (24) or

– aim to protect, maintain or restore the health of a person, (25) or

– concern operations that are closely related to those first two categories of acts. (26)

43. So far as the present case is concerned, there is no issue about this first requirement. It is *the other two requirements* which present their own difficulties in both defining their respective scope and the manner of their application. I propose now to consider these requirements in turn.

1. ***The form of the establishment providing the services in question***

44. Article 132(1)(b) of the VAT Directive provides that services provided by bodies that are not governed by public law can only be exempted from VAT if they are 'hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature'. One may recall at the outset that the Court has confirmed that the concept of 'establishment' used by that provision imply among other things that the establishment in question must be an 'individualised entity'. (27) Since, moreover, Article 132(1)(b) of the VAT Directive has a different scope from that of Article 132(1)(c) of the Directive – which refers to the provision of personal care outside a medical structure – only individualised entities in the form of a medical structure, that is to say, entities in which various resources, in particular human, technical, real estate and financial resources, are pooled, are covered by this particular exemption. (28)

45. With regard, first, to *the type of activity* that these entities must carry out in order to be eligible for this exemption, Article 132(1)(b) of the VAT Directive specifies that it must be that of a hospital, a centre for medical treatment, a centre for diagnosis or of an establishment of similar nature. (29)

46. Since those categories of establishment are not defined in the VAT Directive, they must be understood by reference to their usual meaning in everyday language. (30)

47. Here it is clear from their usual meaning in everyday language that the terms ‘hospitals’, ‘centres for medical treatment’ and ‘centres for diagnosis’ refer to entities whose main activity is, respectively, the care of sick people or victims of medical traumas too complex to be treated at home or in a doctor’s office, the performance of medical services aimed at protecting, maintaining or restoring the health of human beings and the performance of analyses aimed at establishing the presence of a disease or disorder in a patient. (31)

48. As regards the concept of establishments of ‘similar nature’ it is clear that this concept should be understood as referring to medical structures in which different resources are pooled in order to carry on activities similar to those of a hospital, a centre of medical treatment or a diagnostic centre.

49. Second, with respect to *the status of the entities,* Article 132(1)(b) of the VAT Directive provides that in order to benefit from the exemption provided for in that provision, the establishments concerned which are not bodies governed by public law must be ‘duly recognised’. In that respect, it is quite clear from the English version of Article 132(1)(b) of the VAT Directive that this requirement applies to hospitals, centres for medical treatment, centres for diagnosis and other similar establishments, provided that they are not bodies governed by public law. (32) Indeed, that version mentions the exemption applies to ‘other *duly recognised* establishments of a similar nature’, which implies that this condition also applies to the establishment serving as a reference point.

50. Admittedly, in Latin languages such as Spanish, French, Italian, Portuguese, and Romanian, the terms ‘duly recognised’ appear after the reference to the other establishment (for example, in French, ‘et d’autres établissements de même nature *dûment reconnus*’), which might give the impression that this condition only concerns the ‘other establishments of a similar nature’. However, since the list of establishments referred to end up with a reference to those other establishments of similar nature, it is clear that this list must be understood as being merely illustrative of the type of establishment whose services are likely to be exempted. In that context, the terms ‘duly recognised’ should be understood as covering all kinds of medical establishments referred to in that provision.

51. In order to determine the scope of this condition, it is necessary to recall that, according to the settled case-law of the Court, the terms of a provision of EU law which makes no *express* reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union. (33) Since Article 132 of the VAT Directive make no such reference, one may infer that the terms used in each condition of application of the exemptions set out in this provision are to be considered as autonomous concepts of EU law and, therefore, their meaning and scope must be interpreted uniformly throughout the EU.

52. The autonomous nature of the concept of a ‘duly recognised establishment’ used in Article 132(1)(b) of the VAT Directive must not, however, be confused with the fact that this concept, as it is to be understood under EU law, refers, for its application, to a particular factual circumstance,

namely, the situation of the establishment in question with regard to national legislation.

53. In that context, the Court has made it clear that being ‘duly recognised’ does not presuppose a formal recognition procedure, nor does it rule out the possibility that a Member State may provide for such a procedure. It is for the national law of each Member State to lay down the rules under which such recognition may be granted to establishments seeking it. The Member States enjoy a certain discretion in that respect. (34)

54. However, it is settled case-law that, where Member States have a discretionary power, this power must be exercised within the limits imposed by EU law. In particular, the existence of such a discretionary power cannot call into question the boundaries of the concept of ‘due recognition’ of a medical establishment within the meaning of Article 132(1)(b) of the VAT Directive. (35) Moreover, when a Member State exercises its discretion, it must ensure that it does not do so in a way that would compromise any of the objectives of EU law. (36)

55. In those circumstances, I consider that, in order to answer the question referred by the national court, it is necessary to determine the nature and extent of the Member State’s discretion referred to in the case-law. This requires interpreting Article 132(1)(b) of the VAT Directive not only in accordance with the wording of that provision, but also with its context and the objectives pursued by this article and, more generally, by the legislation of which it forms part. (37)

56. In this respect, with regard to the *wording of* Article 132(1)(b) of the VAT Directive, it should be noted that ‘duly’ is a synonym for ‘as required’ and that the term ‘recognised’ refers to something established or known. In the context of that provision, those adjectival terms refer to hospitals, centres for medical treatment, centres for diagnosis and other establishment of a similar nature. It is accordingly clear from the text of that provision that the discretion conferred on the Member States relates to the *conditions* to be satisfied in order to be considered as hospitals, centres for medical treatment, centres for diagnosis and other establishment of a similar nature. (38)

57. As the Commission has in essence contended in its observations, that condition is to be understood as being intended solely to exclude from the benefit of the exemption provided for by Article 132(1)(b) of the VAT Directive medical establishments whose activities are not authorised by law or by the relevant professional bodies. Indeed, any activity, even an illegal one, is taxable and could nonetheless obtain the benefit of any otherwise applicable exemption. If, therefore, the ‘duly recognised’ requirement was not provided for in that directive, it would lead to a situation in which an unauthorised medical establishment could – or, at least, might – benefit from the exemption. (39) All of this simply means that only an establishment duly recognised as a medical establishment is entitled to benefit from the exemption.

58. This conclusion is confirmed by both the context in which those terms ‘duly recognised’ are used and the objective pursued by Article 132(1)(b) of the VAT Directive.

59. As far as the *context* is concerned, several elements tend to support that conclusion, namely, the degree of harmonisation achieved by EU law, the general scheme of the VAT Directive, and the structure of Article 132(1)(b) of the VAT Directive.

60. As regards, first, the degree of harmonisation achieved by EU law, it may be observed that the activities that may be exempted under Article 132(1)(b) of the VAT Directive – such as patient and medical care – are generally subject, in the various Member States, to specific conditions of exercise. However, even though the exemption provided for in Article 132(1)(b) of the VAT Directive applies only to hospitals, centres for medical care, centres for diagnostic and other establishments of a similar nature, neither the VAT Directive in particular nor EU law in general

harmonises the conditions of exercise of these activities. In that context, the reference to the need for the establishment concerned to be duly recognised is simply a way of taking into account this lack of harmonisation, while requiring that the services in question are, from the point of view of the Member State concerned, carried out in a lawful manner.

61. Second, with regard to the general scheme of the VAT Directive, since Article 132(1)(b) and Article 132(1)(c) of the VAT Directive pursue the same objective and, accordingly, are complementary to each other, (40) the conditions for the application of these provisions should, where possible, be interpreted analogously. One might here note that Article 132(1)(c) of the VAT Directive requires that the services in question are to be provided 'in the exercise of the medical and paramedical professions as defined by the Member State concerned'. (41) The terms 'duly recognised' should accordingly be understood as also referring, but in the context of a legal person, to the conditions of exercise of the activities in question in the Member State concerned. (42)

62. Regarding, third, the structure of Article 132(1)(b) of the VAT Directive, it might be noted that this provision lays down three pre-conditions for exemption, each of them dealing with a different aspect of the services that can be exempted, namely, their nature, the type of establishment that perform them and the conditions under which they are carried out. In particular, it follows from that last condition that, with regard to the conditions under which the activities in question were carried out, the Member States may only take into account those of a social nature. Accordingly, if the Member States were able to impose, under the condition laid down in that provision for the establishment at issue to be 'duly recognised', any requirements in relation to either the nature of the services provided or the conditions under which those services are provided, these two other conditions would largely be deprived of their useful effect.

63. As regards the *objective* pursued by Article 132(1)(b) of the VAT Directive, the Court has already underlined that that provision aims in particular at reducing the cost of health care services. (43) In view of such an objective, the condition that private law bodies must be 'duly recognised' as hospitals, centres for medical treatment, centres for diagnosis or as establishments of a similar nature should not be interpreted too restrictively, but as only referring to the conditions relating to medical qualifications and standards prescribed by the national legislation to ensure that the medical care provided is of high quality. (44)

64. Finally, it should be noted that, in addition to the wording, the context and the objectives pursued by that provision, account must also be taken of the principle of interpretation according to which a provision must be interpreted, where possible, in a way that does not call into question its validity. (45)

65. Among the rules that determine the validity of the exercise by the EU legislature of its competences is the principle of equal treatment. According to settled case-law, that principle requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. To this end, the factors which distinguish different situations, and the question whether those situations are comparable, must be determined and assessed in the light of the subject matter of the provisions in question and of the aim pursued by them, whilst account must be taken for that purpose of the principles and objectives of the field in question. (46)

66. In the case of Article 132(1)(b) of the VAT Directive, it is clear that, in the light of the objective pursued by that provision in the first place, which is to reduce the cost of health care services, public and private bodies are, broadly speaking, considered as being in roughly identical situations. If, accordingly, the exemption envisaged by Article 132(1)(b) of the VAT Directive were to apply only to public hospitals, this would effectively amount to a form of unequal treatment so far

as the tax treatment of private hospitals is concerned.

67. The EU legislature has therefore also allowed private establishments to benefit from the exemption. It has, however, restricted that possibility to specific conditions and, thus, has maintained a certain difference in treatment as between both public and private hospitals, since only the latter must demonstrate that they meet the specific conditions provided for in that provision. It is true that according to the Court's case-law, such a difference of treatment may under certain circumstances be objectively justified. (47) Here, however, if the condition contained in Article 132(1)(b) of the VAT Directive requiring the establishment concerned to be 'duly recognised' were to be understood as authorising Member States to impose, on private law bodies alone, some specific requirements other than those requiring such institutions to be authorised by professional bodies and the like to carry out their activitiy under social conditions comparable with those applicable to bodies governed by public law, it would be difficult to discern what reason could be advanced to justify such a difference in treatment.

68. By contrast, however, the requirement that private organisations must demonstrate that they are authorised to carry out their medical activities is fully justified since, by their very nature, private organisations are not an emanation of the State and therefore are not *directly* subject to its supervision so that Member States maylegitimately have provided for recognition mechanisms to ensure that they meet appropriate professional standards.

69. If I then turn to the principle of fiscal neutrality understood here in the sense of competitive neutrality, I have already pointed out that the latter is more an objective of VAT law rather than some true, overarching binding principle, the terms of which can never be compromised by the VAT Directive. It should nevertheless be observed that the Court has already ruled that this principle requires that the exemption provided for in Article 132(1)(b) of the VAT Directive is to be interpreted, as far as possible, in such a way such that all economic operators carrying on the same activities are treated equally as far as the levying of VAT is concerned. In particular, according to the Court, this principle would be compromised if the medical care exemption referred to in (what is now) Article 132(1)(c) were to be made dependent on the legal form in which the taxable person carries out his or her activity. (48)

70. It is true that, as in the case of equal treatment, certain distinctions between public and private hospitals may be justified in the interests of ensuring competitive fairness. Yet, drawing a distinction for VAT purposes as between economic operators according, for example, to their performance in terms of staff, premises, equipment or the economic efficiency of their management – as certain German courts seem to consider – does not appear to be relevant in light of the objective pursued by Article 132(1)(b) of the VAT Directive. One may observe that, generally speaking, it was not the intention of the EU legislature to disadvantage from a tax point of view the promoters of private medicine but rather to ensure that competition between them and public bodies remain fair.

71. It follows that, in my view, both the wording, the context and the objectives pursued by Article 132(1)(b) of the VAT Directive, and the need to interpret any provision in a manner which does not call into question its validity, demonstrate that the discretion available to the Member States to define the conditions under which an establishment governed by private law is to be regarded as 'duly recognised' extends *solely* to the conditions which must be satisfied in order for an establishment to be duly authorised to carry out, within a structure in which resources are pooled, the health and medical services covered by that exemption. In essence, therefore, the 'duly recognised' requirement relates to professional standards only.

72. In reaching this conclusion, I do not overlook the fact that, in paragraph 53 of its judgment of 8 June 2006, *L.u.p.* (C?106/05, EU:C:2006:380), the Court held, by reference to *Dornier*, (49)

that the national authorities may, in accordance with EU law and subject to review by the national courts, take into consideration the activities of the taxable person in question in addition to the public interest, together with the fact that other taxable persons carrying out the same activities already have similar recognition and that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies.

73. In the next paragraph of that judgment (paragraph 54), the Court concludes that 'in requiring, for the purpose of recognition [, for the application of Article 132(1)(b) of the VAT Directive], that at least 40% of the medical tests carried out by the laboratories concerned must be intended for persons insured by a social security authority, the Member State in question did not go beyond the limits of the discretion allowed to it by that provision'.

74. One cannot, however, avoid observing that this analysis is, in fact, fundamentally different from the reasoning in *Dornier* on which the Court claims to rely. As the Court noted in paragraph 53 of *L.u.p*., the decision in *Dornier* consisted only of allowing the national authorities to *take into account* the fact that the costs incurred for the treatment performed by an establishment may be largely met by health insurance schemes or other social security bodies in order to determine whether an establishment governed by private law may be considered as duly recognised. (50) There was no question in *Dornier* of allowing Member States *to impose* a requirement that the establishments concerned perform a certain percentage of operations whose costs were met by health insurance schemes in order for those operations to be exempted under the 'duly recognised' requirement of Article 132(1)(b) of the VAT Directive. On the contrary, as the Court pointed out in paragraph 75 of *Dornier*, when an establishment provides services comparable to those of other operators carrying out the same treatments, 'the mere fact that the cost of that treatment is not fully covered by the social security authorities does not justify a difference in the treatment of providers for VAT purposes'.

75. All of this demonstrates that in *Dornier* the Court simply intended to point out that the due recognition condition can be *deemed* to be have been met under certain circumstances. (51) When medical procedures and operations are covered by the health insurance schemes, one may indeed fairly assume that the establishment which performed these operations is duly authorised to carry out its activities. (52) The converse is not, however, true. The mere fact that a clinic or hospital relies principally or even exclusively on private patients does not in any sense imply that the establishment in question is not duly recognised by the national authorities. The application of health insurance schemes may, of course, depend on a variety of factors.

76. In any event, the Court held in *L.u.p* (in paragraph 36 of that judgment) that the principle of fiscal neutrality precludes the services in question 'from being subject to a different VAT scheme depending on where they are carried out when they are *equivalent from a qualitative point of view in the light of the professional qualifications of the service providers in question*'. (53) It necessarily follows that a Member State may not treat two identical services differently so far as the *due recognition requirement of Article 132(1)(b) of the VAT Directive are concerned* depending on the proportion of the operations performed by the establishment concerned that are covered by health insurance schemes, since such a condition has no connection with the quality of the medical care provided. (54)

77. Inasmuch, therefore, as the Court appears to have suggested in paragraph 54 of *L.u.p.* that the discretion conferred by Article 132(1)(b) of the VAT Directive on the Member States would enable them to impose a requirement that the medical centre in question treat a specified percentage of patients covered by health insurance schemes as a condition of recognition, that suggestion is, with respect, incorrect and is unsupported by both the actual legislative text and, for that matter, the earlier case-law. The due recognition requirement of Article 132(1)(b) of the VAT

Directive simply enables Member States to ensure that the medical establishments meet appropriate standards of health care delivery: it should not be interpreted as permitting Member States, so to speak, to conscript private health care providers into a public health system by subjecting the former to a disadvantageous treatment for VAT purposes. As I have just indicated, in so far as the Court appears to suggest otherwise in paragraph 54 of *L.u.p., I consider – again, with respect – that this was in error and should not now be followed or applied.*

78. In this context, I propose that the Court should clearly indicate that the words 'duly recognised' refer to the conditions that need to be met in order for that establishment to be authorised from the perspective of professional standards to carry out in the Member State concerned the activity of a hospital, a centre for medical treatment, a centre for diagnosis or establishment of a similar nature. In the absence of harmonisation in this area, the Member States clearly enjoy a considerable degree of national autonomy. Where national legislation provides that only services performed by a health care establishment duly authorised to carry out such activities may be covered by social insurance scheme, an establishment may rely on the fact that its services are substantially reimbursed to demonstrate that it should be considered duly recognised within the meaning of Article 132(1)(b) of the VAT Directive.

2. ***The manner in which the services in question are provided: the 'comparable social conditions' requirement***

79. Article 132(1)(b) of the VAT Directive provides that in order to be exempt from VAT, the supply of hospital, medical care or any closely related operations must be carried out by an establishment falling under one of the categories referred to in that provision. In addition, however, when the establishment is a body governed by private law, the services in question must be supplied under 'social conditions comparable' to those applying when these services are supplied by bodies governed by public law. (55)

80. It is important to stress at the outset that, since the principle of legal certainty must be respected by the Member States when implementing the VAT Directive, (56) the 'comparable social conditions' that a private medical establishment seeking a VAT exemption for this purpose must meet should be specified in the national legislation. It would not suffice that such conditions are determined by the relevant fiscal administration at the time an application for a VAT exemption is requested. Indeed, it is only through the medium of generally applicable and published legislation that a private medical establishment can know what the social conditions which it is required to provide should it wish to avail of the exemption actually are.

81. Moreover, it is sufficient for that purpose that the private hospital or any similar medical establishment voluntarily complies with the legal requirements imposed by a Member State in order to benefit from the exemption laid down in Article 132(1)(b) of the VAT Directive. Any other conclusion would mean that a Member State could entirely exclude private medical establishments from the scope of the exemption laid down in that provision simply by electing not to subject such private bodies to social obligations comparable than those prescribed by law in respect of public bodies.

82. When a private establishment considers that the conditions set out in the relevant legislation are neither identical nor even comparable to social conditions imposed on a public hospital, that establishment must enjoy the possibility of challenging the validity of those criteria. In particular, should it transpire that the national legislation contained certain conditions that are not identical to an obligation imposed on public establishments, the national courts must in particular verify that the justification put forward by a Member State in this respect is satisfactory. This implies the existence of a relationship between each of those conditions and a comparable social condition imposed on a public hospital, medical centre or similar medical establishment.

83. In that regard, it should be noted that the VAT Directive does not specify what is meant by the 'social conditions comparable' to those applying to public hospitals providing medical care. (57) Just as in the case of the condition of being 'duly recognised', this does not mean that this concept must be understood by reference to national law, but rather that, within the scope of the definition of this concept, the Member States enjoy a discretionary power to decide on the social conditions which public bodies supplying medical services must respect. Article 132(1)(b) of the VAT Directive further requires that those conditions will also have to be respected by private bodies for their services to be eligible for exemption.

84. The Court has admittedly ruled that the concept of 'social conditions' may cover matters such as the fixing of prices for medical services (58) or the arrangements for services to be paid for by the social security institutions of a Member State. (59) The Court has, however, never attempted to clarify, in a more general and systematic way, the content of that condition. The present case seems to present an appropriate opportunity for such clarification.

85. In this respect, as I have already pointed out, it is common ground that the meaning and scope of a provision must normally be determined by reference, in particular, to the wording, the context, and the objectives pursued by the provision at issue. While there is little to be said about the *context*, the *objectives* and *wording* of this provision serve to clarify the scope of this concept.

86. Concerning the *objectives* pursued by the third condition referred to in Article 132(1)(b) of the VAT Directive, it seems clear that such an objective is to prevent private establishments from offering VAT-exempt services without having to bear the same social obligations of their public law counterparts. This is perhaps just another way of referring to the public service obligations of a social nature imposed on public hospitals and other medical establishments. (60) That condition therefore givesparticular expression to the principles of non-discrimination and of fiscal neutrality as between private bodies and public bodies, especially since, on the one hand, hospital and medical care and closely related activities undertaken by the latter are always exempted and, on the other hand, the former are not necessarily subject to the same social public service obligations.

87. As regards the *wording of* Article 132(1)(b) of the VAT Directive, it is clear from the actual text of that provision that a comparison has to be made between hospitals governed by public law, on the one hand, and private hospitals, on the other.

88. Since the objective of this condition is to ensure fair competition between public and private bodies, this condition is *double-sided*. It prevents private establishments from offering VAT-exempt services where they do not undertake the same public service obligations imposed on public establishments. Conversely, since the services provided by public bodies are always exempt from VAT, it allows private entities which are subject to the same obligations (or which voluntarily assume them) also to benefit from this VAT exemption.

89. It follows from the wording of Article 132(1)(b) of the VAT Directive that this comparison should be made by reference to the particular activities carried out by a medical establishment.

This in turn means that a private medical establishment must also have the option of electing not to comply with the comparable applicable social conditions requirement in respect of certain of its activities and, consequently, not to benefit from the VAT exemption in respect of such activities. (61)

3. ***The interpretation of the terms 'comparable', 'social' and 'conditions'***

90. In order to determine the scope of the comparison to be made by national courts seeking to assess the compatibility with EU law of the social conditions imposed by a Member State on private bodies who wish to benefit from the VAT exemption, it is next necessary to specify the scope of the noun 'condition' and of both of the adjectives 'social' and 'comparable'.

91. The first thing to note is that Article 132(1)(b) of the VAT Directive refers not simply to any kind of obligations imposed on the services provided by public bodies, but rather only to those of a social nature. It is, accordingly, only those obligations which should be considered relevant for the purposes of the comparison to be made. As I have already indicated, this concept is, however, broader than that, for example, of the nature of the fees chargeable by such establishments.

92. For my part, I consider that the concept of 'social conditions' should be understood as referring to the obligations imposed by law on public hospitals vis-à-vis their patients. It does not, however, extend to the obligations imposed on public bodies with regard to the management of their personnel, their premises, their equipment or their cost-effectiveness. (62)

93. Second, the term 'social conditions' must be understood as referring to those conditions *which are prescribed by law* in the Member State concerned regarding *the legal obligations of public hospitals so far as the treatment of public patients is concerned*. (63) Accordingly, those legal obligations may and do vary from Member State to Member State, but one may suppose that they principally concern matters such as an entitlement to certain types of hospital care, together with legislative rules regarding matters such as charges for particular services. But the social conditions requirement could also extend to other matters: a legal requirement obliging public hospitals to keep emergency departments open at weekends might be one such example. In view, moreover, of the requirement prescribed by Article 132(1)(b) of the VAT Directive for private establishments to be 'duly recognised', the social conditions referred to here are by definition different to those specified by national law so far as the recognition of a hospital, a centre for medical treatment or diagnosis or a similar establishment is concerned.

94. Third, the term 'comparable' conveys the sense that the social obligations imposed on public hospitals do not have to be met to the exact letter by their private counterparts. There may also be certain types of social obligations which by their nature could only be fulfilled by public hospitals.

95. This does not mean, however, that Member States might freely decide which social conditions must be observed by private establishments. Indeed, unlike Article 132(1)(m) of the VAT Directive, Article 132(1)(b) of that directive does not refer to 'certain' social conditions as would have been the case had the EU legislature intended to confer a wide discretionary power on the Member States in this matter. (64) On the contrary: the wording used ('Member States shall exempt …') implies that the discretion enjoyed in this respect of the Member States is a limited one. (65)

96. The key objective of Article 132(1)(b) of the VAT Directive in that and other respects is indeed to ensure comparable tax treatment as between public and private medical establishments that, broadly speaking, perform the same functions and which, again broadly speaking, treat their patients in approximately the same fashion. In this regard, however, it is clear that Member States

cannot require private hospitals to supply medical services under social conditions that have no equivalent in respect of the legal obligations imposed on public hospitals as a condition of obtaining the VAT exemption in question.

97. The term ‘comparable’ also implies, in my opinion, a certain degree of generalisation in the comparison. Given, however, that the objective of those conditions is to ensure a broad equality for tax purposes between private and public bodies, I believe that Member States must ensure that private entities substantially comply with all the social conditions *imposed* on public establishments by national legislation that may have an appreciable effect on the fair competition between public and private establishments. This would include, in particular, all the *social conditions* which are likely to have a significant impact on the management of public bodies or on the choice of patients to use the services of a private or public body. A Member State may not, however, grant a VAT exemption in respect of services provided by private establishments that have only partially complied with the social conditions applicable to public establishments that are likely to have such an impact on fair competition between the two types of establishments.

98. Accordingly, when national courts are required to consider the social conditions that private establishments must respect in order for their activities to benefit from the VAT exemption provided for in Article 132(1)(b) of the VAT Directive, they must ensure that, broadly speaking, these conditions neither exceed nor go below of all the social conditions prescribed by law in respect of public establishments, even if some rough approximations may also, *faute de mieux*, be necessary for this purpose.

99. Balanced criteria are indeed necessary for this purpose in the sense that they neither benefit nor disadvantage private establishments. If, for example, in a particular Member State public bodies are *legally obliged* to ensure, from a strictly therapeutic point of view, the same quality of care, regardless of the rate charged or are equally obliged to treat all patients regardless of their personal situation, then that Member State must provide that only private establishments which comply with comparable obligations could benefit from the VAT exemption.

100. Another example might be where public hospitals are obliged by law to offer a service at a basic rate so that the identity of the medical professional who will actually provide the principal medical care is not guaranteed. In those circumstances in order for the similar medical care performed by a private body to be exempted, the patient must have been offered the same option, even if he or she finally chooses to pay an additional fee in order to ensure that they were treated by the particular medical practitioner of his or her choice.

101. When, however, public bodies are authorised to carry out medical operations which are exempt from VAT without being bound by a certain fixed rate of payments or without such operations being covered by a health insurance schemes, the Member State concerned cannot invoke this or a similar reason as a ground to refuse to apply the VAT exemption provided for in Article 132(1)(b) of the VAT Directive to the same transaction carried out by a duly recognised body governed by private law. In particular, if public medical establishments are allowed to charge their more affluent patients additional fees so that they can benefit from additional services and more sophisticated or better quality products, free of VAT, then quite obviously private hospitals must also be able to offer these same services or products free of VAT. (66)

102. In the same vein, if public hospitals are allowed to offer, for example, different rates in order to take into account patients’ preferences in terms of hospital accommodation (such as having a single room) or more efficient prostheses – even though they are not covered by health insurance schemes – the same services, if provided by a private body, must also be exempted from VAT.

(a) ***The judgment in Idealmed III***

103. It is true that in paragraph 21 of its judgment in *Idealmed III*, the Court observed that the comparable social conditions requirement relates to the services provided and *not* to the provider in question. The Court accordingly concluded that 'the proportion of the care services provided under comparable social conditions, within the meaning of that provision, in relation to all the activity undertaken by that provider is irrelevant for the application of the exemption laid down in Article 132(1)(b) of [the VAT] Directive'. (67)

104. For my part, I cannot help thinking that that judgment should not be over-interpreted. The key aspect of the facts in *Idealmed III* was indeed that, according to the national court's presentation of the national legislative provisions at issue – which was binding on the Court – the exemption at issue did not depend on whether *each activity* was carried out under comparable social conditions, but rather on the *proportion* of such activities which fulfilled this condition. Therefore, when the Court held in *Idealmed III* that '*the proportion of the care services provided under comparable social conditions*, within the meaning of that provision, in relation to all the activity undertaken by that provider is irrelevant for the application of the exemption laid down in Article 132(1)(b) of [the VAT] Directive', (68) it did not thereby intend to prevent Member States from prescribing as a social condition and, therefore, as a condition for medical services to be exempted, that, for example, a private hospital must perform a certain number of operations at a given rate. (69)

105. The issues raised in *Idealmed III* rather concerned questions relating to the proportion of the care services of the private hospital in question which are performed under comparable social conditions to those of a public hospital and how this issue potentially might affect any VAT exemption claimed under Article 132(1)(b) of the VAT Directive. While more can be said regarding other issues raised by that judgment, in view of the conclusions I am about to reach regarding the compatibility of legislation such as that described by the referring court with Article 132(1)(b) of the VAT Directive, I do not think that it is necessary to address these other issues which should await determination in a more appropriate case.

4. ***Application to the situation considered by the referring court in its first question***

106. As I have already explained, the question referred raises the issue of the compatibility with Article 132(1)(b) of the VAT Directive of national legislation which subjected the exemption from VAT provided by that article of the VAT Directive to the condition that hospitalisation and medical care operations are provided by a private non-university hospital that is either:

– engaged to supply care by providers of statutory accident insurance; or

– included in a *Land*-level hospital plan (plan-listed hospitals); or

– party to a health care supply agreement with a *Land*-level association of health insurance funds or an association of substitute funds; or

– has performed, during the past fiscal year, at least 40% of hospital services billed for an amount lower than the amount reimbursable by the social security organisations.

107. Since, so far as the present case is concerned, Article 132(1)(b) of the VAT Directive lays down three principal conditions for a service to benefit from the VAT exemption provided for (that is to say, it involves a hospital or medical care activity, is performed by a duly recognised establishment and is performed under comparable social conditions), it is now necessary to examine whether each of those four options prescribed by a provision such as Paragraph 4(14)(b)

UStG, read in combination with Paragraph 108 of SGB V, complies with those conditions.

(a) ***Assessment of the four compliance options with respect to the criteria set out in Article 132(1)(b) of the VAT Directive***

108. In this regard, it is quite clear that those four compliance options cannot be justified by reference to the requirement that the services at stake must belong to hospital or medical care activities or by the one to be performed by 'duly recognised' establishment of Article 132(1)(b) of the VAT Directive. In particular, as we have already seen, that particular condition essentially relates to appropriate professional standards. It is plain from the Court's file – and as the Commission observed in its written submissions – that the hospital is duly recognised by the German authorities. (70) The case thus essentially turns on whether the application of the four compliance options contained in the German legislation can be justified by reference to the 'comparable social conditions' criterion.

109. So far as the first three compliance options are concerned, it may be noted that those requirements are not in themselves 'social conditions' in the particular sense understood in Article 132(1)(b) of the VAT Directive because they are at best only indirectly related to the provision of hospital and medical care to the patient. Those options relate in reality to the financial relationship and contractual arrangements between the hospital or medical establishment concerned and statutory accident insurance, a *Land*-level association of health insurance funds, an association of substitute fund, or a *Land*.

110. In particular, the second option (that is to say, membership of a *Land*-level hospital plan) seems to reflect an endeavour by a Member State to impose what amounts to a form of quota for private hospitals by reference to specific geographic areas. The idea here seems to be to utilise the Article 132 VAT exemption as a means of ensuring that there is a de facto limit to the number of *private hospitals* operating in a particular geographically contiguous area in order that the *public hospitals* functioning in that region retain enough patients in order to be financially viable. I will merely say that Article 132(1)(b) of the VAT Directive cannot be used for this purpose and any attempt by the German State – whether it be through its tax authorities or by those responsible for health care planning – to achieve this end by curtailing an otherwise applicable VAT exemption for private hospitals in this fashion would be manifestly unlawful and contrary to EU law.

111. In any event, one might also observe in this context that, although the information provided by the referring court does not clearly and exhaustively specify the conditions that an institution must meet to fall under the first three compliance options, it seems that the providers of statutory accident insurance, the *Land*-Level associations of health insurance funds and the associations of substitute funds all enjoy a discretion as to whether to conclude an agreement with a hospital. (71)

112. Similarly, the *Länder* are apparently not obliged to include private non-university hospitals that carry out their activities under comparable social conditions in their hospital plan. Since the existence of a discretion provided by national law, the existence of which must be verified by the referring court, implies that the application of the VAT exemption could thus be refused to a medical establishment even though it fulfils the conditions for the exemption prescribed by the VAT Directive, such a discretion is itself plainly incompatible with the wording of Article 132(1)(b) of the VAT Directive. This is so not least since the latter provision *obliges* Member States to exempt transactions that meet the conditions set out in that provision ('Member States *shall* exempt …'). (72)

113. With regard to the last option mentioned in the national legislation, namely, that the private non-university hospital must have performed, during the past fiscal year, at least 40% of hospital services billed for an amount lower than the amount reimbursable by the social security

organisations, it is important to emphasise that this option, as presented by the German Government, depends not on whether the services performed are in fact covered by health insurance schemes, but rather on the prices charged by the private hospital in question in respect of the medical care provided directly to patients. (73) This issue is of relevance in any consideration of the provisions of Article 133 of the VAT Directive to which we must now turn.

(b) ***Article 133 of the VAT Directive***

114. Article 133 of the VAT Directive permits Member States to subject the granting of an otherwise applicable VAT exemption to a number of further conditions which are individual to each case. Among those conditions, Article 133(1)(c) – to which some of the parties have referred – provides that a Member State may choose to make the application of the exemption provided for in Article 132(1)(b) thereof subject to the condition that the private body charges prices which have been *approved* by the public authorities or which do not exceed such prices, or, in the case of transactions which are not subject to price approval, that are lower than those charged for similar transactions by commercial undertakings subject to VAT. (74)

115. The file does not, however, show that the prices of hospital services in Germany have to be *approved* by a public authority, a key requirement of Article 133(1)(c) of the VAT Directive. (75) The prices charged are taken into account for the purposes of reimbursement by social insurance bodies, but it would seem that the prices charged are not subject to this form of control. (76)

116. Moreover, it flows from the wording of Article 133(1)(c) of the VAT Directive that the condition that Member States may thus provide for by virtue of this provision, concerns *all prices* charged by the establishment in question.

It follows that either the prices of all the services performed in the context of the activities of a private hospital comply with the rate approved by the public authorities or do not exceed such prices, or, in the case of transactions which are not subject to price approval, they are lower than those charged for similar transactions by commercial undertakings subject to VAT, in which case all these services may, if they individually meet the conditions of application provided for in Article 132(1)(b) of the VAT Directive, be exempted, or, if this is not the case, none of them can be exempted. In no case, however, does this provision envisage the possibility of refusing the application in respect of the VAT exemption provided for in Article 132 on the ground that *only part of the medical services* actually performed met such a condition. (77)

117. Although the fourth option provided for by German law is not covered by Article 133 of the VAT Directive, I believe that such a condition can nevertheless be considered as falling within the concept of comparable social conditions for the purposes of Article 132(1)(b) of the VAT Directive, provided, however, that regardless of the activity involved, public hospitals are also subject to the legal obligation to perform, during the preceding fiscal year, at least 40% of services billed for an amount lower than the amount reimbursable by the social security organisations or are subject to a legal obligation close to that one.

118. All of this is to say that while the 40% of hospital services billing requirement cannot be justified by reference to Article 133(1)(c) of the VAT Directive, it can nonetheless be regarded in principle as a social condition for the purposes of Article 132(1)(b) thereof, assuming that such an obligation is also imposed by law on public hospitals and other similar establishments. (78)

119. It should be emphasised that the question asked concerns the compatibility of national legislation with EU law and not whether the applicant should benefit from the exemption. So irrespective of the position the Court takes, regarding the fourth option, in respect of the conclusions reached in *Idealmed III,* the national legislation would nonetheless be contrary to EU

law given that the first three options referred to in Paragraph 108 of the SGB V are not directly related to the requirement laid down in Article 132(1)(b) of the VAT Directive that the activities in question be carried out under comparable social conditions.

120. In conclusion, therefore, I propose to answer the first question referred by the national court by stating that Article 132(1)(b) of the VAT Directive must be interpreted as precluding a national legislation, such as that at issue in the main proceedings, which lays down as a condition to be exempted from VAT, that a private hospital must either be engaged to supply care by providers of statutory accident, or be part of the hospital plan of a *Land*, or must have concluded an agreement for the provision of care with a national or regional health insurance fund. In particular, those requirements are not social conditions in the sense understood by Article 132(1)(b) of the VAT Directive.

121. However, a requirement, such as the one mentioned by the German Government, – which requires that a private hospital seeking to avail of a VAT exemption must have carried out, during the previous financial year, at least 40% of hospital services invoiced for an amount lower than the amount reimbursable by the social security bodies – may, constitute a social condition for the purposes of Article 132(1)(b) of the VAT Directive if there is a comparable requirement imposed on bodies governed by public law.

C. **The second question**

122. By its second question, the national court asks under what conditions are hospital care provided by private-law hospitals carried out comparable social conditions, within the meaning of Article 132(1)(b) of the VAT Directive, to those applicable to public-law bodies.

123. In the light of the developments set out in the examination of the first question, I propose that the Court answer the second question to the effect that the concept of 'social conditions comparable with those applicable to bodies governed by public law' used in Article 132(1)(b) of the VAT Directive should be interpreted as referring to all conditions that private institutions must meet in order to be subject to either identical or comparable rules governing the relationship between bodies governed by public law and their patients to which they must comply with in all circumstances when they provide hospital treatment, medical care or operations closely linked to such services. Compliance with that condition by a private establishment may be inferred from the obligations that that establishment has contractually imposed on itself with respect to patients.

V. **Conclusion**

124. I therefore consider that the Court should answer the two questions referred by the Niedersächsisches Finanzgericht (Finance Court, Lower Saxony, Germany) as follows:

(1) Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national legislation, such as that at issue in the main proceedings, which lays down as a condition to be exempted from VAT, that a private hospital must either be engaged to supply care by providers of statutory accident, or be part of the hospital plan of a *Land*, or must have concluded an agreement for the provision of care with a national or regional health insurance fund. In particular, those requirements are not social conditions in the sense understood by Article 132(1)(b) of that directive.

However, a requirement, such as the one mentioned by the German Government – which requires that a private hospital seeking to avail of a VAT exemption must have carried out, during the previous financial year, at least 40% of hospital services invoiced for an amount lower than the amount reimbursable by the social security bodies – may constitute a social condition for the

purposes of Article 132(1)(b) of Directive 2006/112 if there is a comparable requirement imposed on bodies governed by public law.

(2) The concept of 'social conditions comparable with those applicable to bodies governed by public law' used in Article 132(1)(b) of Directive 2006/112 should be interpreted as referring to all conditions that private institutions must meet in order to be subject to either identical or comparable rules prescribed by law governing the relationship between bodies governed by public law and their patients to which they must comply with in all circumstances when they provide hospital treatment, medical care or operations closely linked to such services. Compliance with that condition by a private establishment may be inferred from the obligations that that establishment has contractually imposed on itself with respect to patients.

1 Original language: English.

2 See Berlin, D., *La Directive TVA 2006/112*, Bruylant, Brussels, 2020, p. 538.

3 This condition was added in 2019 to Paragraph 4(14)(b)(aa) of the UStG.

4 DRG is a system to classify hospital cases into different groups.

5 See, with regard to the first two meanings, judgment of 15 November 2012, Zimmermann (C?174/11, EU:C:2012:716, paragraphs 47 and 48). In some judgments, the Court's presentation of its case-law mixes those different meanings, which may give the impression of a certain confusion in relation to the scope of the principle of fiscal neutrality. See, for example, judgment of 29 October 2009, NCC Construction Danmark (C?174/08, EU:C:2009:669, paragraphs 40 to 44).

6 See, to that effect, judgments of 22 February 2001, Abbey National (C?408/98, EU:C:2001:110, paragraph 24); of 22 December 2010, RBS Deutschland Holdings (C?277/09, EU:C:2010:810, paragraph 38); and, more recently, judgments of 26 April 2017, Farkas (C?564/15, EU:C:2017:302, paragraph 43); or of 26 April 2018, Zabrus Siret (C?81/17, EU:C:2018:283, paragraphs 32 to 34).

7 Judgments of 13 March 2014, Jetair and BTWE Travel4you (C?599/12, EU:C:2014:144, paragraph 53), and of 17 December 2020, WEG Tevesstraße (C?449/19, EU:C:2020:1038, paragraph 48).

8 See, for example, judgment of 7 March 2017, RPO (C?390/15, EU:C:2017:174, paragraph 38).

9 The concept of fiscal neutrality is borrowed from the liberal schools of economics which were committed in particular to assign a strict yield objective to taxes. In practice, however, no tax system is economically neutral, since choices about the taxable base and tax rate necessarily influence the behaviour of economic agents. Accordingly, the idea that, in general, taxes should be neutral has been more or less abandoned as the role of taxation as an instrument of economic and social interventionism has progressively been affirmed. See Bommier, L., *L'objectif de neutralité du droit fiscal comme fondement d'une imposition de l'entreprise*, LGDJ, Paris, 2021, pp. 4 to 7.

10 See, for example, to that effect, judgment of 10 April 2008, Marks & Spencer (C?309/06, EU:C:2008:211, paragraph 49).

11 See, for example, judgment of 19 July 2012, Deutsche Bank (C?44/11, EU:C:2012:484, paragraph 45).

12 As the Court recognised in its judgment of 7 March 2017, RPO (C?390/15, EU:C:2017:174,

paragraph 54) when the EU legislature is called upon, when adopting a tax measure, to make choices of a political, economic and social nature, and to rank divergent interests or to make complex assessments, it must be accorded a broad discretion. The same is true at the national level when a directive grants discretion to the Member States not to apply the criteria laid down by the directive, but to specify them. See my Opinion in Golfclub Schloss Igling (C?488/18, EU:C:2019:942, points 55 to 60 and case-law cited).

13 See, for example, judgment of 17 July 2008, ASM Brescia (C?347/06, EU:C:2008:416, paragraph 28).

14 See, for example, judgment of 2 July 2015, De Fruytier (C?334/14, EU:C:2015:437, paragraph 18).

15 See, to that effect, judgment of 5 October 2016, TMD (C?412/15, EU:C:2016:738, paragraph 30).

16 See, for example, judgment of 8 October 2020, Finanzamt D (C?657/19, EU:C:2020:811, paragraph 28).

17 (OJ 1977 L 145, p. 1).

18 See, for example, judgment of 18 September 2019, Peters(C?700/17, EU:C:2019:753, paragraph 18).

19 See, for example, judgment of 13 March 2014, Klinikum Dortmund (C?366/12, EU:C:2014:143, paragraph 28).

20 See, to that effect, judgments of 10 June 2010, CopyGene (C?262/08, EU:C:2010:328, paragraph 27), and of 13 March 2014, Klinikum Dortmund (C?366/12, EU:C:2014:143, paragraph 29).

21 See, to that effect, judgments of 2 July 2015, De Fruytier (C?334/14, EU:C:2015:437, paragraph 19), and of 18 September 2019, Peters (C?700/17, EU:C:2019:753 paragraphs 20 and 21). However, unlike Article 132(1)(b), Article 132(1)(c) of the VAT Directive does not cover operations which are closely related to the health care services referred to in the former. See judgment of 13 March 2014, Klinikum Dortmund (C?366/12, EU:C:2014:143, paragraph 32).

22 Both provisions also have in common that they do not set any requirement regarding the recipient of exempted transactions.

23 See, to that effect, Opinion of Advocate General Sharpston in CopyGene (C?262/08, EU:C:2009:541, point 27).

24 As the Court held in paragraph 29 of the judgment of 1 December 2005, Ygeia (C?394/04 and C?395/04, EU:C:2005:734): ‘services which … are of such a nature as to improve the comfort and well-being of in-patients, do not, as a general rule, qualify for the exemption [unless] those services are essential to achieve the therapeutic objectives pursued by the hospital services and medical care in connection with which they have been supplied.’

25 Regarding the nature of the medical services which might be exempted, see, for example, judgments of 8 June 2006, L.u.p.(C?106/05, EU:C:2006:380, paragraphs 29); of 10 June 2010, CopyGene (C?262/08, EU:C:2010:328, paragraphs 28, 40 to 52); of 10 June 2010, Future Health Technologies (C?86/09, EU:C:2010:334, paragraph 37); of 2 July 2015, De Fruytier (C?334/14, EU:C:2015:437, paragraph 28 and 29); and of 4 March 2021, Frenetikexito(C?581/19,

EU:C:2021:167, paragraphs 25 and 26).

26 See, to that effect, judgment of 2 July 2015, De Fruytier (C?334/14, EU:C:2015:437, paragraph 28 to 31). Regarding the concept of closely related activities within the meaning of Article 132(1)(b) of the VAT Directive, see, for example, judgments of 6 November 2003, Dornier (C?45/01, EU:C:2003:595, paragraphs 33 to 35); of 1 December 2005, Ygeia(C?394/04 and C?395/04, EU:C:2005:734, paragraphs 23 to 29); of 25 March 2010, Commission v Netherlands (C?79/09, not published, EU:C:2010:171, paragraph 51); and of 10 June 2010, Future Health Technologies (C?86/09, EU:C:2010:334, paragraph 49).

27 See judgment of 2 July 2015, De Fruytier (C?334/14, EU:C:2015:437, paragraph 35). For example, the Court held that a laboratory governed by private law carrying out diagnostic medical analyses must be regarded as being an establishment ‘of a similar nature’ to ‘hospitals’ and the ‘centres for medical treatment or diagnosis’ within the meaning of Article 132(1)(b) of the VAT Directive, since the analyses carried out by that kind of entity, in view of their therapeutic purpose, come within the concept of ‘medical care’ as referred to in that provision. See judgments of 8 June 2006, L.u.p.(C?106/05, EU:C:2006:380, paragraph 35), and of 10 June 2010, CopyGene (C?262/08, EU:C:2010:328, paragraph 60). However, an entity carrying out the activity of transporting, in a self-employed capacity, human organs and samples of human origin for hospitals and laboratories does not carry out the same type of particular function as that carried out by medical care and diagnostic establishments or centres which is considered relevant for an entity to be characterised as ‘an establishment of a similar nature’ within the meaning of Article 132(1)(b) of the VAT Directive. Judgment of 2 July 2015, De Fruytier(C?334/14, EU:C:2015:437, paragraph 36).

28 This pooling of resources is what a hospital, a centre for medical treatment and a centre for diagnosis have in common. It is also what differentiates a health care centre from a medical or paramedical office, whose services can also be exempted, but on the basis of Article 132(1)(c) of the VAT Directive.

29 In judgments of 23 February 1988, Commission v United Kingdom(353/85, EU:C:1988:82, paragraph 32); of 6 November 2003, Dornier(C?45/01, EU:C:2003:595, paragraph 47); and of 10 June 2010, CopyGene(C?262/08, EU:C:2010:328, paragraph 58), the Court had incidentally held, without any justification, that the exemption provided for in what is now Article 132(1)(b) of the VAT Directive concerns services provided by ‘establishments pursuing social purposes’ although such purposes are not apparent from either the wording or the objective which only relates to medical care. It is true that that provision lays down a requirement of ‘social comparability’, but this relates to the way in which the services in question are provided and not to the corporate purpose of the establishments providing them. I note, however, that in its recent case-law, the Court has ceased to refer to the social corporate purpose that the establishment in question should have.

30 See, for example, judgment of 5 October 2016, TMD (C?412/15, EU:C:2016:738, paragraph 26), and my Opinion in Grup Servicii Petroliere (C?291/18, EU:C:2019:302, points 40 to 51).

31 See, to that effect, judgment of 8 June 2006, L.u.p. (C?106/05, EU:C:2006:380, paragraph 35).

32 See, to that effect, regarding the concept of ‘other similar establishments’, judgment of 8 June 2006, L.u.p. (C?106/05, EU:C:2006:380, paragraph 41).

33 See, by analogy, judgment of 29 October 2015, Saudaçor (C?174/14, EU:C:2015:733, paragraphs 52 to 54).

34 Judgment of 8 June 2006, L.u.p. (C?106/05, EU:C:2006:380, paragraph 42); of 6 November

2003, Dornier (C?45/01, EU:C:2003:595, paragraphs 64 and 81); and of 10 June 2010, CopyGene (C?262/08, EU:C:2010:328, paragraph 61 to 63).

35 See, by analogy, Opinion 3/15 *(*Marrakesh Treaty on access to published works*)* of 14 February 2017 (EU:C:2017:114, paragraph 122).

36 See, by analogy, Opinion 3/15 *(*Marrakesh Treaty on access to published works*)* of 14 February 2017 (EU:C:2017:114, paragraph 124).

37 See, for example, judgment of 14 May 2020, Orde van Vlaamse Balies and Ordre des barreaux francophones et germanophone (C?667/18, EU:C:2020:372, paragraph 25).

38 See, to that effect, judgments of 10 June 2010, CopyGene (C?262/08, EU:C:2010:328, paragraph 74), and of 10 June 2010, Future Health Technologies (C?86/09, EU:C:2010:334, paragraph 34). In both cases the Court seems to infer from the fact that the hospital was administratively authorised to carry on its activities that it was duly recognised within the meaning of Article 132(1)(b) of the VAT Directive.

39 See, for example, judgments of 11 June 1998, Fischer(C?283/95, EU:C:1998:276, paragraph 21), and of 17 February 2005, Linneweber and Akritidis (C?453/02 and C?462/02, EU:C:2005:92, paragraph 29).

40 See, to that effect, judgment of 10 June 2010, Future Health Technologies (C?86/09, EU:C:2010:334, paragraph 38).

41 In particular, the Court deduced from this condition that the Member States' discretion in this regard was limited by the need to ensure that the exemption provided for by that provision applies only to services that are of sufficient quality. See judgments of 18 September 2019, Peters (C?700/17, EU:C:2019:753, paragraph 34), and of 5 March 2020, *X* (VAT exemption for telephone consultations) (C?48/19, EU:C:2020:169, paragraph 42).

42 Article 133(1)(c) of the VAT Directive already has as an objective to allow Member States to make the granting of the exemption provided for in Article 132(1)(b) thereof conditional on the requirement that bodies other than those governed by public law 'must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT'. Since the EU legislature has taken care to dedicate a separate provision to the way in which the activities in question are carried out, and voluntarily limited this examination to the social conditions applied, this element cannot be taken into account within the framework of a separate assessment criterion, without depriving the first criterion of its ' *effet utile*'.

43 See, for example, judgment of 1 December 2005, Ygeia(C?394/04 and C?395/04, EU:C:2005:734, paragraph 23).

44 See, to that effect, for example, judgment of 8 October 2020, Finanzamt D (C?657/19, EU:C:2020:811, paragraphs 36 and 37), and of 5 March 2020, *X (*VAT exemption for telephone consultations*)* (C?48/19, EU:C:2020:169, paragraphs 41 and 42).

45 See judgment of 19 November 2009, Sturgeon and Others (C?402/07 and C?432/07, EU:C:2009:716, paragraph 47).

46 See judgment of 7 March 2017, RPO(C?390/15, EU:C:2017:174, paragraphs 41 and 42).

47 See judgment of 7 March 2017, RPO(C?390/15, EU:C:2017:174, paragraphs 52 and 53).

48 See, for example, judgment of 10 September 2002, Kügler (C?141/00, EU:C:2002:473, paragraph 30).

49 Judgment of 6 November 2003, Dornier(C?45/01, EU:C:2003:595).

50 See paragraphs 72 and 73 of Dornier. I also understand paragraph 65 of judgment of 10 June 2010, CopyGene(C?262/08, EU:C:2010:328) in this sense. Admittedly, in paragraph 75 of that judgment, the Court held that the fact that an establishment has been authorised by the competent health authorities to handle cord stem cells cannot lead, by itself and automatically, to recognition from the point of view of Article 132(1)(b) of the VAT Directive. However, the handling of stem cells, even when the cells are designated for human applications, may have purposes other than medical care or diagnosis, such as research. Accordingly, as the Court found, such a factor 'tends to suggest that [an establishment] carries on activities dealing with hospital and medical care. Such authorisation can therefore be a factor tending to support the argument that [this entity] is, in any case, "duly recognised" within the meaning of [Article 132(1)(b) of the VAT directive]', without, however, leading, by itself and automatically, to the recognition that this establishment was duly recognised in the Member State in question as being a hospital, a centre for medical treatment, a centre for diagnosis or an establishment of a similar nature.

51 See, to that effect, judgment of 10 June 2010, CopyGene (C?262/08, EU:C:2010:328, paragraph 71): '[the fact the national authorities are entitled to take into consideration that an establishment's activities received no support from and are not covered by the public social security scheme does] not mean that the exemption … must be systematically excluded when the services supplied are not reimbursed by the social security authorities.'

52 Subject implicitly to the condition, for that element to have evidential value from the point of view of formal logic, that the duly authorised character of the establishment is a condition for the services provided to be covered by health insurance schemes.

53 Emphasis added.

54 I note that, on several occasions, the Court made adjustments regarding its case-law on the interpretation of the exemption provided for in the current Article 132(1)(b) of the VAT Directive. See, for an example of a judgment overturning a previous solution, judgment of 7 September 1999, Gregg(C?216/97, EU:C:1999:390, paragraph 15) or, for a judgment reinterpreting a previous judgment in a non-literal way in order to distinguish an earlier judgment, judgment of 18 September 2019, Peters (C?700/17, EU:C:2019:753, paragraph 35).

55 It should be noted that this condition was not included in the original Commission Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes – Common system of value added tax: uniform basis of assessment (No C 80/1). See Opinion of Advocate General Sharpston in CopyGene (C?262/08, EU:C:2009:541, point 82).

56 Judgment of 9 June 2016, Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR (C?332/14, EU:C:2016:417, paragraph 49).

57 In that respect, the Court noted in paragraph 24 of judgment of 5 March 2020*,* Idealmed III (C?211/18, EU:C:2020:168) that 'that provision does not define precisely the aspects of the provision of care concerned that must be compared for the purpose of assessing whether it applies'. This should not, however, be understood too restrictively. It is clear, indeed, from the

wording of Article 132(1)(b) of the VAT Directive that what must be ‘socially comparable’ are the conditions under which the services eligible for exemption are provided and not just, as that paragraph might suggest, the content of those services.

58 Judgment of 5 March 2020, Idealmed III (C?211/18, EU:C:2020:168, paragraph 28).

59 Judgment of 5 March 2020, Idealmed III (C?211/18, EU:C:2020:168, paragraph 31). In this regard, the Court noted that the arrangements ‘are relevant’ but did not specify under what conditions nor the consequences that this will have on the examination.

60 Those obligations are therefore implicitly linked to the fact that the services in question form part of a service of general economic interest referred to in Article 106 TFEU. Indeed, the provisions of Article 132(1) of the VAT Directive are intended to exempt certain activities on the grounds that they are in the general interest. See, to that effect, judgment of 5 March 2020, Idealmed III (C?211/18, EU:C:2020:168, paragraph 26), and on the fact that the services provided by a hospital, a centre for for medical treatment or diagnosis fall under a service of general economic interest, judgments of 25 October 2001, Ambulanz Glöckner (C?475/99, EU:C:2001:577, paragraph 55), and of 12 July 2001, Vanbraekel and Others(C?368/98, EU:C:2001:400, paragraph 48).

61 Since, however, Article 132(1)(b) of the VAT Directive refers to any social condition, in order to determine whether the requirement imposed by a Member State so that an activity can exempted for that purpose are compatible with that provision, account should be taken not only of the obligations applicable *specifically* to similar services provided by a public body, but also of the obligations more generally incumbent on public establishments performing such activities in so far as these obligations are of a social nature. If – to take a contemporary example – all public hospitals performing a specific activity are required by law to reserve a certain number of beds for patients suffering from COVID-19, regardless of the medical department involved, then this same obligation – which is social in nature – would have to be respected by any private hospital seeking to have this activity exempted. Of course, in that example, if the COVID-19 obligation did not, for instance, extend to public neurological hospitals or to the neurological department of a general hospital, the fact that private neurological hospitals or the neurology department of a general hospital did not reserve a certain number of beds for such patients could not be held against it for the purposes of the Article 132(1)(b) exemption to deny the benefit of the VAT exemption to activities performed by this hospital or by this department.

62 The purpose of this is, I believe, implicitly to not adversely affect private organisations which, among others, have adopted different modes of organisation or medical protocols and, therefore, to encourage fair competition, that is to say oriented on the merits.

63 Indeed, it is only by reference to such conditions that a private hospital could be able to verify that the conditions imposed on it are indeed comparable to those imposed on a public hospital. If, on the contrary, this term were to be understood as referring simply to the factual conditions under which public bodies carry out their activities or the various practices they followed, the compatibility of the conditions that private bodies are required to meet would be very difficult to assess, since that would require the examination of the situation of potentially thousands of other hospitals in the Member State in question.

64 See judgment of 10 December 2020, Golfclub Schloss Igling (C?488/18, EU:C:2020:1013, paragraphs 30 and 33).

65 In particular, I do not think that, because the issue is complicated, it should be left to the discretion of the Member States.

66 In practice, it is also not uncommon for public hospitals to be allowed to treat people who are not covered by health insurance funds, provided they are able to pay the costs.

67 Judgment of 5 March 2020, Idealmed III (C?211/18, EU:C:2020:168, paragraph 21).

68 Emphasis added. It is clear, accordingly, that the exemption applies service by service rather than by reference to the institution as a whole.

69 As an example, suppose that a Member State imposes two social obligations on public hospitals, the first of which relates to the respect of certain rights recognised to patients (e.g. right to a complete access to their medical file and to have it transferred, right to be accompanied, etc.) and the second consisting of reserving 20% of the hospital beds for COVID-19 patients. That Member State could not allow private hospitals to benefit from the VAT exemption for *all of their activities* if merely 40% of them complied with those two obligations, since this would mean, regarding the first condition, that potentially 60% of the services are exempted even though they did not respect those rights granted to patients. However, the Member State would be entitled to require, as one social condition among others, that private hospitals also reserve 20% of their beds for COVID-19 patients, even though that condition depends on the hospital providing the services at issue and not directly on the nature of those services.

70 The information provided for by the referring court suggests that the national legislation does not require that, in order to be authorised to carry out non-university hospital activities, a private body must necessarily be in one of the four situations referred to in Paragraph 4(14)(b) of the UStG read in combination with Paragraph 108 of the SGB V. Rather, those four situations appear to be likely to arise only once an establishment has been duly authorised to carry out such activities.

71 See, for example, Paragraph 109(2) of the SGB V.

72 Emphasis added.

73 Compliance with that condition accordingly does not depend on factors that would be beyond the control of a public or private hospital, such as the reimbursement policies implemented by the social security organisations.

74 As is clear from the wording of that provision, that condition must be assessed in relation to each activity undertaken by the establishment in question.

75 See Berlin, D., *La Directive TVA 2006/112*, Bruylant, Brussels, 2020, p. 538.

76 In this regard, I would like to emphasise, in order to clear up any misunderstanding, that the question of the modalities of reimbursement of a medical service by the health insurance funds, even when these modalities are fixed by law, has nothing to do with a price control. Indeed, the fact that only certain care services which are provided at a certain price are not covered, does not mean that medical institutions are obliged to charge their services at that price. The institutions remain free to charge the rates they wish.

77 This literal interpretation of Article 133 of the VAT Directive is confirmed by the need to interpret any EU law provision in a way that is consistent with the general principles of law, which include the principle of equal treatment, as well as with the objective pursued by Article 133 of the

VAT Directive, which seems to be primarily to allow Member States to impose additional conditions in order to ensure that only private bodies which operate under the same constraints as those imposed on public bodies can benefit from the exemption.

78 Admittedly, if there are other significant social conditions that public hospitals have to meet when providing the same service, the national legislation would also be contrary to EU law inasmuch as it did not require that private hospitals comply with social conditions comparable in order to benefit from the VAT exemption provided for in Article 132(1)(b) of the VAT Directive. However, those other social conditions will not be enforceable against the applicant since, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals. See, for example, judgment of 5 March 2002, Axa Royale Belge (C?386/00, EU:C:2002:136, paragraph 18), and my Opinion in Tribunal Económico Administrativo Regional de Galicia (C?521/19, EU:C:2021:176, point 21).