OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 14 November 2002 [1]

I — Introduction

1. In this case the Bundesgerichtshof (Federal Court of Justice), Germany, has submitted two questions on the interpretation 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 [2] (hereinafter 'the Sixth Directive'). The factual background to those questions is a series of performances by the three tenors Luciano Pavarotti, Placido Domingo and José Carreras. To what extent is VAT chargeable on those performances?

2. Those questions relate more particularly to Article 13A of the Sixth Directive, which exempts certain activities in the public interest from VAT. The exempt activities include cultural services supplied by cultural bodies. The national court seeks to ascertain whether soloists can be regarded as cultural bodies. The national court also asks whether performances by soloists which have a primarily commercial aim can be activities in the public interest.

3. The questions afford the Court the opportunity to refine the *Gregg* judgment. [3] In that judgment the Court ruled that also natural persons may — under certain conditions — be regarded as charitable organisations for the purposes of Article 13A of the Sixth Directive.

II — The legal framework

A — *European law*

4. Article 13A(1) requires the Member States to exempt certain activities in the

1 — Original language: Dutch.

2 — OJ 1977 L 145, p. 1.

3 — Case C-216/97 *Gregg v Commissioners of Customs & Excise* [1999] ECR I-4947.

public interest from VAT. That provision reads, in so far as is relevant: 'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

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

5. Article 13A(2) provides:

'(a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)... (n) of this Article subject in each individual case to one or more of the following conditions:

— they shall not systematically aim to make a profit, but any profits nevertheless arising shall not ;be distributed, but shall be assigned to the continuance or

— improvement of the services supplied, they shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned,

— they shall charge prices approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to value added tax,

— exemption of the services concerned shall not be likely to create distortions of competition such as to place at a

disadvantage commercial enterprises liable to value added tax.

(b) The supply of services or goods shall not be granted exemption as provided for in (1)... (n) above if:

— it is not essential to the transactions exempted,

— its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.'

6. Article 28(3), introduction and (b), provides:

'During the transitional period referred to in paragraph 4, Member States may:

...

(b) continue to exempt the activities set out in Annex F under conditions existing in the Member State concerned.'

7. Annex F gives a list of transactions which may be exempted pursuant to Article 28(3)(b). Point 2 of the Annex mentions:

'Services supplied by authors, artists, performers, lawyers and other members of the liberal professions, other than the medical and paramedical professions... .'

B — *National law*

8. For the purposes of the main proceedings the Umsatzsteuergesetz (Law on Turnover Tax)[4] is of primary importance.

9. Paragraph 4 of that Law excludes categories of supplies and services from VAT.

4 — In the version of 24 March 1999, BGBl. I, p. 402.

Activities which are carried out by certain public bodies are exempt under Paragraph 4(20)(a). Those bodies are: theatres, orchestras, chamber music ensembles, choirs, museums, botanical gardens, zoological gardens, archives, libraries and buildings and parks which are protected as national monuments. Those exceptions also apply to activities carried out by bodies of the same kind which are owned by other taxable persons (private bodies) in so far as the competent authority of a *Land* declares that they perform the same cultural functions as the public bodies listed in the previous sentence.

10. Paragraph 4(20)(b) also exempts the organisation of theatrical performances and concerts in so far as these are carried out by the theatres, orchestras, chamber music ensembles or choirs referred to in Paragraph 4(20)(a).

11. Paragraph 12 of the Umsatzsteuergesetz provides for a reduced rate of VAT for services provided by theatres, orchestras, chamber music ensembles, choirs and museums and the organisation of theatrical performances and concerts by other economic operators.

12. Paragraph 18 of the Umsatzsteuergesetz lays down rules on the levying procedure. In order to ensure that tax is collected the Federal Minister for Finance may stipulate that tax payable in respect of a number of activities is to be paid by it being withheld by the person to whom the services are supplied. This applies *inter alia* to activities carried out by a taxable person who is established abroad. The Minister for Finance has used that power.

13. The Umsatzsteuer-Richtlinien comprise guidelines for the tax authorities on turnover taxes. They give *inter alia* the following interpretation of Paragraph 4(20) of the Umsatzsteuergesetz:

— all groups of musicians and vocal ensembles consisting of two or more persons constitute orchestras, chamber music ensembles or choirs. The type of music is not relevant; the music may also be light music.

— the tax exemption for concerts also applies where soloists take part, provided that the event as a whole has the character of a concert. The same applies to the organisation of concerts.

III — Facts and procedure

14. Matthias Hoffmann, the accused in the main proceedings, had run a concert office in respect of pop and (later also) classical music concerts since 1971. By the beginning of the 1990s he was one of the most important concert organisers in Germany. In 1996/1997 he organised the world tour of the three tenors Luciano Pavarotti, Placido Domingo and José Carreras. Two of the concerts on that world tour were held in Germany.

15. Mr Hoffmann failed to withhold turnover tax on the fees paid to the three soloists and also failed to pay the tax concerned over to the German tax authorities. He was required to do so under the Umsatzsteuergesetz, [5] since the persons actually liable to pay VAT (the three soloists) were established abroad.

16. Mr Hoffmann was convicted of tax fraud, in particular in connection with the above offence. By judgment of 22 December 1998 the Landgericht (Regional Court) sentenced him to a period of imprisonment.

17. In so far as is relevant the Landgericht gives the following grounds for that conviction. The exemption provided for in Paragraph 4(20)(a) of the Umsatzsteuergesetz applies only to organisations, which excludes individual artists. In particular where performances by the three tenors are concerned, it is the case that the personality of each of them is foremost, and not the show as a whole. Moreover, a separate contract was concluded with each of them. The Landgericht submits, furthermore, that even according to a broad interpretation of the Umsatzsteuer-Richtlinien an organisation within the meaning of Paragraph 4(20)(a) of the Umsatzsteuergesetz must consist of at least two members.

18. The Landgericht does not consider that interpretation of the national legislation to be contrary to Article 13 of the Sixth Directive. Article 13A(2) empowers the Member States to make exemption from VAT for bodies other than public bodies subject to conditions. That paragraph of the Article mentions among the conditions that may be laid down *inter alia* that a body must not systematically aim to make a profit and that a body must be managed and administered on an essentially voluntary basis. The Community legislature is thereby indicating that the exemption is aimed primarily at economically weak bodies which serve the public interest.

5 — That obligation follows from Paragraph 18(8) of the Law and from implementing legislation. That obligation is not under discussion in the proceedings before the Court.

19. The Landgericht further states that the Member States are free to decide whether to exploit the exemptions from liability to pay VAT which are set out in Article 13A. In the view of the Landgericht those exemptions should not, in any case, be applicable to natural persons.

20. In his appeal to the Bundesgerichtshof against his conviction, Mr Hoffmann argues that the failure to apply the VAT exemption infringes Community law. He claims that it constitutes unlawful discrimination. It is true that the Sixth Directive permits exemptions from the normal levying of VAT, with the national legislature having an 'additional power', but transposition into national law must not lead to results which run counter to the aims of Community law. If the number of persons involved is used as a criterion this is contrary to the purpose of the Sixth Directive, which is to ensure uniform taxation and thereby avoid distortion of competition. The accused refers in that connection to the changes in the case-law of the Court of Justice concerning charitable organisations, according to which, in contrast with the Court's earlier view,[6] the term 'organisation' is no longer applicable only to legal persons but also to natural persons (the *Gregg* judgment[7]).

21. The Public Prosecutor's Office takes a different position in the main proceedings. The exemption from VAT is intended as a subsidy to certain public bodies. That subsidy relates to the fact that the public would not, the Public Prosecutor's Office maintains, be prepared to pay higher prices for cultural performances. The Public Prosecutor's Office submits that the case-law of the Court allows subsidisation in itself of undertakings by means of tax relief. The case-law merely prohibits undertakings from being placed at a disadvantage on the basis of their legal form. What is important is whether in this case the artists are to be treated in the same way as bodies which are assisted by the State.

22. The Bundesgerichtshof subsequently made a reference for a preliminary ruling by order of 5 April 2000, which was received at the Registry of the Court on 17 April 2000, on the following questions:

1. Is Article 13A(1)(n) of the Sixth Council Directive to be interpreted as meaning that the term 'other [recognised] cultural bodies' used therein also

6 — Case C-453/93 *Bulthuis-Griffioen* v *Inspecteur der Omzetbelasting* [1995] ECR I-2341.

7 — Cited in footnote 3.

covers a soloist who supplies cultural services?

2. If the first question is answered in the affirmative, do restrictions arise from the heading '... activities in the public interest' chosen in Article 13A, for example where performances by soloists serve primarily commercial purposes?

23. In the proceedings before the Court, written observations have been submitted by Mr Hoffmann, the Commission and the German, Netherlands and United Kingdom Governments. At the hearing on 3 October 2002 Mr Hoffmann, the Commission and the German Government explained their positions orally.

IV — Relevant case-law

A — *General*

24. It is a well-known fact that the Sixth VAT Directive generates a lot of Court of Justice case-law. This is true of the Directive in general and of Article 13A in particular.

25. The large number of cases brought before the Court is the result, in my opinion, of the character of the Sixth Directive. That Directive is detailed in nature, particularly in the description of the many exemptions from the main rule laid down in the Sixth Directive, which is that VAT is always chargeable on a transaction. That detailed nature does not mean, however, that the scope of the exemptions is self-evident and it certainly does not mean that it was possible for all — including future — situations to be covered by the wording of the Sixth Directive. On the contrary, a detailed body of rules such as this is by its nature incapable of covering a constantly changing reality. This applies all the more to a body of rules on taxation which itself can give rise to changes in legal or company constructs in order to avoid payment of taxation.

26. The main line of reasoning in the Court's case-law relates to the characteristics outlined above. On the one hand that line of reasoning is strict. On the other, the Court looks at the legislature's aim in creating certain legal concepts. That case-law of the Court guides this Opinion.

27. In the recent *Commission* v *Germany* judgment [8] the Court enumerates a number of elements which are important for this case. First of all the Court states that Article 2 of the Sixth Directive contains a definition of liability to VAT. That provision defines the transactions which are to be subject to VAT as the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such and the importation of goods. The Sixth Directive provides, particularly in Title X, of which Article 13 forms part, for exemption from VAT for certain categories of activity. An exemption for which no provision is made in the Sixth Directive constitutes a deviation from the general rule laid down in Article 2 of the Sixth Directive. Such a deviation can only be consistent with Community law if it is permitted in accordance with the provisions of that Directive.

28. On this point the Court thus interprets the Sixth Directive strictly, in the sense that only exemptions for which express provision is made in the Sixth Directive are permitted. This interpretation follows from one of the Community legislature's most important starting points when it was drawing up the Sixth Directive. This was the equality of fiscal treatment, which was intended to combat distortion of competition. In this connection exceptions to harmonisation must be interpreted strictly, since each exception results in further divergence of the level of the tax burden in the Member States. [9]

29. Following on from this I would mention a second of the Community legislature's starting points, fiscal neutrality. This refers to the Community legislature seeking to ensure that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way. [10]

30. At this point I return to the *Commission* v *Germany* judgment. The Court regards the concepts used in Article 13 of the Sixth Directive as independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another. Title A exempts from VAT certain activities which are in the public interest. That provision does not however provide exemption from the application of VAT for every activity performed in the public

8 — Case C-287/00 [2002] ECR I-5811, paragraph 38 et seq.

9 — See in this regard *inter alia* my Joined Opinion in Cases C-345/99 and C-40/00 *Commission* v *France* [2001] ECR I-4493 and I-4539, point 35 et seq.

10 — See *inter alia* the judgments in Cases 268/83 *Rompelmann* [1985] ECR 655, paragraph 19; 50/87 *Commission* v *France* [1988] ECR 4797, paragraph 15, and C-37/95 *Ghent Coal Terminal* [1998] ECR I-1, paragraph 15.

interest, but only for those which are listed and described in great detail in it. [11] Most of those exemptions — including exemption (n), which is at issue here — cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The purpose of the exemptions is therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes. [12]

B — *Article 13A(1)*

31. As regards the exemptions for cultural activities, I would refer to my Opinion in *Commission* v *Finland*, in which I reached the conclusion that the Community legislature had opted for a measured system of VAT on art. [13] Certain cultural activities may be exempt from VAT on the basis of Article 13 of the Sixth Directive, other activities may be exempt for a transitional period and Member States may apply a reduced rate of VAT to yet other activities.

32. The exemptions provided for in Article 13 of the Sixth Directive are granted in favour of activities pursuing specific objectives. Such activities are not always defined by reference to purely material or functional criteria. Most of the provisions — including exemption (n) — also define the bodies which are authorised to supply the exempted services. [14]

33. The *Gregg* judgment [15] is relevant in this connection. In that judgment the Court gives an interpretation of the restriction of the exemption to activities undertaken by establishments or organisations. The Court states that those terms are in principle sufficiently broad to include natural persons as well. In employing those terms, the Community legislature did not intend to confine the exemptions to the activities carried on by legal persons, but meant to extend the scope of those exemptions to activities carried on by individuals. The terms 'establishment' and 'organisation' suggest the existence of an individualised entity performing a particular function, but that does not mean that normally only legal persons satisfy that condition. One or more natural persons running a business may constitute an 'establishment' or 'organisation'.

11 — Paragraphs 44 and 45 of the judgment.

12 — Judgment in Case C-174/00 *Kennemer Golf* [2002] ECR I-3293, paragraph 19.

13 — Opinion in Case C-169/00 [2002] ECR I-2433.

14 — See the judgment in Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraph 13, and paragraph 13 of the *Gregg* judgment, cited in footnote 3.

15 — Cited in footnote 3.

34. The Court bases that interpretation, which is broad in this respect, *inter alia* on the principle of fiscal neutrality. Economic operators carrying on the same activities may not be treated differently, on the basis of their legal form, as far as the levying of VAT is concerned. [16]

35. Without prejudice to Article 13A(2), Member States may not lay down conditions which affect the definition of the subject-matter of the exemptions envisaged by Article 13A(1), the Court states in the *Commission* v *Spain* judgment. Only conditions intended to ensure the correct and straightforward application of the exemptions may be laid down. Those conditions refer to measures intended to prevent any possible evasion, avoidance or abuse. [17]

C — *Article 13A(2)*

36. Article 13A(2) of the Sixth Directive specifies additional conditions which Member States may lay down for the granting of certain exemptions listed in Article 13A(1). Those additional conditions may only be imposed where the exemption benefits bodies other than those governed by public law. The list of conditions contained in Article 13A(2) is exhaustive in nature. [18]

37. The present case is concerned particularly with the conditions set out in the first two indents. The question is how much discretion the content of those indents allows the national legislature. Two recent judgments of 21 March 2002 are relevant in this connection, namely *Kennemer Golf* [19] and *Zoological Society of London*. [20]

38. The *Kennemer Golf* judgment provides an interpretation of the first indent. The Court states that the organisation in question must not aim to make a profit. Such an organisation may have a surplus at the end of an accounting year, but must not aim to make a profit in the sense of financial advantages for the organisation's members.

39. The *Zoological Society of London* judgment deals with the second indent.

16 — See on these lines also the judgment in Case C-141/00 *Ambulanter Pflegedienst Kügler* [2002] ECR I-6833, paragraph 30.

17 — Judgment in Case C-124/96 [1998] ECR I-2501, paragraphs 11 and 12.

18 — As follows from paragraph 18 of the *Commission* v *Spain* judgment cited in footnote 17.

19 — Cited in footnote 12, in particular paragraph 32 et seq.

20 — Judgment in Case C-267/00 *Zoological Society* [2002] ECR I-3353, in particular paragraph 20 et seq.

The additional condition which requires a body to be managed and administered on an essentially voluntary basis is interpreted by the Court in the light of the legal context of that condition. The Community legislature intended, according to the Court, to make a distinction between the activities of commercial undertakings and those of bodies that do not aim to generate profits for their members. The aim of that condition is therefore to reserve VAT exemption for bodies which do not have a commercial purpose, by requiring that the persons who participate in the management and administration of such bodies have no financial interest of their own in their results, by means of remuneration, distribution of profits or any other financial interest, even indirect.

40. Essentially, the second indent gives Member States the opportunity to interpret the public interest objective where the exemption benefits bodies other than those governed by public law. The Community legislature evidently proceeded on the assumption that the activities carried on by bodies governed by public law are by their nature in the public interest.

41. The Community legislature also proceeds on the assumption that non-commercial bodies are more likely than commercial bodies to serve the public interest. The Community legislature therefore expressly gives the Member States the power to treat the two categories of body differently in fiscal terms. That power even goes so far that the exemptions may result in a distortion of competition to the disadvantage of commercial undertakings which are indeed subject to VAT, since the condition set out in the fourth indent — which is designed to combat distortion of competition — is optional in nature.

V — Assessment of the first question

A — *Framework for the assessment*

42. The first question concerns the term 'cultural body' [21] used in Article 13A(1)(n) of the Sixth Directive. Can a soloist — i.e. one natural person — be regarded as a body as well? That question cannot be answered without first defining the content and scope of the terms 'cultural service' and 'cultural body' contained in Article 13A(1)(n) of the Sixth Directive.

21 — In the Dutch version of the text the word 'instelling' is used in item (n), while in other parts of Article 13A(1) 'inrichting' and 'organisatie' are used. There is no significance in this terminological difference. In many language versions (including the French, English and German language versions) this difference is not made. Moreover, it can also be inferred from *Gregg* that the same thing is meant.

43. I would point out for the record that paragraph (2) of Article 13A plays no part here. Quite apart from the fact that the referring court's question focuses on paragraph (1), paragraph (2) does not give the Member States the power to lay down conditions regarding the (minimum) size of a body. The list of conditions contained in paragraph (2) is exhaustive in nature.

44. The question concerning interpretation essentially comprises four elements. In the first place it must be established which cultural services fall within the scope of the exemption provided for in Article 13A(1)(n). However, cultural services are not eligible for exemption in all cases. The exemption applies only where the services are supplied by certain cultural bodies. The second element concerns the significance of that restriction to certain bodies.

45. The third element which I will discuss is the crux of the question referred, namely whether one natural person may also be deemed to be a body. The fourth element is connected with the interpretation which the German legislature has given this autonomous concept. Article 13A(1)(n) gives the Member States — as does paragraph (2) of Article 13A — discretion as far as bodies other than those governed by public law are concerned, since the VAT exemption need only be granted to cultural bodies that have been recognised by the Member State concerned. The Court must rule on the extent to which the national legislature may stipulate a minimum size for a body as a condition of its recognition.

46. I will explain these elements in the light of the main lines of the case-law, which I have set out in the previous paragraph. To sum up: the provisions of Article 13A are autonomous concepts of Community law which must be interpreted strictly, where it is a matter of defining the scope of an exemption. The crux of Article 13A(1)(n) is the exemption of certain cultural activities. The restriction to certain bodies is in the nature of a derivation of this. Moreover, the discretion to differentiate between bodies which are and bodies which are not eligible for exemption must be assessed in accordance with the principle of fiscal neutrality.

B — *Cultural services*

47. As I stated in point 31, the Community legislature opted for a measured system of VAT on art. Certain, but not all, cultural services are covered by the exemption provided for in Article 13A. Inspired by the Commission's observations, I would

differentiate in the context of this case, which concerns classical concerts, between two services. The first service is the service supplied to the concert-goers in return for the purchase of an entry ticket. The purchase of the ticket entitles them to attend a concert or, in other words, to receive a cultural service. They may assert that entitlement against the other party, irrespective of whether that other party is the theatre in which the concert is being held, an independent organiser such as the accused in the main action in this case or the music group itself. According to the legislative history of the Sixth Directive, [22] the term 'cultural service' covers in any event services which are supplied to the public. The consideration for such services is constituted by the prices the public pays. There is no doubt that such services are exempt from VAT, provided of course that the other conditions laid down in Article 13A are satisfied. That conclusion is not contradicted in these proceedings.

48. The services which Hoffmann supplied to the public (expressed in the sale of entry tickets) were, so it appears from the uncontested submissions to the Court, exempt from VAT. The main proceedings relate to a second service. At issue is the levying of VAT on the fee which Hoffmann, the accused in the main proceedings, paid to the three soloists. In order to answer the question referred it is essential to examine whether also the service ensuing from the legal relationship into which the performing artist enters and which involves that artist giving the organiser of a concert an undertaking that he will perform falls within the scope of Article 13A(1)(n).

49. It does not appear from the legislative history of the Sixth Directive in so many words that this service too comes under the VAT exemption. Moreover, provision was made in Article 28(3)(b) in conjunction with Annex F, point 2, of the Sixth Directive for a separate exemption from liability to VAT for a transitional period for services provided by performing artists (performers). Furthermore, under Article 12(3)(a) of the Sixth Directive, [23] the reduced rate of VAT may be applied. In view of the premiss underlying the Court's case-law — a strict interpretation of the exemptions from liability to VAT — these points militate in favour of keeping the service concerned outside the scope of Article 13A.

50. Strikingly enough, the applicability of the VAT exemption to the fee paid to the

22 — See more extensively on this subject Terra and Kajus, *Commentary on the Value Added Tax of the European Community*, IBFD Publications 1993, Volume 2, p. 83.

23 — According to the wording introduced by Council Directive 92/111/EEC of 14 December 1992 amending Directive 77/388/EEC and introducing simplification measures with regard to value added tax (OJ 1992 L 384, p. 47).

performing artist is not as such under discussion in the proceedings before the Court. Thus, the German Government too is of the opinion that after expiry of the transitional period referred to in Article 28(3) performing artists may continue to enjoy the VAT exemption provided that the conditions laid down in Article 13A(1)(n) are satisfied. The German national legislation also permits that exemption in principle (except for soloists). At the hearing the Commission confirmed that in its view the service concerned could be exempt from VAT. According to Hoffmann that service is so closely connected with the service which the organiser supplies to the public that it would be contrary to the purpose of the exemption to make the fee subject to VAT. That purpose is, precisely, to keep the price of a cultural service low by means of a fiscal measure.

51. I too am of the opinion that in the circumstances which form the subject matter of the main proceedings the exemption likewise applies to the service which the performing artist supplies. I, like Hoffmann, attach importance to the link which exists between the service which is supplied directly to the public and the service which the soloists supply to Hoffmann. The two transactions are directly connected. The price which Hoffmann must pay to the soloists is part of his costs and is usually passed directly on to the public.

52. If that transaction with the soloists were not exempt from VAT and the costs incurred by Hoffmann in providing a service were therefore taxed, that would reduce the effectiveness of the VAT exemption, and the purpose of the rule — which I would describe in this respect as more favourable treatment of *certain* cultural activities — would thus be thwarted.

53. I would, additionally, make the following observation. The temporary exemption from liability to VAT under Article 28(3)(b) of the Sixth Directive applied to services supplied by performing artists. My opinion regarding the scope of the exemption provided for in Article 13A(1)(n) of the Sixth Directive entails a degree of overlap between the two provisions. There is likewise an overlap with the possibilities for a reduced rate of VAT on the basis of Article 12(3). The existence of such an overlap does not in itself constitute a reason for a different interpretation of Article 13A(1)(n), however. Article 12 of the Umsatzsteuergesetz shows that the overlap need not result in unclear implementing legislation and consequently in legal uncertainty for the taxable person. That provision explicitly states that unrecognised bodies are subject to a reduced rate of VAT.

C — *Cultural bodies*

54. At this point I come to the restriction of the exemption to cultural services which are supplied by bodies governed by public law or by other cultural bodies recognised by the Member State concerned. The Sixth Directive not only provides that activities intended to achieve certain objectives are exempt from VAT but also governs who — and this is an extra requirement — may supply the exempt activities. [24]

55. When interpreting that restriction the following four points merit attention:

— what is the significance of applying the restriction to *cultural* bodies?

— are commercial bodies excluded from exemption?

— how does this restriction relate to the principle of fiscal neutrality?

— how great is the Member States' discretion to recognise or not recognise bodies?

56. The requirement that a body must be of a cultural nature should be interpreted as far as possible in the same way as the cultural nature of the service provided. [25] Restricting myself to the sector to which the main proceedings relate, I would state for the record that the Community legislature had in mind primarily bodies in which cultural activities take place, such as concert halls and theatres. Because concert halls and theatres are government bodies at one time and structures governed by private law at another, it was necessary not to restrict the exemption to bodies governed by public law. The purpose of the rule is not, after all, to give government bodies a fiscal advantage over bodies governed by private law. The Sixth Directive therefore affords the Member States the possibility of exempting similar cultural bodies governed by private law as well. By way of illustration I would point to the German national legislation, which lays down as a criterion for the exemption of bodies governed by private law that such bodies must

24 — I am using here the Court's wording, which was discussed in point 33 of this Opinion.

25 — It is not apparent from the legislative history of the Directive as described in Terra and Kajus, loc. cit., that the Community legislature set out to make an express distinction between the terms.

have the same 'cultural function' as the bodies governed by public law which are by their nature exempt.

57. The exemption need not be restricted to concert halls and theatres, however. Performing artists are not excluded. There is no reason for them to be either. It is the artists who supply the cultural service, and that service falls — as I stated above — within the scope of the term 'cultural service' within the meaning of Article 13A(1)(n) of the Sixth Directive. In a nutshell, all bodies which regularly supply cultural services are by definition cultural bodies.

58. The second point concerns the issue of the extent to which commercial bodies are excluded. This point is relevant primarily on account of the *Kennemer Golf* judgment,[26] in which the Court states that the purpose of the exemptions listed in Article 13A is to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes. I would also point out that the bodies recognised by the Member States are mentioned in the same breath as bodies governed by public law which by their nature are no

59. Nevertheless, the Sixth Directive enables commercial bodies to benefit from the exemption. I would point out in this connection that the wording of the Sixth Directive does not exclude commercial bodies. More importantly, Article 13A(2) of the Sixth Directive provides for the optional exclusion of commercial bodies. Thus, on the basis of paragraph (2) Member States are entitled, but not obliged, to exclude commercial bodies. This was not done in the German legislation at issue in the main proceedings.

60. The third point is that Article 13A(1)(n) of the Sixth Directive therefore does not treat all taxable persons equally. The exemption only benefits certain taxable persons. Thus the rule is at odds with the principle of fiscal neutrality: it looks like similar cases are receiving different fiscal treatment in connection with the aim of activities.[27] The Court defends this unequal treatment in so many words in the *Kennemer Golf* judgment.[28] It can be seen from that judgment that the principle of fiscal neutrality is not always the deciding factor.

26 — See point 38 of this Opinion.

27 — See regarding this principle point 34 of this Opinion.

28 — See point 37 et seq. of this Opinion.

61. That principle does not preclude a difference in treatment between activities which are similar but not the same. In this regard I have already drawn attention in my Opinion in *Commission* v *Finland* [29] to the fact that the Sixth Directive is very detailed in nature, which automatically means that in a number of cases activities which are substantively somewhat similar but not entirely the same are treated differently. The Sixth Directive has created many borderline cases, with the boundaries used not always being natural ones. This certainly applies to the exemptions listed in Article 13A, which relate only to certain — and therefore not all — activities in the public interest. [30]

62. The principle of fiscal neutrality does, according to the Court in the *Gregg* judgment, preclude economic operators carrying on the same activities from being treated differently, on the basis of their legal form, as far as the levying of VAT is concerned.

63. Nevertheless, it appears to me appropriate to look once again at the relationship between Article 13A(1)(n) and the principle of fiscal neutrality in order to ascertain whether the distinction which depends on the aim of the activities must be regarded as a distinction between the same or between similar cases. The first distinction is not permitted, but the second is.

64. My conclusion, then, is that the restriction, referred to in the previous point, of the persons covered by the exemption is permitted. The exemption does not have as its object, contrary to what the Landgericht claims in the main proceedings, to place economically weak bodies at an advantage, but to lower the threshold for theatre visits by the public. The threshold constituted by the level of the entry price exists primarily in the case of (more difficult) cultural performances which do not of themselves attract a wide public. That threshold does not exist, or at any rate exists to a far lesser degree, in the case of commercial performances which are in themselves profitable. The public is far more prepared to pay the price demanded by the organiser. The VAT exemption mechanism — which, moreover, still leads to only a relatively limited price reduction — therefore fails in such cases to achieve the objective pursued.

29 — Cited in footnote 13; point 41 of that Opinion.

30 — See point 43 of this Opinion.

Since the exemption also entails a loss of tax revenue, I consider it reasonable to regard the exempt and non-exempt activities as similar but not the same.

65. The fourth point is the discretion of the Member State. As I see it, the first matter of importance is that the power granted to a Member State in Article 13A(1)(n) to recognise (or not recognise) bodies other than bodies governed by public law is not subject to any provisos. In principle that freedom is unrestricted — within the limits of Article 13.[31] That freedom goes so far that a Member State may even provide in its legislation that no cultural body which is not governed by public law may be recognised. But Member States may also, for example, take the commercial or non-commercial character of a cultural body as a criterion. A different criterion was selected in Germany: in order to be recognised the body must be declared by the competent authority of a *Land* to perform a 'cultural function'.

66. In these proceedings the Commission submits that when exercising that discretion Member States must comply with Community law and, more particularly, the principle of fiscal neutrality. I support the Commission in that view and would state it in more precise terms as follows. Where a Member State makes use of the discretion granted to it to recognise bodies, such use is bound by general principles of Community law. I am thinking in particular of the following:

— use of that discretion must not conflict with the aim of Article 13A(1)(n). In other words, the effectiveness of that provision must not be impaired.

— use must not result in unequal treatment of equivalent cases. In other words, the principle of fiscal neutrality must be complied with. I have already discussed this principle above.

67. As regards the effectiveness of the provision, I would draw attention to the following. In general, Member States are under an obligation to achieve the result pursued by a directive and to take all appropriate general or specific measures to ensure compliance with that obligation. To put it in negative terms, Member States must refrain from taking measures which jeopardise the attainment of the result

31 — In *Commission* v *Spain* (cited in footnote 17), for example, the Court defined the following limit: the criteria which the Member States use must not affect the substantive scope of the exemption by resulting in *certain cultural services* being excluded from the VAT exemption.

prescribed by a directive. Specifically, we are dealing here with a power of discretion which is not subject to any provisos. That discretion is wide, but use thereof must not negate the system. [32] In the present case it is therefore necessary to consider whether the national measure excluding soloists from the VAT exemption can negate the system.

D — *Can one person also be regarded as a body?*

68. This brings me to the third element of the question posed, namely the question whether one natural person can be regarded as a body. This is the crux of the national court's question. The German, United Kingdom and Netherlands Governments submit that this is not possible. The German Government points out, moreover, that a term taken from a body of Community rules must be interpreted literally as far as possible. In its opinion there must be a minimum degree of concurrence [33] with the usual meaning of a word. Hoffmann and the Commission take a different view.

69. It can be seen from *Gregg* that the legal form of the body is not important, although there must be an individualised entity performing a particular function. The *Gregg* judgment concerned two natural persons performing a function together. They ran a business (more specifically, a nursing home) and acted outwardly like a unit. The present case concerns a different sector, the cultural sector, and more specifically the performance of music.

70. A case similar to the one in *Gregg* occurs where a musical duo or trio acts outwardly as a unit, including where contracts with concert organisers are concerned. There is no doubt in my mind that, by analogy with *Gregg*, such a music group consisting of two or more persons can be regarded as a cultural body within the meaning of the Sixth Directive.

71. This being the case I do not see why, particularly in view of the facts at issue in the main proceedings, a soloist could not be

32 — Case C-305/97 *Royscot and Others* [1999] ECR I-6671, paragraph 24.

33 — At the hearing of the Court the German Government used the term 'Mindestkonvergenz'.

regarded as such an entity. A soloist is entirely comparable with the music group apart from the fact that he consists of one person. In the light of the principle of fiscal neutrality, and in the absence of clarity in the wording of the Sixth Directive, it does not appear to me to be right to interpret the Sixth Directive in such a way that the number of participants in a music group is decisive for the question whether a VAT exemption is granted. In this regard I agree with the Commission and Hoffmann in so far as they argue that an absolute exclusion of soloists is contrary to Community law. This conclusion is not affected by the 1994 guidelines [34] on the interpretation of Article 13 to which the German Government refers. Those guidelines exclude artists who work alone. Quite apart from the fact that those guidelines are not binding, I am of the opinion that their content has been superseded by *Gregg*.

72. The foregoing does not mean that an individual who provides a cultural service can be regarded in all circumstances as a cultural body. In my view, what is decisive is whether the individual (soloist) acts outwardly as an entity. Moreover, the service on which VAT is or is not levied must be an individualised service which the soloist does not supply as part of a whole such as, in the case of classical music, an orchestra.

73. By way of illustration I would again point out the following. In a case such as the present there is all the more reason to regard the soloists as bodies. They are soloists who have considerable business interests which it would have been obvious are being managed by a legal person. It would also have been obvious if the contracts which the accused concluded in the case at issue in the main proceedings had had such a legal person as the other party. The incidental fact that this did not happen — as can be seen from the facts of the case — must not lead to different fiscal treatment.

74. In short, Community law does not exclude a soloist from the exemption.

E — *The Member States' discretion in the matter*

75. I now come to the fourth element which I identified in point 65 above: in so far as the bodies concerned are not public bodies, the VAT exemption set out in Article 13A(1)(n) applies only to cultural

34 — Guidelines of the Advisory Committee provided for in Article 29 of the Directive, issued at the 41st meeting on 28 February and 1 March 1994.

bodies *recognised by the Member State concerned*. Assuming that Article 4(20) of the Umsatzsteuergesetz is to be interpreted as meaning that soloists are excluded from the VAT exemption, this means that a soloist in Germany cannot be regarded as a cultural body. In the light of the interpretation of the Sixth Directive which I have given above, the exclusion of soloists from the VAT exemption therefore ensues in the present case purely from the national legislation. That legislation provides, in so far as is relevant, only for an exemption for groups of musicians and vocal ensembles comprising two or more people.

76. The interpretation of the German Law is of course reserved for the national court. These proceedings before the Court are concerned only with whether a Member State which makes the possible recognition of a body conditional upon the number of participants in the body is overstepping the limit of the discretion granted to it. The Commission takes the view that the general exclusion of soloists does not fall within the limit of that discretion, given that the Member State bases the difference in treatment on subjective criteria.

77. To begin with, the test for effectiveness: it is necessary to examine whether the national measure excluding soloists from the VAT exemption can negate the system. I consider the purpose of the exemption to be of primary importance in this connection. According to the *Kennemer Golf* judgment that purpose is to provide more favourable treatment for certain organisations whose activities are directed towards non-commercial purposes.[35] I would emphasise that the rule does not mean that *all* non-commercial bodies are provided with more favourable treatment. As has been said, the Member States have the necessary latitude on this point. In my opinion a national rule which restricts the more favourable treatment to cultural bodies with more than one participant does not negate the system. Such a rule merely limits the scope of the exemption in the Member State concerned.

78. As the Court stated in *Gregg*, the principle of fiscal neutrality precludes economic operators carrying on the same activities from being treated differently, as far as the levying of VAT is concerned, on the basis of their legal form. In my view that opinion can be applied by analogy to the present case. The unequal treatment applies here to music groups with one participant on the one hand and music groups with two or more participants on the other, who carry on the same activities.

35 — See in particular *Kennemer Golf*, cited in footnote 12.

That distinction bears no relation whatever, moreover, to the aim pursued by the rule. I therefore regard this distinction as unequal treatment of equivalent cases.

79. Since the activities concerned here are the same and not comparable, I take the view that the German Government is in breach of the principle of fiscal neutrality. This does not mean that Community law itself is being breached. A Member State may put forward a special ground as justification. A distinction might be necessary, for example, for inspection reasons. No special justification for the distinction has been put forward in the present case, however.

F — *Summary*

80. To sum up, I would answer the first question referred by the national court in the affirmative on the basis of the following findings:

— the service supplied by a performer to the organiser of a performance may, like the service which the organiser supplies to the public, fall within the scope of Article 13A(1)(n) of the Sixth Directive.

— the Member States have wide discretion to recognise 'cultural bodies' other than public bodies as eligible for the VAT exemption. They may use the non-commercial or commercial nature of a cultural body as a criterion.

— Their discretion is wide, but not unrestricted. It is subject to general principles of Community law such as effectiveness and the principle of fiscal neutrality.

— A soloist may be regarded as a 'cultural body' within the meaning of Article 13A(1)(n) of the Sixth Directive provided that he acts outwardly as an entity and provided that the service on which VAT is or is not levied is an individualised service.

— The absolute exclusion of soloists by a national rule does not impair the effectiveness of the Sixth Directive. Such a rule does infringe the principle of fiscal neutrality. Exclusion is therefore contrary to Community law, save where there is special justification.

national law. In the view of the United Kingdom and Netherlands Governments, on the other hand, it follows from the term 'public interest' that bodies which systematically aim to make a profit may not be exempted. The Commission refers in connection with the second question to Article 13A(2). This forms the basis on which to exclude commercial bodies from the exemption.

VI — Assessment of the second question

81. As I have answered the first question in the affirmative, it is also necessary to answer the second question referred by the national court.

82. This question relates to the restriction of the exemption provided for in Article 13A to activities in the public interest. The term 'public interest' is used in the heading of the article.

83. Mr Hoffmann points out that the various exemptions listed in Article 13A are worded precisely and that they all entail a subsidy with a view to the public interest. The German Government's observations tend in the same direction, given that they point out that the heading does not entail any restriction at all on the Member State when it is transposing the provision into

84. I would point out to begin with that the heading of an article does not form part of the regulatory part of a body of rules. Like the title of the body of rules as a whole or of a part of it, the title (the heading) of an Article describes the subject-matter of what follows. A title is explanatory in nature. The essential difference between the regulatory part of a body of rules and the explanatory part is expressed well in the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation. [36] Nevertheless, the legislature's intention can be inferred from the title of a provision. In that sense, such a title may play a part in the Court's assessment. I also interpret the term 'public interest' contained in the title of Article 13A in that way. The term therefore does not entail any direct restriction, but does determine the interpretation of the exemptions listed in Article 13.

36 — OJ 1999 C 73, p. 1.

85. That being said, the heading concerned in the present case has no independent meaning. I would refer in this connection to the wording of Article 13A(1)(n). That provision relates only to *cultural* services supplied by certain *cultural* bodies. The requirement that both the service and the body must be of a cultural nature means of itself that the exemption relates to the public interest. I concur with the contribution made by Hoffmann and the German Government.

86. Moreover, the term 'public interest' can also be interpreted in a second way in this context, namely as a non-commercial interest. The discussion of the first question gives a sufficiently definite answer as regards that interpretation as well. Indeed, the Court has pointed out that the purpose of the VAT exemptions is to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes. That purpose is also expressed in the conditions which a Member State may, on the basis of Article 13A(2), impose on the exemption of bodies not governed by public law. [37] The heading has no independent meaning in this respect, however, since, as I said previously when answering the first question, commercial bodies are not excluded by their nature. To put it more strongly, the conditions set out in Article 13A(2), which have as their object to give the Member States the power to exclude commercial bodies, are of an optional nature. That paragraph (2) removes any doubt: Article 13A(1)(n) does not preclude commercial bodies — which therefore do not act in the public interest in the restricted sense referred to here — from benefiting from the exemption as well.

87. To sum up:

— the term 'public interest' in the title of Article 13A has no independent meaning.

— the Sixth Directive does not exclude commercial bodies from the exemption by virtue of their nature.

37 — See the much-cited *Kennemer Golf* judgment referred to in footnote 12, paragraph 19.

VII — Conclusion

88. On the basis of the foregoing considerations I propose that the Court give the following answer to the questions referred by the Bundesgerichtshof:

— As regards the first question: A soloist may be regarded as a 'cultural body' within the meaning of Article 13A(1)(n) 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, provided that he appears outwardly as an entity and the service on which VAT is or is not levied is an individualised service. The absolute exclusion of soloists in a national rule does not impair the effectiveness of the Sixth Directive. Such a rule does infringe the principle of fiscal neutrality. Exclusion is therefore contrary to Community law, save where there is special justification.

— As regards the second question: the term 'public interest' in the title of Article 13A has no independent meaning.