Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

15 November 2012*

(Sixth VAT Directive — Exemptions — Article 13A(1)(g) and (2) — Services closely linked to welfare and social security work supplied by bodies governed by public law or organisations recognised as charitable — Recognition — Conditions not applicable to organisations other than bodies governed by public law — Discretion of the Member States — Limits — Principle of fiscal neutrality)

In Case C-174/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 2 March 2011, received at the Court on 13 April 2011, in the proceedings

Finanzamt Steglitz

v

Ines Zimmermann,

THE COURT (Second Chamber),

composed of A. Rosas, acting as President of the Second Chamber, M. Ilešič, U. Lõhmus (Rapporteur), A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: J. Mazák,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 23 May 2012,

after considering the observations submitted on behalf of:

— Ms Zimmermann, by U. Behr, Rechtsanwalt,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the European Commission, by W. Mölls and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 July 2012,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13A(1)(g) and (2)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 The reference has been made in proceedings between Ms Zimmermann and the Finanzamt Steglitz (Tax Office, Steglitz; 'the Finanzamt') concerning the value added tax ('VAT') due for the years 1993 and 1994.

Legal context

European Union ('EU') Law

3 Article 13A(1) of the Sixth Directive provides:

'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:

…

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to 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;

…

(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned;

…'

4 Article 13A(2) of the Sixth Directive provides:

'(a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (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 [VAT],

— 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 [VAT].

(b) The supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (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 [VAT].'

German law

5 Paragraph 4 of the 1993 Law on turnover tax (Umsatzsteuergesetz 1993; 'UStG') in the version applicable in the material years, that is to say, in 1993 and 1994, provided:

'The following transactions … are exempt:

…

16. transactions closely linked with the operation of … organisations providing out-patient care for those who are sick or in need of care where:

(a) those bodies are run by legal persons governed by public law or

…

(e) in the case of … organisations providing out-patient care for those who are sick or in need of care, the medical and pharmaceutical costs have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the preceding calendar year;

…

18. the services of officially recognised voluntary welfare associations, and corporations, associations of persons and funds serving purposes of voluntary welfare which are affiliated as members of a welfare association, where

(a) that operator serves, solely and directly, public-interest, charitable or ecclesiastical purposes,

(b) the services directly benefit the group of persons who are beneficiaries under the statute, act of foundation or other constitution, and

(c) the consideration paid for the services in question is lower than the average rates demanded by commercial undertakings for similar services….'

6 The threshold of two thirds provided for in Paragraph 4(16)(e) of the UStG ('the two thirds threshold') was lowered to 40% as of 1 January 1995.

7 The concept of 'welfare' referred to in Paragraph 4(18) of the UStG is defined in Paragraph 66(2) of the Tax Code (Abgabenordnung, BGBl. 1976 I, p. 613, and BGBl. 1977 I, p. 269) as follows:

'Welfare consists in the planned protection of persons in need or in danger in the public interest rather than for profit. This protection may extend to well-being in health, morals, education or economic standing and may aim to prevent or put right a given situation.'

8 Paragraph 23 of the 1993 Regulation implementing the UstG (Umsatzsteuer-Durchführungsverordnung 1993; 'UStDV') lists 11 associations which are classified as officially recognised welfare associations for the purposes of Paragraph 4(18) of the UStG.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Ms Zimmermann is a registered nurse and in 1992 worked at a welfare centre as a staff nurse. In addition, from the beginning of 1993 she cared for individual patients on a freelance basis and on 1 June 1993 registered an out-patient care service. Following her application of 27 August 1993, she was authorised by the health insurance schemes on 1 October 1993 for home nursing services. In her tax returns for 1993 and 1994, Ms Zimmerman declared her transactions as exempt from VAT pursuant to Paragraph 4(16)(e) of the UStG.

10 In 1999, the Finanzamt found that Ms Zimmermann, together with her staff, had treated a total of 76 people in 1993, 52 of whom (68%) were private patients. The Finanzamt thereupon refused to treat the services provided by Ms Zimmermann in 1993 as exempt from VAT pursuant to Paragraph 4(16)(e) of the UStG.

11 The Finanzamt noted that, under Paragraph 4(16)(e) of the UStG, costs must have been borne, in at least two thirds of cases, wholly or mainly by the statutory social security or social welfare authorities. Exemption under Paragraph 4(16)(e) of the UStG of the services supplied by Ms Zimmermann in 1994 was also refused by the Finanzamt on the ground that that provision related to circumstances in the preceding calendar year. Nonetheless, according to the Finanzamt, the exemption provided for under Paragraph 4(14) of the UStG applied to the extent that Ms Zimmermann had provided care services of a therapeutic nature. By decision of 27 April 1999, the Finanzamt estimated the proportion of those services at one third.

12 Following an unsuccessful complaint, Ms Zimmermann brought an action contesting those decisions before the Finanzgericht (Finance Court). In the course of those proceedings, she submitted a letter sent to her on 19 October 2005 by the Berlin Senate Administration for Health, Social Affairs and Consumer Protection, attesting that, at least since 1988, Ms Zimmerman had provided the same services and carried out the same activities as the care centres (welfare centres) from the League of Voluntary Welfare Associations (Liga der Verbände der freien Wohlfahrtspflege) in Berlin and that Ms Zimmermann and her business had been recognised for the purposes of social security law as a charitable organisation.

13 The Finanzgericht upheld the action for the most part. It stated that the transactions carried out by Ms Zimmermann in 1993 were exempt, up until 1 October 1993, under the first sentence of Paragraph 4(14) of the UStG to the extent that they were apportionable to care of a therapeutic nature. The Finanzgericht estimated that this accounted for 75% of those transactions.

14 According to the Finanzgericht, Ms Zimmermann can claim exemption under Paragraph 4(16)(e) of the UStG for the period from 1 October 1993 to 31 December 1994. It stated that, from the beginning of that period onwards, at least two thirds of Ms Zimmermann's transactions related to persons whose medical and pharmaceutical costs were borne wholly or mainly by the statutory social

security or social welfare authorities. Again according to the Finanzgericht, Paragraph 4(16)(e) of the UStG is to be interpreted in conformity with the Sixth Directive to the effect that only the period subsequent to September 1993 was relevant.

15 By its appeal on a point of law, the Finanzamt claims that the decision of the Finanzgericht should be set aside and the action dismissed in so far it was upheld at first instance, for the period from 1 October 1993 to 31 December 1994, on the basis of Paragraph 4(16)(e) of the UStG. Ms Zimmermann contends that the appeal should be dismissed.

16 The Bundesfinanzhof (Federal Finance Court) finds, in contrast to the Finanzgericht, that the conditions laid down in Paragraph 4(16)(e) of the UStG are not satisfied. Nonetheless, doubts remain as to whether Article 13A(1)(g) or Article 13A2(a) of the Sixth Directive can serve as a legal basis for the two thirds threshold. Furthermore, in *L.u.P.* (Case C-106/05 [2006] ECR I-5123), the Court did not expressly approve the condition, laid down in Paragraph 4(16)(c) of the UStG, that a threshold of 40% must have been reached during the preceding year. Additionally, according to the Bundesfinanzhof, the implications for VAT law of the principle of neutrality are uncertain in the present case.

17 According to the Bundesfinanzhof, for the purposes of applying the exemption provided for in Paragraph 4(18) of the UStG, applicable only to the 11 bodies listed in Paragraph 23 of the UStDV, which supply services which are similar, if not identical, to those supplied by Ms Zimmermann, it is largely immaterial that the medical and pharmaceutical costs were borne in part by the statutory social security or social welfare authorities. Nor, in that connection, must account be taken of the situation during the preceding calendar year.

18 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 13(A)(1)(g) and/or (2)(a) of the [Sixth Directive] permit the national legislature to make the exemption of out-patient care services for those who are sick or in need of care dependent on the fact that, in the case of such organisations, “the medical and pharmaceutical costs have been borne in at least two thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the preceding calendar year” (Paragraph 4(16)(e) of the [UStG])?

(2) In the light of the principle of the neutrality of [VAT], is it relevant to the answer to that question that the national legislature treats the same services as exempt under different conditions where they are carried out by officially recognised voluntary welfare associations, and corporations, associations of persons and funds serving purposes of voluntary welfare which are affiliated as members of a welfare association (Paragraph 4(18) of the [UStG])?’

Consideration of the questions referred

19 By its questions, which may conveniently be examined together, the national court asks in substance whether, under Article 13A(1)(g) and/or Article 13A(2)(a) of the Sixth Directive construed in the light of the principle of fiscal neutrality, the exemption from VAT of out-patient services supplied by commercial service providers may be made subject to a condition such as that at issue in the main proceedings, by virtue of which the costs relating to those treatments must, during the preceding calendar year, have been borne wholly or partly by the statutory social security or social welfare authorities in at least two thirds of cases (‘the condition at issue in the main proceedings’), in particular where that condition does not apply to all providers of the type of service mentioned.

20 It emerges from the order for reference that, according to the explanatory memorandum for the UStG, the purpose of both Paragraph 4(16)(e) and Paragraph 4(18) is to transpose Article 13A(1)(g) of the Sixth Directive.

21 The exemption provided for in Article 13A(1)(g) of the Sixth Directive applies to goods and services which are 'closely linked to welfare and social security work' and supplied 'by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned'.

22 As is clear from settled case-law, the terms used to specify the exemptions in Article 13 of the Sixth Directive are to be interpreted strictly. Nevertheless, the interpretation of those terms must be consistent with the objectives underlying the exemptions and must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 must be construed in such a way as to deprive the exemptions of their intended effects (see inter alia, to that effect, Case C-445/05 *Haderer* [2007] ECR I-4841, paragraph 18 and the case-law cited; Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 25 and the case-law cited; and Case C-262/08 *CopyGene* ECR [2010] ECR I-5053, paragraph 26).

23 The Court has already accepted, in a case relating to an earlier version of Paragraph 4(16) of the UStG, that the provision of general care and domestic help by an out-patient care service to persons in a state of physical or economic dependence amounts to the supply of services closely linked to welfare and social security work for the purposes of Article 13(A)(1)(g) of the Sixth Directive (see Case C-141/00 *Kügler* [2002] ECR I-6833, paragraphs 8, 17, 44 and 61).

24 In the present case, it has not been disputed that the out-patient services provided by Ms Zimmermann can be regarded as 'closely linked to welfare and social security work' in accordance with Article 13A(1)(g) of the Sixth Directive. It is for the national court to assess this issue, having regard to the case-law set out in paragraphs 22 and 23 above.

25 It is apparent from the documents before the Court and, in particular, from the observations of the German Government that the condition at issue in the main proceedings relates to the recognition of the 'charitable' nature of the 'other organisations', apart from the bodies governed by public law, referred to in Article 13A(1)(g) of the Sixth Directive.

26 Article 13A(1)(g) of the Sixth Directive does not specify the conditions and procedures for recognising such organisations (see Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 49). In consequence, it is in principle for the national law of each Member State to lay down the rules in accordance with which that recognition may be granted to such organisations. Member States have a discretion in that respect (see inter alia, to that effect, *Kügler*, paragraph 54; *Kingscrest Associates and Montecello*, paragraphs 49 and 51; and Case C-415/04 *Stichting Kinderopvang Enschede* [2006] ECR I-1385, paragraph 23).

27 In that context, under Article 13A(2)(a) of the Sixth Directive, Member States may make the grant of the exemption provided for in Article 13A(1)(g) to bodies other than those governed by public law subject to one or more of the conditions listed therein. Those optional conditions may be imposed freely and additionally by Member States for the grant of that exemption (see, to that effect, *Kingscrest Associates and Montecello*, paragraphs 38 and 50; *L.u.P.*, paragraph 43; and Case C-434/05 *Horizon College* [2007] ECR I-4793, paragraph 45).

28 It follows that, in the main proceedings, the point at issue is essentially whether, in laying down the framework for the recognition referred to in Article 13A(1)(g) of the Sixth Directive, the Federal Republic of Germany has observed the limits of its discretion (see also, by analogy, *Kügler*, paragraph 55).

29 In that respect, the German Government argues that the Federal Republic of Germany was within its rights in providing that the recognition of organisations other than bodies governed by public law, for the purposes of the exemption provided for in Article 13A(1)(g) of the Sixth Directive, was to be exhaustively governed by national tax legislation, with no latitude being left to the administrative authorities in that regard.

30 Admittedly, the adoption of national rules concerning the conditions and procedures for recognition of the 'charitable' nature of organisations other than bodies governed by public law is allowed under Article 13A of the Sixth Directive (see, to that effect, *Kingscrest Associates and Montecello*, paragraph 50).

31 It is clear, however, from the case-law of the Court that, in order to determine the organisations which should be recognised as 'charitable' for the purposes of Article 13A(1)(g) of the Sixth Directive, it is for the national authorities, in accordance with EU law and subject to review by the national courts, to take into account, in particular, the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions; the public interest nature of the activities of the taxable person concerned; the fact that other taxable persons carrying on the same activities already enjoy similar recognition; and the fact that the costs of the supplies in question may be largely met by health insurance schemes or other social security bodies (see, to that effect, *Kügler*, paragraphs 57 and 58; *Kingscrest Associates and Montecello*, paragraph 53; and, by analogy, Case C-45/01 *Dornier* [2003] ECR I-12911, paragraphs 72 and 73; *L.u.P.*, paragraph 53; and *CopyGene*, paragraphs 65 and 71).

32 Furthermore, the exemption provided for in Article 13(A)(1)(g) of the Sixth Directive may be relied upon by a taxable person before a national court in order to oppose national rules incompatible with that provision. In such cases, it is for the national court to establish, in the light of all relevant factors, whether the taxable person is an organisation recognised as 'charitable' for the purposes of that provision (see *Kügler*, paragraph 61).

33 Accordingly, where a taxable person challenges the recognition, or the absence of recognition, of an organisation as 'charitable' for the purposes of Article 13A(1)(g) of the Sixth Directive, it is for the national courts to examine whether the competent authorities have observed the limits of the discretion granted by that provision whilst applying the principles of EU law, including, in particular, the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality (see inter alia, to that effect, *Kügler*, paragraph 56; *Kingscrest Associates and Montecello*, paragraphs 52 and 54; and *L.u.P.*, paragraph 48).

34 In the present case, the referring court is uncertain as to the lawfulness under the Sixth Directive of two aspects of the condition at issue in the main proceedings: (i) the two thirds threshold and (ii) the fact that the assessment as to whether that condition is satisfied must obligatorily – according to the interpretation adopted by that court – be based on the situation as it stood during the preceding calendar year ('the obligation to take account only of the preceding calendar year').

35 As regards, first, the two thirds threshold, it should be noted that, in accordance with the case-law set out in paragraph 31 above, the fact that the costs of the services concerned may have been borne largely by statutory health insurance funds or by other social security bodies is an element which may be taken into account in determining the organisations which must be granted recognition for the purposes of Article 13A(1)(g) of the Sixth Directive.

36 In those circumstances, in relation to the exemption provided for under Article 13A(1)(b) of the Sixth Directive, the Court has held in substance that, by merely requiring, for the purposes of recognition as laboratories governed by private law for the application of that provision, that at least 40% of the

medical tests carried out by the laboratories concerned must be intended for persons insured with a social security authority, the Member State in question did not go beyond the limits of its discretion under that provision (see *L.u.P.*, paragraphs 53 and 54).

37 The assessment of a requirement setting a two thirds threshold, such as that at issue in the main proceedings, for the purposes of applying Article 13A(1)(g) of the Sixth Directive, calls for a similar approach. The fact of requiring such a threshold is a similar mechanism for meeting the need to recognise that certain organisations are 'charitable' in order to apply that provision. Similarly, by requiring – also in connection with the condition at issue in the main proceedings – that the costs relating to the out-patient services concerned must have been borne wholly or partly by the statutory social security or social welfare authorities, a Member State does not, in principle, go beyond the limits of its discretion under Article 13A(1)(g) of the Sixth Directive.

38 As regards, secondly, the obligation to take account only of the preceding calendar year, the referring court wonders whether that obligation could be based on the introductory words of Article 13A(1) of the Sixth Directive, according to which account is to be taken, in particular, of the 'straightforward' application of the exemptions allowed under that provision.

39 In that regard, whilst it is true that, according to the introductory words of Article 13A(1) of the Sixth Directive, Member States must lay down the conditions for exemptions in such a way as to ensure the correct and straightforward application of those exemptions and to prevent any possible evasion, avoidance or abuse, those conditions cannot affect the substantive definition of the exemptions (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 32; *Kingscrest Associates and Montecello*, paragraph 24, and Case C-401/05 *VDP Dental Laboratory* [2006] ECR I-12121, paragraph 26).

40 In consequence, it would be for the referring court, to the extent necessary, to assess whether, in situations where activities should, from their commencement, have been recognised as 'charitable' for the purposes of Article 13A(1)(g) of the Sixth Directive, in accordance with the case-law set out in paragraph 31 above, the obligation to take account only of the preceding calendar year has as a consequence that, as regards the first calendar year – or even the first two calendar years – of those activities, recognition that the service provider concerned is 'charitable' for the purposes of that provision is automatically and inevitably ruled out.

41 In so far as the obligation to take account only of the preceding calendar year were to have such an effect, it could not be justified on the basis of the introductory words of Article 13A(1) of the Sixth Directive.

42 The referring court goes on to consider the implications for the case before it of the principle of fiscal neutrality, given that in the context of Paragraph 4(18) of the UStG, applicable only to the 11 organisations listed in Paragraph 23 of the UStDV, the exemption for services such as those supplied by Ms Zimmermann is not subject to the condition at issue in the main proceedings.

43 It is apparent from the case-law set out in paragraphs 22 and 33 above that, for applying the exemption provided for in Article 13A(1)(g) of the Sixth Directive, compliance with the principle of fiscal neutrality requires, in principle, that all the organisations other than those governed by public law be placed on an equal footing for the purposes of their recognition for the supply of similar services (see also, by analogy with Article 13A(1)(b) of the Sixth Directive, *L.u.P.*, paragraph 50, and *CopyGene*, paragraph 71).

44 The German Government argues that, in the specific context of Article 13A(1)(g) of the Sixth Directive, the point is to ensure equal treatment in the recognition of certain organisations as 'charitable', with a view to assimilating them to bodies governed by public law. On that view, according to the German Government, the principle of fiscal neutrality should be understood not as

meaning that services which are in substance the same should be taxed in the same way, but rather that taxable persons of the same kind should have to satisfy the same conditions in order to benefit from the exemption.

45 The German Government maintains that the condition at issue in the main proceedings – including, in particular, the two thirds threshold – is supposed to guarantee that the service provider concerned is truly a 'charitable' organisation and serves to ensure that it is placed on an equal footing with public-law bodies. However, according to that government, since Paragraph 4(18) of the UStG – in contrast with Paragraph 4(16) – covers only non-profit making legal persons whose 'charitable' nature has been formally established, the German legislation is not treating identical taxable persons differently; rather, it merely lays down, for recognition as 'charitable' organisations, different conditions for different taxable persons whose material and legal circumstances are different.

46 In relation to those points, it should be borne in mind that, in the field of VAT, the concept of neutrality is used in different senses.

47 On the one hand, recalling that the deduction mechanism provided for under the Sixth Directive is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, the Court has held that the common system of VAT seeks to ensure neutrality of taxation of all economic activities, provided that those activities are themselves subject in principle to VAT (see inter alia, to that effect, Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 27, and Case C-277/09 *RBS Deutschland Holdings* [2010] ECR I-13805, paragraph 38).

48 On the other hand, according to settled case-law, the principle of fiscal neutrality means that supplies of goods or services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes (see, inter alia, Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 24, and Joined Cases C-259/10 and C-260/10 *Rank Group* [2011] ECR I-10947, paragraph 32 and the case-law cited).

49 It is in that latter sense that the concept of neutrality is relevant in the present case. As is clear from the case-law set out in paragraph 22 above, in the interpretation of the exemptions provided for under Article 13 of the Sixth Directive, the principle of fiscal neutrality must be applied alongside the principle that those exemptions must be interpreted strictly (see also, to that effect, Case C-44/11 *Deutsche Bank* [2012] ECR, paragraph 45).

50 From that viewpoint, it should be borne in mind that the principle of fiscal neutrality – a particular expression of the principle of equal treatment at the level of secondary EU law and in the specific area of taxation (see, to that effect, *NCC Construction Danmark*, paragraph 44) – is not a rule of primary law against which it is possible to test the validity of an exemption provided for under Article 13 of the Sixth Directive. Nor does that principle make it possible for the scope of such an exemption to be extended in the absence of an unequivocal provision to that effect (see, to that effect, *VDP Dental Laboratory*, paragraphs 35 to 37, and *Deutsche Bank*, paragraph 45).

51 Indeed, the activities in the public interest which must be exempted from VAT, the activities which may be exempted by the Member States and those which may not, as well as the conditions to which activities eligible for exemption may be made subject by the Member States, are defined by the content of Article 13A of the Sixth Directive (see Case C-144/00 *Hoffmann* [2003] ECR I-2921, paragraph 38, and Case C-253/07 *Canterbury Hockey Club and Canterbury Ladies Hockey Club* [2008] ECR I-7821, paragraph 38).

52 Accordingly, the principle of fiscal neutrality does not preclude, for example, the situation under Article 13A(1)(g) of the Sixth Directive, whereby, for the purposes of the exemption, it is unnecessary for bodies governed by public law to be recognised as 'charitable', but such recognition is required in the case of organisations other than bodies governed by public law.

53 As is apparent from paragraphs 42 and 52 above, in the context of the exemption provided for under Article 13(1)(g) of the Sixth Directive, it is not in relation to bodies governed by public law that the principle of fiscal neutrality requires equal treatment in terms of recognition as 'charitable', but in relation to all other organisations, each as compared with the others.

54 As the German Government confirmed at the hearing before the Court, the organisations covered by Paragraph 4(18) of the UStG, which are exhaustively listed in Paragraph 23 of the UStDV, are governed not by public law but by private law – as are the taxable persons to whom the condition at issue in the main proceedings applies.

55 It is true that, as the German Government argues in substance, the principle of fiscal neutrality cannot, as such, preclude refusal of the exemption under Article 13A(1)(g) of the Sixth Directive to organisations which – like the applicant in the main proceedings – systematically aim to make a profit, in accordance with the option available under the first indent of Article 13A(2)(a) of that directive.

56 However, there is nothing in the information placed before the Court to suggest that, through the condition at issue in the main proceedings, the Federal Republic of Germany has availed itself of that option. On the contrary, it appears that, for the purposes of the exemption provided for under Article 13A(1)(g) of the Sixth Directive, that condition contemplates precisely the recognition of profit-making commercial bodies as 'charitable'.

57 Moreover, applying the rules of interpretation set out in paragraph 22 above (see, inter alia, Case C-473/08 *Eulitz* [2010] ECR I-907, paragraph 42 and the case-law cited), the Court has held, in relation to the concept of 'organisations recognised as charitable by the Member State concerned' as referred to in Article 13A(1)(g) of the Sixth Directive, that that concept is in principle sufficiently broad to encompass natural persons and private profit-making entities (see Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 17; *Hoffmann*, paragraph 24; *Kingscrest Associates and Montecello*, paragraphs 35 and 47; and Case C-492/08 *Commission v France* [2010] ECR I-5471, paragraphs 36 and 37).

58 Accordingly, national legislation may not, in implementing the exemption provided for under Article 13A(1)(g) of the Sixth Directive, lay down materially different conditions for profit-making entities, on the one hand, and non-profit making legal persons falling under Paragraph 4(18) of the UStG, on the other.

59 It follows that Article 13A(1)(g) of the Sixth Directive, interpreted in the light of the principle of fiscal neutrality, precludes a threshold such as the two thirds threshold in so far as, in relation to supplies of goods or services which are essentially the same, that threshold is applied – for recognition as 'charitable' for the purposes of that provision – to some taxable persons governed by private law, but not to others.

60 In order to provide the referring court with a complete answer, it should be noted that it is for that court to take into account, in the light of all the specific factors of the dispute before it, the requirements under Article 13A(2)(b) of the Sixth Directive.

61 Accordingly, whatever interpretation is given to the phrase 'closely linked' in Article 13A(1)(g) of the Sixth Directive, it should be borne in mind that the first indent of Article 13A(2)(b) of that directive makes exemption conditional, in any event, on the supply of goods or services concerned being

essential to the transactions exempted (see *Stichting Kinderopvang Enschede*, paragraph 25). It is for the referring court to determine whether, for the purposes of that indent, all the services supplied by Ms Zimmermann are essential to the transactions exempted (see, by analogy, *Horizon College*, paragraphs 38 to 41).

62 Furthermore, under the second indent of Article 13A(2)(b) of the Sixth Directive, the supply of goods or services is excluded from the exemption under Article 13A(1)(g) if its basic purpose is to obtain additional income for the organisation through transactions which are in direct competition with those of commercial enterprises liable for VAT.

63 In the light of all the foregoing considerations, the answer to the questions referred is that, under Article 13A(1)(g) of the Sixth Directive, interpreted in the light of the principle of fiscal neutrality, the VAT exemption for out-patient services supplied by commercial service-providers may not be made subject to a condition such as that at issue in the main proceedings, by virtue of which the costs relating to those services must, during the preceding calendar year, have been borne wholly or partly by the statutory social security or social welfare authorities in at least two thirds of cases, where that condition is not capable of ensuring equal treatment in relation to the recognition, for the purposes of that provision, of the 'charitable' nature of organisations other than bodies governed by public law.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Under Article 13A(1)(g) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, interpreted in the light of the principle of fiscal neutrality, the VAT exemption for out-patient services supplied by commercial service-providers may not be made subject to a condition such as that at issue in the main proceedings, by virtue of which the costs relating to those services must, during the preceding calendar year, have been borne wholly or partly by the statutory social security or social welfare authorities in at least two thirds of cases, where that condition is not capable of ensuring equal treatment in relation to the recognition, for the purposes of that provision, of the 'charitable' nature of organisations other than bodies governed by public law.

[Signatures]