# OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 28 October 2004 [1]

## I — Introduction

1. This case concerns a question referred to the Court for a preliminary ruling under Article 234 EC by the Verwaltungsgerichtshof (Administrative Court) on the interpretation of Article 87 EC.

2. In substance, the national court asks the court to clarify whether a national rule providing for a change in the value added tax (VAT) status of medical services from taxable to exempt and which does not entail, following that change, the adjustment of deductions in accordance with Article 20 of the Sixth VAT Directive [2] (hereinafter 'the Directive') constitutes State aid under Article 87 EC.

1 — Original language: Italian.

2 — 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).

## II — Legislative framework

*Community law*

3. The first provision relevant to this case is Article 87(1) EC, which provides, subject to the exceptions contemplated by the Treaty, that any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and which affects trade between Member States is incompatible with the common market.

4. Article 88(3) EC, for its part, provides that plans to grant or alter aid shall be notified in good time to the Commission and that Member States may not put their proposed aid measures into effect until the Commission has approved them

5. Mention should also be made of Article 86(2) EC, which provides:

'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

6. Various provisions of the Sixth VAT Directive also come into play in this case.

7. Article 13(A)(1)(c) of the directive provides for the exemption of medical services from VAT, in the following terms:

'A. Exemptions for certain activities in the public interest

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

...

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

...'.

8. That exemption has been applicable in Austria since 1 January 1997. Article IX of Annex XV of the Act of Accession of Austria to the European Union provides, so far as concerns us here, as follows:

'(a) Notwithstanding Articles 12 and 13(A)(1):

The Republic of Austria may, until 31 December 1996, continue to apply:

— a reduced rate of value added tax of 10% to hospital activities in the field of public health care and welfare and to the transport of sick or injured persons in vehicles specially designed for the purpose by duly authorised bodies;

— a standard rate of value added tax of 20% to the provision of medical care by physicians in the field of public health and social welfare;

— an exemption, with refund of tax paid at the preceding stage, to supplies carried out by social security and social welfare institutions.

...'

9. Article 17 of the Sixth Directive deals with the origin and scope of the right to deduct VAT and provides:

'1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...'

10. The adjustment of deductions is governed by Article 20 of the directive, which provides:

'1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where that deduction was higher or lower than that to which the taxable person was entitled;

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where purchases are can celled or price reductions are obtained; however, adjustment shall not be made in cases of transactions remaining totally or partially unpaid and of destruction, loss or theft of property duly proved or confirmed, nor in the case of applications for the purpose of making gifts of small value and giving samples specified in Article 5(6). However, Member States may require adjustment in cases of transactions remaining totally or partially unpaid and of theft.

2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one-fifth of the tax imposed on the goods. The adjustment shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired or manufactured.

By way of derogation from the preceding subparagraph, Member States may base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods the adjustment period may be extended up to 10 years.'

*National law*

11. In Austria, turnover from medical practice is exempt from VAT by virtue of Paragraph 6(1)(19) of the Umsatzsteuergesetz 1994 (Austrian Law on Turnover Tax, hereinafter 'UStG'). Paragraph 29(5) UStG 1994, which gives effect to Annex XV of the Act of Accession of Austria to the European Union, provides that the exemption applies only to transactions after 31 December 1996. Accordingly, medical services rendered prior to 1 January 1997 were subject to VAT and chargeable at the standard rate.

12. The adjustment of deductions is provided for by Paragraph 12(10) and (11) UStG, in the following terms:

'(10) If, in the case of an item used by an undertaking as a fixed asset in its business,

the circumstances material to the deduction of input tax in the calendar year of its first use (subparagraph 3) should change during the four calendar years following the year of its first use, compensation shall be effected for each year to which the change applies by adjusting the deduction of input tax.

This shall apply mutatis mutandis to input tax on subsequent acquisition or manufacturing costs, expenditure to be capitalised or, in the case of buildings, on the cost of major repairs, in which case the adjustment period shall start to run from the beginning of the calendar year that follows the year during which the services giving rise to those costs and expenditure were first used in connection with the fixed asset.

In the case of real estate within the meaning of Paragraph 2 of the Grunderwerbsteuergesetz 1987 (Law on Land Transfer Tax 1987) (including expenditure to be capitalised and the cost of major repairs) the period of four calendar years shall be replaced by a period of nine calendar years.

...

(11) If, in the case of an item that an undertaking has manufactured or acquired for its business or in the case of other services that have been rendered for its business, the circumstances that were material to the deduction of input tax should change (subparagraph 3), an adjustment shall be made to the deduction of input tax for the assessment period during which the change occurred, unless subparagraph 10 should apply.'

...'

13. According to the third sentence of Paragraph XIV of Federal Law BGBl. 21/1995, as amended by BGBl. 756/1996 (hereinafter 'BGBl. 21/1995'), however, the adjustment does not apply to deductions made by doctors prior to the changeover to VAT-exempt status:

'There shall be no adjustment to the deduction of input tax under Paragraph 12(10) and (11) of the Umsatzteuergesetz 1994 that would otherwise apply as a result of the first application after 31 December 1996 of the provisions in Paragraph 6(1)(17) and (18), except in so far as in relation to nursing homes, retirement homes, homes for the blind and care homes, and of the provisions in Paragraph 6(1)(19) to (22) of the Umsatzteuergesetz 1994. ...'

14. Finally, the Gesundheits- und Sozialbereich-Beihilfengesetz (BGBl. 746/1996, Law on Aid for the Health and Social Services

Sectors) provides for a grant scheme to compensate doctors for VAT paid which has become non-deductible in the wake of the changeover to VAT exemption.

## III — Facts and procedure

15. Mr Heiser, the appellant in the main proceedings, is a medical doctor specialising in oral and maxillo-facial surgery.

16. In his VAT return for 1997, the appellant claimed a VAT credit of approximately ATS 3.5 million. This claim was based on the fact that, under the Austrian legislation, long-term medical services (such as orthodontic treatment) commenced prior to 1 January 1997 but completed after 31 December 1996 — that is, after the changeover from VAT liability to VAT exemption — are deemed to be VAT-exempt. Having paid VAT on down payments received prior to 1997 for orthodontic treatment not yet completed at the time of the changeover to VAT-exempt status, Mr Heiser believed himself entitled to apply the exempt status retrospectively to the treatment in question.

17. On 4 October 1999, taking the view that in the case of long-term orthodontic treatment the service is supplied over the course of approximately a year, the Finanzamt (tax office), in its assessment of VAT due for 1997, allowed the credit in question only in respect of treatment having commenced in 1996. It thus allowed only ATS 1 460 000 by way of VAT credit, an amount less than that claimed by Mr Heiser.

18. The appellant challenged that assessment before the competent appeals body, the Finanzlandesdirektion für Tirol. In a letter of 1 March 2002, that body instructed the Finanzamt inter alia to determine the extent to which deductions should be adjusted under Paragraph 12(10) UStG 1994 as of 1 January 1997 because of the changeover from taxability to exemption.

19. On 19 September 2002, after those determinations had been made, the Finanzlandesdirektion für Tirol dismissed the appeal against the assessment and varied the assessment raised by the Finanzamt to the appellant's detriment, by adjusting as of 1 January 1997 the deductions made by Mr Heiser between 1993 and 1996 for investments in immovable and movable property.

The total adjustments came to ATS 254 506.09 (EUR 18 495.69).

20. Mr Heiser thereupon appealed to the Verwaltungsgerichtshof, challenging, inter alia, the competent authority's adjustment of deductions. He argued that Paragraph XIV (3) of Law BGBl. 21/1995 expressly exempts medical practitioners from having to adjust deductions as of 1 January 1997.

21. For its part, the Finanzlandesdirektion für Tirol countered that Paragraph XIV(3) of Law BGBl. 21/1995 was not applicable on the basis that that provision constituted State aid under Article 87 EC which had not been notified to the Commission and had thus not been approved by it. Under Article 88(3) EC, therefore, the Austrian authorities could not give effect to unnotified aid. Furthermore, the provision was also contrary to Article 20 of the Sixth Directive.

22. In doubt as to the interpretation of Article 87 EC, the Verwaltungsgerichtshof, by order of 31 March 2003, decided to stay the proceedings pending before it and to refer the following question to the Court for a preliminary ruling:

'Does a rule, such as that contained in Paragraph XIV(3) of Federal Law BGBl. 21/1995, as amended by BGBl. 756/1996, providing that in the case of supplies made by doctors the changeover from taxable to exempt status for the purposes of value added tax does not, in relation to goods that continue to be used in the business, entail the reduction of input tax already deducted that is prescribed by Article 20 of the Sixth Council Directive 77/388/EEC, constitute State aid within the meaning of Article 87 EC (formerly Article 92 of the EC Treaty)?'

23. In the ensuing proceedings, the appellant, the Austrian Government and the Commission submitted written observations and made oral representations at the hearing on 30 September 2004.

## IV — Legal analysis

24. As we have seen, the question referred concerns Article 87(1) EC. The national court asks whether the Austrian legislation's dispensation for medical practitioners from

the requirement to adjust deductions should be considered State aid.

*The issue of the compatibility of the national provision with Article 20 of the Sixth Directive*

25. Before turning to consider the question referred, I must first note that all the intervening parties also submitted observations concerning the compatibility of the national provision with Article 20 of the Sixth Directive.

26. The Commission, on the one hand, submits that it is not so compatible. By a series of arguments based on both a literal and a teleological reading, it comes to the conclusion that Article 20 requires deductions to be adjusted following the change in the Austrian VAT rules. Although, in its opinion, such adjustment could be required only in respect of VAT deducted after Austria's accession to the European Union, that is, after 1 January 1995. Prior to then, the Sixth Directive did not apply in Austria and the issue of adjustment of deductions effected previously had therefore to be resolved solely in the light of the Austrian legislation applicable at the time.

27. The Austrian Government and Mr Heiser, on the other hand, argue that the principle of the protection of legitimate expectations and the principle of legal certainty require that the right to deduct VAT, once it has accrued, cannot subsequently be made subject to adjustment under Article 20 as a result of a changeover from a rule of taxability to one of exemption, as a result, that is, of an event outside the taxable person's control. The Austrian legislation was therefore in conformity with Article 20 of the Sixth Directive, interpreted in the light of those general principles of Community law.

28. For my part, I must first stress that the Verwaltungsgerichtshof did not request the Court for a preliminary ruling on the interpretation of Article 20 of the Directive.

29. None the less, it has to be asked whether an answer on this point may not still be necessary. As the Court has held, 'in order to provide a helpful answer to the national court which has referred a question to it for a preliminary ruling, the Court may deem it

necessary to consider provisions of Community law to which the national court has not referred in its question.' [3]

30. It therefore needs to considered whether interpretation of the Community provision in question would be helpful for the purposes of the main proceedings.

31. It seems to me that that is not the case. It would clearly have no bearing on the main proceedings were the argument to succeed that the national provision is compatible with Article 20 of the Sixth Directive. In that event, it would still have to be determined whether or not the dispensation allowed by the national provision constituted State aid for the purposes of Article 87(1) EC. An interpretation of the Community provision to that effect would therefore be of no assistance to the national court in resolving the dispute in the main proceedings.

32. The outcome would clearly be different, on the face of it, if the Commission's argument were upheld that Article 20 precludes a national provision not providing for the adjustment of deductions upon a change in the statutory context. [4] In that case, the provision in question would, on the face of it, have to be disapplied as being contrary to a provision of Community law, and it would not therefore be necessary to consider whether it also constituted State aid.

33. On closer inspection, however, that outcome too would turn out to be of no relevance for the national proceedings in this case. Because, as the Commission itself rightly observes, the national court could not disapply the national rule adjudged contrary to the directive so as to order adjustment of the deductions in question. That outcome would necessarily entail imposing a higher tax liability on Mr Heiser than would be the case if the national rule were applied. But as the Court has on many occasions emphasised, 'according to Article [249 EC] the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each member state to which it is addressed". It follows that a

3 — Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9, Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10, and Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39.

4 — An interpretation, incidentally, about which I continue to harbour the same doubts as those I expressed in my Opinion in Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep*, ECR I-5337.

directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person'.[5] As against Mr Heiser, who relies on a particular right specifically conferred on him by a national provision, the Austrian authorities could not therefore rely on the alleged incompatibility of that provision with Article 20.[6]

34. In both eventualities, therefore, the resolution of the issue would not be of assistance to the national court.

35. I will therefore confine myself to examining the question asked by the national court, that is, whether the dispensation from the adjustment requirement enjoyed by the Austrian medical sector constitutes State aid for the purposes of Article 87 EC.

*Analysis of the question*

36. Austria and Mr Heiser, on the one hand, and the Commission, on the other, give completely different answers to the question asked, on the strength of arguments that will be detailed, as required, in what follows. While the Commission believes that the disputed provision constitutes State aid, the other two intervening parties take the opposite view.

37. For my part, I must observe that, according to the settled case-law of the Court, four cumulative conditions must be satisfied in order for a public measure to constitute State aid: (i) the measure must give a selective advantage to certain undertakings or to the production of certain goods, (ii) the advantage must be granted directly or indirectly using State resources, (iii) the measure must distort or threaten to distort competition, and (iv) must be capable of affecting trade between Member States.[7]

38. I will therefore now turn to analyse each of these conditions with reference to the

5 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48. See, more recently, Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraphs 20 and the order in Case C-233/01 *RAS* [2002] ECR I-9411, paragraph 22.

6 — See, in particular, the Order in *RAS*, where the issue was whether a national court could disapply a national provision on the ground of incompatibility with Directive 73/239/EC on Direct Insurance other than Life Assurance in order to give judgment against an insured person for the payment of a higher insurance premium than would have been payable under the national provision in question. On that issue, the Court concluded that 'interpretation of [the directive], which has been requested by the national court, cannot, in any event, enable judgment to be given against Mr Lo Bue for the payment of an increase in premium which is not based on the national law applicable to the main proceedings ...' (paragraph 21).

7 — See, for example, Case C-280/00 *Altmark* [2003] ECR I-7747, paragraph 74.

facts of this case, having first noted, however, as a preliminary point, that the question as to whether or not the measure at issue constitutes State aid arises only in so far as it concerns an economic activity, that is, '[an] activity consisting in offering goods and services on a given market' [8] A measure can constitute State aid only if it benefits an 'undertaking', a concept that for the purposes of the application of the Treaty rules on competition encompasses, according to settled case-law, 'every entity engaged in an *economic activity*, regardless of the legal status of the entity and the way in which it is financed'. [9]

39. It is true that, in the healthcare sector, it is by no means certain that that condition is always and necessarily met. I would recall the view taken by the Court, in the field of social security, according to which bodies or organisations that fulfil an 'exclusively social function' and are entirely non-profit-making do not fall to be regarded as undertakings. [10]

That does not apply in this case, however. What we have here is a situation analogous to that considered in *Pavlov*, which concerned Dutch medical specialists. In that case, the Court held that those doctors are undertakings within the meaning of the Treaty, since they 'provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services' and 'are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity'. [11]

40. That much clarified, I now turn to examine the conditions referred to above.

41. (i) I would first observe, with regard to the first condition, that the provision in question undoubtedly confers an advantage on the Austrian medical sector. Those operating in that sector have not had to bear the financial cost which, in the absence of the dispensation from the adjustment requirement, would have been imposed on them as a consequence of the changeover from a rule of VAT taxability to one of VAT exemption. The measure at issue thus reduced their charge to tax.

8 — Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75. See also Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, Case C-475/99 *Ambulanz Glockner* [2001] ECR I-8089, paragraph 19, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 47, and Case C-218/00 *CISAL* [2002] ECR I-691, paragraph 23.

9 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération française des sociétés d'assurance and Others* [1995] ECR I-4013, paragraph 14; Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21; *Pavlov*, paragraph 74; *Wouters*, paragraph 46; and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK and Others* [2004] ECR I-2493, paragraph 46). Emphasis added.

10 — See, in particular, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 15 and 18, Case T-319/99 *Fenin* [2003] ECR II-357, paragraphs 38 to 39, and *AOK*, paragraphs 47-51.

11 — *Pavlov*, paragraph 76.

42. It is also a selective advantage, in that it applies to a single sector of activity (the medical sector) and 'places the persons to whom the exemption applies in a more favourable financial position than other taxpayers'. [12]

43. On that point, it should be noted that the fact that a public measure confers an advantage on a whole economic sector is not sufficient, contrary to what the Austrian Government maintains, to negate the selective nature of the measure and thus to take it outside the ambit of State aid. As may be inferred from the very letter of Article 87(1) EC, public measures that concern 'the production of certain goods', in other words, a particular sector of the economy, can fall within the scope of the article. [13] That is specifically so in the case of measures designed 'to give the undertakings of a particular ... sector a partial reduction of the financial charges arising from the normal application of the general ... system', [14] a description that fits this case perfectly. The national legislation at issue makes a special rule for the medical sector, one that is more favourable to the taxpayer than the ordinary VAT rules applicable to other sectors.

44. It does not seem to me, furthermore, that a different conclusion is warranted by the Austrian Government's argument that while the disputed measure does give rise to unequal tax treatment as between different economic sectors, it is not designed to create an advantage for the medical sector, having regard to the objective it pursues. The measure, according to the Austrian Government, pursues an objective in the general interest by facilitating the provision of medical care and, hence, of 'services of general economic interest' within the meaning of Article 86(2) EC. More specifically, the Austrian Government explains, the provision in question was adopted with the sole purpose of avoiding a situation where social security organisations would be faced with additional charges as a result of the medical sector becoming VAT-exempt. Under the agreements in force between the Austrian Medical Council and the social security organisations, the latter would have had to compensate the doctors appropriately for the additional expenses arising as a result of the change in the VAT rules. In those circumstances, the Austrian legislature decided that it would not burden the social security organisations with those charges and so introduced a dispensation from the adjustment requirement in respect of VAT deducted prior to the changeover to VAT exemption, and provided, in the case of VAT that had become non-deductible following the changeover, for the payment of direct aid (paragraph 13 above).

45. In that regard, however, I would first observe that the nature of the objectives

12 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14.

13 — Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18, and Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33.

14 — *Belgium* v *Commission*, paragraph 33.

behind a State measure is not sufficient ipso facto to take it outside the ambit of State aid. Otherwise, the Member State would only have to invoke the legitimacy of the aim pursued by the public intervention to avoid the application of the Treaty rules on State aid. Article 87 EC, furthermore, as consistently interpreted by the Court, 'does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects', [15] that is, their potential distorting effect on competition. The fact that the measure concerned may serve objectives in the general interest is not therefore sufficient to exclude it from the concept of aid. [16]

46. Likewise, I do not find merit in the Austrian Government's argument regarding Article 86(2). On the basis of that Treaty provision, the Court has excluded from the ambit of State aid measures of State intervention that are no more than 'compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage'. [17] But it seems clear to me that a blanket provision such as that at issue here, which applies to all medical and paramedical services without regard to the nature of the service supplied or the nature of the costs incurred, does not come within that exception.

47. That much said, it is also the case that not all differences in treatment of undertakings or sectors constitute an advantage for the purposes of Article 87 EC. [18] According to Community case-law, differences which in effect favour particular undertakings or sectors but which are 'justified by the *nature or general scheme*

15 — Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20, Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23, *Belgium* v *Commission*, cited above, paragraph 25, Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 61, and Case C-126/01 *GEMO* [2003] ECR I-13769, paragraph 34.

16 — See, in particular, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 8.

17 — *Altmark*, paragraph 87. The Court explained that in order for a compensation measure of that kind to fall outside the scope of State aid, four conditions must be satisfied: 1) the recipient undertaking must be actually required to discharge public service obligations and those obligations must have been clearly defined; 2) the parameters on the basis of which the compensation is calculated must have been established beforehand in an objective and transparent manner; 3) the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit; 4) where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined on the basis of an analysis of the costs which a typical, well-run undertaking would have incurred in discharging the public service obligations in question (paragraph 95).

18 — See, for example, Case C-353/95 P *Tiercé Ladbroke* [1997] ECR I-7007, paragraph 33, and Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 17.

of the system of which [they are] part' [19] are not of a selective nature (and constitute a so-called 'general measure'). That category may include, inter alia, differences in tax treatment, provided that they are dictated by reasons relating to the logic of the tax system, [20] and not simply by the general purposes and objectives pursued by the State in adopting the measures in question. [21]

48. It does not seem to me, however, that those conditions are met in this case. The reasons behind the provision at issue are difficult to construe as reasons inherent in the tax system. Its sole purpose, as confirmed by the explanations offered by the Austrian Government itself, is to facilitate the transition from one set of tax arrangements to another, by having the State bear some of the 'costs' of this statutory change. What is more, the Austrian Government failed to give any explanation as to how the dispensation from the adjustment requirement might be justified by the nature or structure of the VAT system.

49. Finally, I do not see any merit in Mr Heiser's point that the national provision does not create an advantage since it does no more than to compensate Austrian doctors for the handicap they had suffered, as a result of their services having been chargeable to VAT, compared to their counterparts in other Member States who were exempt from paying VAT. The medical professions had thus been hindered not helped and the provision at issue did no more than create/restore a level playing-field between Austrian practitioners and those of other Member States.

50. However, without it being necessary to consider whether Austrian doctors were actually placed at a disadvantage by being subject to VAT, I believe it is sufficient to recall the settled case-law of the Court according to which 'the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid'. [22] In other words, contrary

19 — Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 42. The italics are mine. See also, to the same effect, Case 173/73 *Italy* v *Commission*, paragraph 33, *Tiercé Ladbroke*, paragraph 35, *Belgium* v *Commission*, paragraph 33, Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 42 and Case C-308/01 *GIL Insurance* [2004] ECR I-4777, paragraph 60.

20 — See, in particular, *GIL Insurance*, in which the Court regarded as 'justified by the nature and the general scheme of the national system of taxation of insurance' a measure introduced 'to counteract the practice of taking advantage of the difference between the standard rate of [insurance premium tax] and that of VAT by manipulating the prices of rental or sale of appliances and of the associated insurance' (paragraph 74).

21 — See, for example, Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, in which the Court rejected arguments by the Spanish Government that a measure to facilitate the replacement of commercial vehicles did not fall to be classified as State aid since its objectives were environmental protection and road safety.

22 — Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 21.

to what is suggested by Mr Heiser, it would not be open to Austria to justify the dispensation by arguing that the advantage conferred was aimed at correcting alleged distortions of competition in the common market for medical services.

51. In that regard, the Court has also stated that '[f]or the application of Article 92 of the Treaty, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time', [23] the proper comparison being that between the situation of the beneficiary and that of other undertakings or sectors at the time of the granting of the aid.

52. (ii) It seems clear to me also that the advantage in question has been funded through public resources. The Court has consistently held that the concept of aid 'embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect'. [24] That is the case in particular of measures which give certain undertakings a tax advantage, because while such measures do not entail any expenditure of State resources they do entail a loss of revenue which would otherwise have accrued to the State.

53. In this case, it is sufficient to note that by applying the dispensation from the adjustment requirement the Austrian authorities have in practice forgone the tax receipts which would have flowed from the adjustment in the form of part-repayments of deductions. The measure therefore entailed an additional charge for the State. The tax advantage in question was thus granted through State resources

54. (iii) As for the condition concerning the potential to distort competition, it seems to me that the case at hand leaves no room for doubt on that count. It is settled case-law that aid which, like that provided for by Paragraph XIV(3) of BGBl. 21/1995, 'is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition'. [25]

23 — *Adria-Wien Pipeline*, paragraph 41.

24 — *Italy* v *Commission*, paragraph 15.

25 — Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30 and cases cited therein.

55. It does not seem to me, furthermore, that Mr Heiser's arguments regarding the organisation of the Austrian medical sector give any reason to disturb that conclusion. According to Mr Heiser, even if it were the case that the measure in question constituted an advantage for Austrian doctors, that advantage could not distort competition since the patient's choice of doctor would not be influenced by the price of the services. In reality, the decisive factor in that choice would be whether the doctor was or was not approved for reimbursement purposes, since in the latter case the patient would have to pay more than 50% of the price of treatment out of his or her own pocket. In the absence of price-competition the measure therefore had no bearing whatsoever on the competitive position of its beneficiaries.

56. According to the information contained in the case-file, however, whether or not services are provided by an approved doctor, the patient is never reimbursed the full price of the treatment. The doctor thus has some 'room for manoeuvre' with respect to the non-reimbursable part of the price. But a measure that has the effect of lowering the 'production costs' of medical treatment (by allowing deductions on machinery and equipment, for example) can impact on the price of such treatment and is therefore capable of having distorting effects on competition.

57. (iv) Turning finally to the effect of the measure on trade between Member States, I would first point out that, according to settled case-law, 'the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected'. [26] It follows from that, firstly, that there is no threshold or percentage below which it may be considered that trade between Member States is not affected. [27] And secondly, that aid can be such as to affect trade between Member States even if the recipient operates on a local or regional scale only and does not engage in cross-border trade. As a result of the aid, the business carried on by the recipient may be maintained or increased with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned. [28] Finally, the Community case-law holds that in order for a measure to be considered aid it is sufficient for it to be potentially harmful to trade between Member States without the actual effect of it having to be shown. [29]

26 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 42, and *Altmark*, paragraph 81.

27 — See, for example, *Altmark*, paragraph 81.

28 — See, for example, *Altmark*, paragraphs 78 and 82.

29 — Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro* [2000] ECR II-2319, paragraphs 76 to 80, and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava* [2002] ECR II-1275, paragraphs 76 to 78.

58. In the case of the measure at issue, it is possible, in my opinion, that even though it concerns the supply of services which are of a predominantly local or regional character, it has the potential to affect trade between Member States to some extent. As the Commission points out (and as demonstrated by the extensive Community case-law in this area), the market concerned by the contested provision, which is the market for medical treatment, is one that is open to competition and characterised by increasing cross-border trade. In that context, a measure which, as I have said, reduces 'production costs', may make treatment provided in Austria more competitive and thereby deter or curtail the supply of services by operators in other Member States.

59. It seems to me therefore, in the light of all the foregoing considerations, that the national provision in question constitutes State aid for the purposes of Article 87(1) EC and that Austria should therefore have complied with the procedure laid down by Article 88 EC, in other words the requirement to notify the measure and not to give effect to it pending the adoption of a final decision by the Commission.

## V — Conclusion

60. I am therefore of opinion that the Court should answer the question referred by the Verwaltungsgerichtshof in the following terms:

'A rule, such as that contained in Paragraph XIV(3) of Federal Law BGBl. 21/1995, as amended by BGBl. 756/1996, which dispenses those engaged in the medical sector, in connection with the transition from taxable to exempt status for VAT purposes, from the general requirement under national law for deductions to be adjusted, constitutes State aid within the meaning of Article 87(1) EC.'