OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 27 September 2001 [1]

I — Introduction

1. By order of 3 February 2000 received at the Registry of the Court on 14 April 2000, the Bundesfinanzhof (Federal Finance Court) (Federal Republic of Germany) submitted three questions under Article 234 EC seeking an interpretation of Article 13A(1)(c) and (g) of the Sixth VAT Directive [2] in the context of a dispute between a company providing out-patient care services (Ambulanter Pflegedienst Kügler GmbH, hereinafter referred to as 'Kügler' or 'the applicant') and the Finanzamt für Körperschaften I, Berlin (Corporate Tax Office, hereinafter referred to as the 'Finanzamt' or the 'administration'). The answers provided by the Court will help the court of reference to decide whether the medical services and out-patient care provided by Kügler from 1988 to 1990 should be subject to value added tax (hereinafter 'VAT'), as the administration contends, or should enjoy tax exemption under the aforesaid provisions, as the applicant claims.

II — Legal background

A — *Community legislation*

2. Article 13 (entitled 'Exemptions within the territory of the country'), part A (entitled 'Exemptions for certain activities in the public interest'), paragraphs 1(b), (c), and (g) and 2(a) and (b) of the Sixth Directive provide that:

'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:

...

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

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; hereinafter the 'Sixth Directive').

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;

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

...

(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;

...

2. (a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)... (g)... 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)... (g)... 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.'

B — *National legislation*

3. Under the first sentence of Paragraph 4(14) of the Umsatzsteuergesetz of 1980 (Law on Turnover Tax, hereinafter 'the UStG' [3]),

'transactions arising from pursuit of the profession of doctor, dentist, natural medical practitioner, physiotherapist, midwife or a similar professional medical activity for the purposes of Paragraph 18(1)(1) of the Einkommensteuergesetz (Law on Income Tax) or pursuit of the profession of clinical chemist' [4] are to be exempted from such tax.

4. Paragraph 4(16), in the version in force during the period to which the dispute in the main proceedings relates, that is to say from 1988 to 1990, provided that the following were exempt from tax:

'transactions closely linked with the operation of hospitals, diagnostic clinics and other bodies providing medical care, diag-

3 — BGBl. I 1979, p. 1953.

4 — The translation of the national provisions is not official.

noses or clinical results and of old people's homes, residential accommodation for the elderly and nursing homes, where:

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

(b) in the case of hospitals...

(c) in the case of diagnostic clinics and other bodies providing medical care, diagnoses or clinical results, the services are supplied under medical supervision...

(d) in the case of old people's homes, residential accommodation for the elderly and nursing homes, at least two-thirds of the services have been supplied to persons referred to in Paragraph 68(1) of the Bundessozialhilfegesetz (Federal Law on Social Assistance)... in the previous calendar year'.

5. In 1992 the introductory part of Paragraph 4(16) of the UStG was amended, so that tax exemption now applies to: [5]

'transactions closely linked with the operation of hospitals, diagnostic clinics and other bodies providing medical care, diagnoses or clinical results and of old people's homes, residential accommodation for the elderly, nursing homes, bodies for the temporary admission of those in need of care and bodies providing out-patient care for those who are sick or in need of care where...'.

6. At the same time a subparagraph (e) was added to Paragraph 4(16), with the following wording:

'(e) in the case of bodies for the temporary admission of those in need of care and bodies providing out-patient care for those who are sick or in need of care, the costs of the care have been borne in

5 — The amendments were introduced in the 1992 Steueränderungsgesetz (Tax Amendment Law) amending tax legislation, referred to hereinafter as 'the StÄndG'; BGBl. I 1992, p. 297, especially p. 317.

at least two-thirds of cases wholly or mainly by the statutory social security or social welfare authorities in the previous calendar year'.

7. As clarification of the provisions described above, I also note that Paragraph 4(14) of the UStG refers to Paragraph 18(1)(1) of the Einkommensteuergesetz (Law on Income Tax, hereinafter 'EStG')[6] for the definition of income from 'professional activities'. From the case-law of the Bundesfinanzhof, however, it emerges that the reference has been applied only to the assessment of the nature of the activity in question but not to the classification of income under the law on taxation of earnings. It has been deduced from this that the exemption under Paragraph 4(14) of the UStG is not restricted to the professional as an individual but may also be claimed by a partnership or capital company.

8. As regards the possible exemption of out-patient care, the court of reference points out that, in accordance with recent judgments of the Bundesfinanzhof, services in the form of *therapeutic treatment* (that is to say medical care required on account of illness) provided by nurses as part of home nursing are regarded as activities 'similar' to medical activities within the meaning of Paragraph 4(14) of the UStG and thus enjoy the tax exemption provided thereunder. This does not apply, however, to *general care*, activities consisting, for example, in providing for personal hygiene, the preparation of food and feeding, helping patients to dress and undress and to get up and go to bed; nor does it apply to *domestic help*, which includes shopping, cleaning and clothes washing. According to the court of reference, these two latter types of out-patient care could, however, be eligible for tax exemption under Article 4(16) of the UStG as amended by the StÄndG, but only from the date on which that law came into force, that is to say 1 January 1992, because for reasons of equity the amendment could not be applied retrospectively.

6 — BGBl. I 1987, p. 657.

III — Facts and questions for a preliminary ruling

9. Kügler is a limited liability company under German law which provided out-patient care services between 1988 and 1990. Under its statutes it pursued exclusively charitable aims, assisting people who were unable to look after themselves because of their physical condition or economic situation.[7] These aims were attained by providing home nursing, home

7 — In other words, persons in need of economic assistance within the meaning of Article 53(1)(2) of the Abgabenordnung (Tax Code) of 1977 (BGBl. I 1976, p. 613, and amendment I 1977, p. 269).

help, domestic assistance and family care, as certified by the Finanzamt in a notice of 23 August 1988 valid until 31 December 1989.

10. By means of various notices of assessment for the period in dispute, the Finanzamt determined the turnover tax owed by the claimant for the period from 1988 to 1990 at a reduced rate on the basis of estimated returns. However, as it considered that it was entitled to exemption under Paragraph 4(14) and (16) of the UStG of 1980, Kügler first lodged an objection with the Finanzamt and then brought legal proceedings. Both actions were dismissed.

11. In particular, according to the Finanzgericht, Kügler did not exercise any of the activities referred to in Paragraph 4(14) of the UStG because as a legal person it was unable to meet the criteria relating to professional activity. Furthermore, its turnover was not eligible for exemption under Paragraph 4(16) of the UStG because first the applicant did not run a body providing medical care [see Paragraph 4(16)(c) of the UStG] and secondly the exemption for bodies providing out-patient care for those who are sick or in need of care was not introduced until 1992 [see Paragraph 4(16)(e) of the UStG as amended].

12. According to the Finanzgericht, no other conclusion was possible, even relying on the Sixth Directive, and in particular on subparagraphs (c) and (g) of Article 13A(1) thereof. It contended not only that subparagraph (c) also lays down that the requirements can be met only by natural persons who fulfil the qualification criteria for the medical and paramedical professions, but also that the applicant could not claim the exemption granted to bodies recognised as charitable organisations within the meaning of subparagraph (g), since such recognition was not granted to bodies providing out-patient care until 1992, when Paragraph 4(16) of the UStG was amended by the StÄndG.

13. Kügler then appealed to the Bundesfinanzhof on a point of law ('Revision') alleging infringement of Paragraph 4(14) and (16) of the UStG of 1980 and Article 13A(1)(c) and (g) of the Sixth Directive.

14. In its order for reference, the Bundesfinanzhof asks above all about the applicability of the exemption under Article 13A(1)(c) of the Sixth Directive to services provided by a legal person. It states that the doubts stem from the *Gregg* judgment, [8] in which the Court of Justice observed that 'most of the provisions [of Article 13A(1) of the Sixth Directive] also define the bodies which are authorised to supply the exempted services' (paragraph 13) and that 'the terms "body"

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

or "organisation" are used in some provisions of Article 13A(1) of the Sixth Directive whilst in others the activity in question is described by reference to individuals in their professional capacity, such as the medical and paramedical professions (under (c))...' (paragraph 14). In the same judgment, moreover, the Court added that 'the principle of fiscal neutrality precludes... the possibility [that reliance] on the... exemption... referred to in Article 13A(1)(b) and (g) was dependent on the legal form in which the taxable person carried on his activity' (paragraph 20).

15. Secondly, given the various types of service provided by Kügler, the court of reference asks whether, in addition to medical care, general care and domestic help can be eligible for the exemption under subparagraph (c), at least to the extent that they are ancillary to therapeutic services. In this regard, the Bundesfinanzhof cites a judgment of the Court which, in its opinion, could exclude from the exemption in question all services that do not have a therapeutic effect. In Case 353/85 *Commission* v *United Kingdom*, [9] the Court stated that 'the provision of medical care in the exercise of the medical and paramedical professions' constitutes services 'provided outside hospitals and similar establishments and within the framework of a confidential relationship between the patient and the person providing the care, a relationship which is normally established in the consulting room of that person' (paragraph 33).

16. Finally, if not all the services provided by the applicant can benefit from the exemption under Article 13A(1)(c) of the Sixth Directive, the Bundesfinanzhof asks whether in the present circumstances subparagraph (g) of that provision may be applicable. In that case, however, it is necessary to ask whether the applicant can rely on that provision, given that it was not transposed into national law until after the period to which the tax assessments from the Finanzamt relate. However, in view of the fact that according to the case-law of the Court 'where the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by individuals as against any national provision which is incompatible with the directive', [10] the Bundesfinanzhof wonders whether such requirements apply in the present case.

17. On the basis of these considerations, the Bundesfinanzhof decided to refer the

9 — Case 353/85 *Commission* v *United Kingdom* [1988] ECR 817.

10 — Case C-193/91 *Finanzamt München III* v *Mohsche* [1993] ECR I-2615, paragraph 17.

following questions to the Court for a preliminary ruling:

'1. Does the tax exemption provided for in Article 13(A)(1)(c) of Directive 77/388/EEC apply only where medical care is provided by an "individual" or is it independent of the legal form of the person providing the care?

2. If the exemption is also applicable to capital companies, does it cover wholly or partially the activities of a capital company in the form of out-patient nursing (therapeutic care, general care and domestic help) which is provided by qualified nurses?

3. Do the abovementioned services fall within the scope of Article 13(A)(1)(g) of Directive 77/388/EEC and can a taxable person rely on that provision?'

IV — Legal analysis

A — *The first question*

1. Arguments of the parties

18. Except for the Finanzamt, all the other parties in the present proceedings have suggested that the reply to the first question should be that the exemption under Article 13A(1)(c) of the Sixth Directive does not depend on the legal form of the person providing the care and that it is therefore immaterial whether that person is a natural person or a legal person.

19. In particular, they consider that Articles 2 and 4 of the Sixth Directive militate in favour of such a reply: [11] the first because it specifies that VAT is levied on sales of goods and services, not on the persons who perform such activities; the second because, in specifying that for the

11 — Under Article 2 of the Sixth Directive, in Title II under the heading 'Scope', 'the following shall be subject to value added tax:
1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;
2. the importation of goods'.
In contrast, Article 4(1), in Title IV under the heading 'Taxable persons', provides that '"taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'.

purposes of the directive 'taxable person' means 'any person who independently carries out in any place [an]... economic activity,... whatever the purpose or results of that activity', it confirms that liability to the tax does not depend on the legal form of the taxable person.

20. Secondly, the parties point out first that Article 13(A)(1)(c) lays emphasis on the type or nature of the activities considered, specifically 'medical care', rather than on the legal form of the persons providing them, and secondly that the indication of the professional categories authorised to perform such activities depends on the definition of the activities themselves. [12] Furthermore, only natural persons may exercise an activity on behalf of legal persons and hence, if natural persons possess the necessary qualifications and act in the exercise of their profession, legal persons as well, through them, can perform an economic activity eligible for exemption under Article 13(A)(1)(c) of the Sixth Directive.

21. Moreover, in more general terms the parties recall the principle of fiscal neutrality underlying the Sixth Directive, which prevents economic agents who perform the same operations from suffering different treatment as regards the collection of VAT. [13] That principle would be infringed if the exemption in question depended on the legal form of the taxable person performing the activity involved. The parties state that in the *Gregg* case the Court based itself on that principle (see paragraph 20) in a case dealing with the extension to natural persons of provisions relating to 'establishments' and 'organisations'. While it recognised that the literal wording of Article 13(A)(1)(b) and (g) of the Sixth Directive could lend itself to a different interpretation and that 'the terms used to describe the exemptions envisaged by Article 13 of the Sixth Directive are to be interpreted strictly since these constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person' (paragraph 12), the Court went on to state that 'it cannot be inferred from the fact that Article 13(A)(1) of the Sixth Directive mentions different categories of economic operators that the exemptions provided for in that provision are confined to legal persons where it refers expressly to activities undertaken by "establishments" or "organisations" [see subparagraphs (b) and (g)], whilst in other cases an exemption may also be claimed by natural persons' (paragraph 15). Indeed, the Court further stated that 'the terms "establishment" and "organisation" 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 referred to in that provision to

12 — For a similar approach in the interpretation of the third indent of Article 9(2)(e) of the Sixth Directive, see the judgment in Case C-145/96 *von Hoffmann* v *Finanzamt Trier* [1997] ECR I-4857, in which the Court observed that the provision in question 'does not refer to professions, such as those of lawyers, consultants, accountants or engineers, but to services. The Community legislature has used the professions mentioned in that provision as a means of defining the categories of services to which it refers' (paragraph 15).

13 — See the fourth and fifth recitals of the Sixth Directive and the judgment in Case C-283/95 *Fischer* v *Finanzamt Donaueschingen* [1998] ECR I-3369, paragraph 27, which contains further references.

the activities carried on by legal persons, but meant to extend the scope of those exemptions to activities carried on by individuals' (paragraph 17). [14]

22. Finally, the parties note that the exemption of medical services irrespective of the legal form of the person providing them is justified by the very rationale of the exemption, which is designed to reduce medical expenses and thus encourage the protection of health. [15]

23. On the other hand, the Finanzamt maintains that the view most consistent with the case-law of the Court and the wording of the provisions in question is that the exemption applies only to natural persons. It recalls, first and foremost, that 'it is settled case-law [of the Court] that the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law.... That must also be true of the specific conditions laid down for those exemptions to apply and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption' [16] and that 'the terms used to specify the exemptions envisaged by Article 13... are to be interpreted strictly'. [17]

24. Moreover, according to the Finanzamt, the literal tenor of the provision in question is unambiguous and can only refer to activities performed by natural persons. In interpreting the exemptions envisaged by Article 13(A)(1), the Court noted that whereas certain of the exemptions expressly refer to the concept of 'organisation', other activities to be exempted are identified by reference to professional titles, such as the medical and paramedical professions mentioned in subparagraph (c), which patently refer to natural persons. It is therefore clear, in the view of the Finanzamt, that a capital company can only claim the exemptions which make reference to the concept of 'organisation'. [18] The fact that in the *Gregg* case the Court considered that the exemptions relating to 'organisations' mentioned in subparagraphs (b) and (g) of the provision in question were applicable to natural persons does not, according to the Finanzamt, allow the same

14 — Subsequently, in the *SDC* case (Case C-2/95 *Sparekassernes Datacenter (SDC)* v *Skatteministeriet* [1997] ECR I-3017), the Court further stated that 'as regards, more specifically, the legal form of the company supplying or receiving services,... it must be concluded that, if the identity of the persons involved is immaterial in determining whether the service in question is exempt from VAT under points 3 and 5 of Article 13B(d), the type of legal person represented by the operators concerned is a fortiori immaterial' (paragraph 35).

15 — See in this connection the Opinion delivered by Advocate General Saggio in Case C-384/98 *D.* v *W.* [2000] ECR I-6795, paragraph 16.

16 — Judgment in Case C-453/93 *Bulthuis-Griffioen* v *Inspecteur der Omzetbelasting* [1995] ECR I-2341, paragraph 18; reference is also made to the judgment in Case 348/87 *Stichting Uitvoering Financiële Acties (SUFA)* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 11.

17 — *SUFA*, paragraph 13.

18 — *Bulthuis-Griffioen*, paragraph 20.

reasoning to be employed in the case at issue, but in reverse, that is to say to extend the exemption envisaged under Article 13A(1)(c) to capital companies.

25. If, despite everything, the Court were to consider that the provision was also applicable to legal persons, the Finanzamt maintains that both the shareholders and the directors of capital companies should hold the required medical and paramedical qualifications (which in the present case the director of the applicant did not). In the opinion of the Finanzamt, only that conclusion, which was endorsed by the wording of the provision, would permit certain activities to be exempted regardless of the legal form of the economic agent.

2. Assessment

26. I consider that the first of the views I have described is by far and away the most preferable, and nothing or next to nothing need be added in its support, save to rebut certain objections raised by the Finanzamt.

27. First of all, in general terms I too wish to point out that 'the exemptions constitute independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the Directive'. [19] However, I do so for the opposite reason to that cited by the Finanzamt, namely to remind the Court that Articles 2 and 4 of the Sixth Directive, which set the objective and subjective scope of the directive, make no reference to the legal form of the person performing the taxable activity. Nor does extending the exemption to cover medical services provided by legal persons conflict with the principle of the strict interpretation of Article 13 of the Sixth Directive, because the exemption remains applicable only to medical services supplied by qualified staff and hence does not lead to the provision being applied to cases other than those indicated in the directive. The opposite interpretation, by contrast, takes for granted the very conclusion that must be demonstrated.

28. Furthermore, and regardless of the emphasis placed on the fact that it accords with the aim of reducing medical expenditure, the solution proposed here seems to me to be more in line with the principle of fiscal neutrality. It makes it possible to treat equally all economic agents engaging in the same activity, thus avoiding influencing their decisions as to the legal guise that

19 — See for example *SDC*, paragraph 21, which also contains further references.

they intend to adopt in order to perform their activities and affecting the conditions of competition that could derive from such decisions. [20]

29. But not even the wording of the provision in question supports the conclusion reached by the Finanzamt. As the advocates of the opposite interpretation have correctly observed, the wording of subparagraph (c) does not require that the medical services be supplied by a person with a particular legal form. For these services to be exempted, two conditions must be met irrespective of the legal form of the person in question: that the services are indeed 'medical services' and that they are performed by persons meeting the necessary professional requirements. [21] And in following a similar line of argument in the *Gregg* case the Court considered that exemptions relating to 'establishments' or 'organisations' were applicable to the activities of *natural persons* in that the conditions of 'the existence of an individualised entity performing a particular function... are... satisfied not only by legal persons but also by one or more natural persons running a business' (paragraph 18).

30. I also note that neither does the case-law cited by the Finanzamt justify the conclusions which the latter reaches. At paragraph 20 of the *Bulthuis-Griffioen* judgment the Court did not state, as the defendant administration asserts, that the exemptions under Article 13 which do not refer to the concept of 'organisation' and instead use professional titles are applicable *only* to natural persons. In reality, the Court said precisely the opposite; it stated that in those cases the exemption 'may *also* be claimed by natural persons' (emphasis added). This means that, even though 'the activity in question is described by reference to individuals in their professional capacity', [22] the exemption could also be claimed for activities provided by an operator acting in the form of a legal person. [23]

31. Finally, as regards the Finanzamt's assertion that if the Court decided to follow the line I have set out the exemption could be granted only on condition that the shareholders and directors of the undertak-

20 — The Opinion of Advocate General Cosmas in the *Gregg* case goes in the same direction (paragraph 28).

21 — I wish to point out that, with regard to the exemption under Article 13A(1)(b) of the Sixth Directive, which also contains indications about the persons carrying out the exempted activities, Advocate General Cosmas observed that 'from the general structure of the system of tax exemptions, it appears clear that the reason for those exemptions from tax is the *type* and *conditions* of the supply of the specific activities, factors which do not depend on the legal personality of the operator' (Opinion in *Gregg*, paragraph 26).

22 — *Gregg*, paragraph 14.

23 — I must point out, however, that in the subsequent *Gregg* judgment, as I have indicated above (paragraph 21), the Court openly adjusted its focus and recognised that even where the directive speaks of 'establishment' and 'organisation' the exemption is not limited to operations performed by legal persons (paragraph 17).

ing also possessed the necessary professional qualifications, it seems to me that neither the provisions of the directive nor the rationale of the exemption justify the imposition of this further condition. What Article 13(A)(1)(c) actually requires is only that the medical care to which it refers be provided in the exercise of the medical and paramedical professions and hence by persons authorised to provide it.

32. In conclusion, I am of the opinion that the reply to the first question should be that the exemption provided for in Article 13(A)(1)(c) of the Sixth Directive is independent of the legal form of the person providing the medical care.

B — *The second question*

33. If the reply to the first question is, as I have proposed, that the exemption is also applicable to capital companies, the Bundesfinanzhof asks in its second question whether it covers wholly or partially the earnings of a capital company supplying out-patient nursing care (therapeutic treatment, general care and domestic help) by means of qualified nursing personnel. In essence, the court of reference seeks to determine, for the present purposes, the scope of the concept of 'medical care' for which Article 13(A)(1)(c) provides.

1. Arguments of the parties

34. With the exception of the applicant, all the parties that have expressed an opinion on the subject (the Finanzamt, the German Government and the Commission) consider that the exemption under Article 13(A)(1)(c) covers exclusively therapeutic treatment, in other words treatment linked to the prevention, diagnosis or cure of a disease, but not the other activities in which the applicant also engages (general care and domestic help), which in themselves do not contribute to the recovery of the patient because they do not serve a direct therapeutic purpose.

35. Bearing in mind, in particular, the principle that the exemptions under Article 13 of the Sixth Directive are to be interpreted strictly, this view emphasises the fact that only medical care in the narrow sense is closely associated with the activities performed to promote the health

and recovery of the patient.[24] General care and domestic help, by contrast, do not in themselves serve therapeutic purposes and are generally provided by persons not belonging to the medical or paramedical (nursing) professions, as the provision of the directive stipulates. Even if they were provided by qualified personnel, they would not have a direct link with medicine; as such, they could therefore not enjoy exemption, not least because otherwise operations that differed from one another (in other words medical and non-medical care) would be subject to the same tax regime.

36. For the purposes of the exemption under subparagraph (c) of Article 13(A)(1), what is important is the fact that the medical care be provided outside hospitals, because subparagraph (b) of the same provision deals with care provided in the hospital setting. Nevertheless, it is not essential that it be provided in the consulting room of the person providing the care; in fact, when in Case C-353/97 the Court described the care referred to in subparagraph (c) as care provided 'within the framework of a confidential relationship between the patient and the person providing the care, a relationship which is *normally* established in the consulting room of that person' (paragraph 33, emphasis added), it clearly did not intend to limit the exemption solely to medical care provided in the latter context.

37. I then note that general care and domestic help cannot be exempted either on the grounds that they are possibly ancillary to medical care. Indeed, unlike subparagraph (b) of the provision in question, subparagraph (c) does not add that, in addition to medical care provided in the exercise of the medical and paramedical professions, 'closely related activities' are also exempt. Furthermore, even if ancillary activities were in principle eligible for exemption under subparagraph (c), general care and domestic help could not be considered under this heading by reason of their nature and the commitment they require.

38. According to the Commission, a different solution would be necessary only to the extent that such activities were indissociable from the main medical care. In Case 353/85, with regard to the possible exemption under subparagraph (c) of certain goods supplied in connection with the exercise of the medical and paramedical professions, the Court stated that 'indent (c)... covers only the provision of medical care... and excludes the supply of goods, as defined in Article 5 of the directive, without

24 — In this regard, see also the Opinion of Advocate General Saggio in Case *D.*, in which he expressed a similar view (paragraph 16).

prejudice to minor provisions of goods which are indissociable from the service provided' (paragraph 35). On the basis of that precedent and drawing inspiration from the concept of 'single supply' enunciated by the Court in another context, [25] the Commission deduces that the exemption could be extended to cover such care which, although not being 'medical care', was indissociable from a specific medical treatment.

39. The view adopted by Kügler is the exact opposite. Although I do not fully understand the sometimes opaque argumentation, the applicant contests the statement of the court of reference on the point in question (see paragraph 8 above) and instead maintains, citing the origins of the relevant national legislation and a variety of concrete examples, first that under German law it is not clear whether the activities involved in general care and domestic help are to be denied the exemption under subparagraph (c) and secondly that in any case it is not easy to draw a distinction between medical care and other types of general out-patient assistance provided by qualified nursing staff. In their view, no indications useful for that purpose can be deduced with certainty from the Community provision under examination either. Furthermore, the applicant appears to maintain that the exemptions under subparagraphs (c) and (g) form a consistent whole, whose components complement one another and must be applied in a similar manner. In the applicant's view, this makes it possible to plug any gaps that may be encountered in the system of exemptions of the Sixth Directive as regards the activities in question, favouring the protection of the public interest to which social security and welfare regimes are directed. Hence, according to Kügler, the exemption under subparagraph (c) also covers general care and domestic help, provided they are supplied by qualified nursing staff, while the exemption under subparagraph (g) is valid for all out-patient care, including that performed for therapeutic purposes, irrespective of whether it is provided by qualified staff or not..

2. Assessment

40. I wish to recall first of all that in order to be exempted the medical care referred to in Article 13(A)(1)(c) must be provided in the exercise of the medical and paramedical professions. Whereas the concept of 'medical care' is, so to speak, a Community

25 — Judgment in Case C-349/96 *Card Protection Plan (CPP) v Commissioners of Customs & Excise* [1999] ECR I-973, where it is stated that 'there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied' (paragraph 30, which contains further references).

matter, the definition of the professions mentioned is a matter for national legislation, given that Article 13(A)(1)(c) of the Sixth Directive expressly leaves that responsibility to the Member States.

41. That having been said, I consider that the expression 'medical care' must be clarified in two respects, namely regarding the place in which it must be performed in order to benefit from exemption and the types of care that actually fall within the scope of the provision in question.

42. On the first point, as the other parties also emphasise, the wording of Article 13(A)(1)(c) contains no useful indication. As we have seen, however, subparagraph (b) of the same article exempts care provided by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature. Given that by means of these two subparagraphs of the article in question the directive aims to cover the entire system of exemptions for medical care in the narrow sense and that subparagraph (b) exempts all care provided in a hospital setting in a broad sense, it must be concluded that subparagraph (c), for its part, aims to exempt medical care provided outside that setting, both in the consulting room of the person providing the care and at the home of the patient or elsewhere.[26]

43. By contrast, as regards the identification of the types of care that can be included in the notion of medical care for the purposes of subparagraph (c), I believe that the judgment delivered by the Court in the *D.* case is particularly useful. In that judgment the Court observes that from an analysis of all the different language versions of Article 13(A)(1)(c) of the Sixth Directive it emerges that all bar the Italian version refer to medical care concerning the health of persons. Moreover, the German, French, Finnish and Swedish versions even use the concept of therapeutic treatment or of care provided to the person. From this the Court deduces that 'the concept of "provision of medical care" does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders' (paragraph 18).

44. Nor can I share the view of the applicant that *all* the care it provides is in the public interest and must therefore be exempted, not least on the ground that the cost, in the Federal Republic of Germany at least, is borne largely by social security or health insurance funds. In that regard, it is

26 — I wish to point out again that in Case 353/85 the Court speaks of a 'relationship which is *normally* established in the consulting room of the person providing the care' (emphasis added), which seems implicitly to provide also for care provided outside the consulting room.

sufficient to recall that in the *D.* judgment the Court stated that for the purposes of exempting an economic activity, such as expert medical analysis, it is irrelevant that it may be in the public interest (paragraph 20). Indeed, in that judgment the Court cites precedents in which it was specified that Article 13(A) of the Sixth Directive 'does not provide exemption for every activity performed in the public interest, but *only* for those which are listed and described *in great detail*'.[27]

45. In short, I feel able to conclude that among the various types of care mentioned in the second question from the court of reference exemption can be granted only to therapeutic care, meaning care linked to the prevention, diagnosis or cure of a disease and care provided in the exercise of the medical and paramedical professions outside the hospital setting.

46. As to exemption of the types of care in question as ancillary to medical care proper, I consider that this possibility is to be ruled out. Normally the provision under examination, unlike subparagraph (c), expressly provides for extending the exemption to ancillary operations closely linked to the principal activity (see for example subparagraphs (a), (b), (i) and (n)); even in these cases, however, the Court adopts a clearly restrictive stance.[28] But above all I consider that the argument against the proposition is confirmed by Case 353/85, in which the Court, with reference to the very provision under examination here, excluded the possibility of extending the exemption to services ancillary to medical services, with the sole exception of the different and exceptional case of services 'strictly necessary' for medical services (in the case in point, 'minor provisions of goods which are indissociable from the service provided').

47. Hence, for the provision of general care and domestic help to be exempted under Article 13(A)(1)(c), it would be necessary to demonstrate that in the case in point the condition stipulated in the cited case-law was met. Leaving aside the possible difficulty of proving the existence of such a link in the case before the Court, I wish to point out that in any event, according to

27 — See Case C-149/97 *Institute of the Motor Industry* v *Commissioners of Customs and Excise* [1998] ECR I-7053, paragraph 18 (emphasis added), which also contains further references, including one to the judgment in Case 107/84 *Commission* v *Germany* [1985] ECR 2655, which the Finanzamt also cites.

28 — See Case C-306/94 *Régie dauphinoise* v *Ministre du Budget* [1996] ECR I-3695, paragraph 20 et seqq., with regard to Article 19(2), Case C-327/94 *Dudda* v *Finanzgericht Bergisch Gladbach* [1996] ECR I-4595, paragraphs 25-31 with regard to the first indent of Article 9(2)(c), *CPP*, op. cit., paragraphs 26-32, on questions submitted for a preliminary ruling stemming from the application of Article 13B(a) relating to insurance operations and the supply of services 'related to such operations', and Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraphs 22-30, on Article 13A(1)(b).

the case-law of the Court,[29] such a verification of fact cannot be carried out at Community level but is for the court of reference to carry out.

48. In view of the foregoing, I therefore propose that the reply to the second question should be that the exemption under Article 13(A)(1)(c) of the Sixth Directive is applicable only to receipts relating to therapeutic care provided by qualified nursing staff, including that provided at the patient's home, and to connected services that are strictly necessary and physically and economically indissociable from the provision of the service.

C — *The third question*

49. In its last question, which was submitted for the eventuality that the Court considered that not all the activities in which Kügler engages could be exempted under subparagraph (c), the Bundesfinanzhof asks whether non-therapeutic care, in other words activities linked with basic care and domestic help, fall within the scope of subparagraph (g) of Article 13(A)(1) of the Sixth Directive and whether that provision has direct effect and can therefore be relied upon by a taxable person before national courts.

1. The first part of the question

50. The first part of the question does not appear to pose particular problems. In practice, all the parties, and in essence the Bundesfinanzhof as well, agree that the services provided in the context of general care and domestic help fall within the scope of subparagraph (g) in that they are closely associated with welfare and social security work. In particular, the Commission and the German Government point out that it can easily be deduced from the wording of Article 13(A)(1) of the Sixth Directive that, whereas on the one hand therapeutic care is exempted under subparagraph (c), on the other general care and domestic help are normally linked with social assistance and hence, as a matter of principle, come within the concept of services closely linked to welfare and social security work described under subparagraph (g) of that article. This solution also has the merit of avoiding an overlap between the exemptions set out in the various subparagraphs of Article 13(A)(1) and thus makes it possible to comply with the principle of strict interpretation, which as we have seen must inform such exceptions to the general principle that services are to be subject to VAT.

29 — See *CPP*, paragraph 32.

51. The view adopted by Kügler differs only in part. Kügler also emphasises the connection between the activities in question and welfare and social security work. According to the applicant, in fact, such a connection is further confirmed not only by the intrinsic nature of those activities but also by the manner in which they are financed, given that the related costs are borne largely by health insurance funds and welfare and social security agencies. The peculiarity of Kügler's position lies in the fact that, in its opinion, *all* out-patient care in the sense defined by the second question from the court of reference — in other words therapeutic care, general care and domestic help — should be exempted without distinction, not only under subparagraph (c) of Article 13(A)(1) as stated above, but also under subparagraph (g), which concerns us here. Indeed, from what one can understand from Kügler's reply to the questions from the court of reference, Kügler maintains that the difference between the two subparagraphs lies not in the type of exempted services but in the professional qualification of the persons performing such services.

52. For my part, in view of the foregoing, I cannot but endorse the majority position for the same reasons adduced by the parties advocating it. I would merely add that I would not arrive at a different conclusion even if, as in the case in question, the staff of the organisations contemplated in the provision operated at the homes of patients and not within an old people's home. As with the similar problem of interpretation that arose with regard to subparagraph (c) of the provision, the reference to 'old people's homes' in subparagraph (g) should not, in my opinion, be understood as a limitation on the relevant activity for the purposes of the exemption but as a contribution to the definition of the nature of such activities and hence of the objective scope of the provision. [30]

53. I therefore consider that the reply to the first part of the third question should be that general care and domestic help fall within the scope of Article 13(A)(1)(g) of the Sixth Directive.

2. The second part of the question

54. The reply to the second part of the question, in other words the question whether subparagraph (g) of Article 13(A)(1) of the Sixth Directive has direct effect and can therefore be relied upon by a taxable person before national courts of law, is more complex, however. Moreover, on that question the positions of the parties involved in the present proceedings also

30 — See my Opinion in Case 353/85, in which the Court describes the medical care under subparagraph (c) as that 'normally [provided] in the consulting room' of the person providing it (see paragraphs 36-42 above).

diverge more widely, at least beyond a certain point. There is no disagreement on the fact that the problem arises only for the period before 1992, the date on which the StÄndG came into effect, nor on the fact that where the provisions of a directive appear, as far as their subject-matter is concerned, to be clear, sufficiently precise and unconditional, those provisions may have direct effect and hence be relied upon by individuals before national courts. [31] As to the remainder, however, the positions of the parties show profound differences of opinion, as will emerge from the summary which I shall now proceed to make.

(a) Arguments of the parties

55. The German Government and the Finanzamt staunchly contest any claim that Article 13(A)(1)(g) is directly applicable, emphasising above all that the tax exemption for which it provides can indeed also be granted to organisations other than bodies governed by public law, but only on condition that they are 'recognised as charitable by the Member State concerned'. Until such formal 'recognition' is granted, the provision cannot be applied to the organisations in question; which implies that it is not 'unconditional' and hence lacks one of the essential requirements for being considered to be directly applicable.

56. They observe that the case in point is very different from the situation dealt with by the Court in *Becker*. That case discussed the incidence, for the purposes of the direct applicability of a provision of the directive, of the introductory sentence of Part B of Article 13 (which is identical to that of Part A(1) of the same article; see paragraph 2 above), which alludes to any conditions Member States may lay down for the implementation of the directive; [32] in the present case, by contrast, the provision refers explicitly to an act of the State laying down whether, when, on what conditions and to what extent recognition should be granted.

57. It is therefore evident, in their view, that 'recognition' is a 'constitutive' element of the charitable nature of the organisation and requires a formal measure by the legislature of the Member State concerned. They contend that it cannot be granted by administrative means nor can it be deduced implicitly case by case, not only because before 1992 German law made no provi-

31 — To cite only the precedents mentioned by the parties themselves, see the judgments in *Becker*, at paragraph 25, and *Mohsche*, at paragraph 17.

32 — It alludes in particular to the passage in that judgment in which the Court stated that the unconditional nature and hence direct effect of an exemption cannot be called into question solely because the Member States are granted a degree of discretion on aspects that 'do not in any way affect the definition of the subject-matter or the exemption conferred' (paragraph 32).

sion for 'organisations recognised as charitable' but also because any other conclusion would imply a broad interpretation of the exemptions under Article 13, which, as has been stated several times, are to be interpreted strictly. Moreover, to admit the possibility of recognition on a case-by-case basis, implicitly or by administrative means, would inevitably mean sacrificing the principle of legal certainty.

58. Nor, in their opinion, can third parties, such as health insurance funds, grant recognition when signing agreements for the provision of home nursing services by the organisations in question. The recipient of the tax revenue is the State, and only the State can waive a tax by granting an exemption, and under the German constitution it can do so only by means of legislation. According to this view, recognition granted solely for the purpose of reimbursing expenses associated with the services provided to the health insurance funds' contributors can therefore not have any effect in the tax sector, that is to say in a sector other than the social security sector.

59. In any case, they point out, Article 249 EC expressly recognises that Member States, who are responsible for implementing Community directives, are obliged to achieve that result but remain free to choose the ways and means of attaining it. All the more so when, as in the present case, the Member State is also granted wide powers of discretion as to the content of the implementing provision. In the present case, on the one hand the Federal Republic of Germany initially considered that there was no reason to 'recognise' the organisations in question but subsequently modified its legislative policy once it realised the growing importance acquired during the 1980s by home nursing provided by private individuals; on the other hand, it took measures in this regard by introducing legislation. Hence in the view of these parties there is no reason to limit the freedom granted to the State by imposing retroactive recognitions obtained in forms or under conditions different from those laid down by the German legislature.

60. In conclusion, the German Government and the Finanzamt observe that in the present case, given that 'recognition' was granted only from 1992 onwards by means of the amendments introduced by the StÄndG, Kügler cannot claim the exemption for the period before that date.

61. The Commission and Kügler adopt a completely different position. The former agrees that, as the applicability of

Article 13(A)(1)(g) depends on prior recognition by the State concerned of a body as being an 'organisation recognised as charitable', it is not possible as a matter of principle to acknowledge that the provision is unconditional. In its opinion, however, this does not completely exclude the possibility that the provision is directly applicable if it can be demonstrated that in certain cases the State has recognised the organisation in some way, particularly as the remainder of the provision indicates in sufficiently precise and unconditional terms the activities that benefit from the exemption. It maintains that any other solution would run counter to the very rationale of the principle of direct applicability of the provisions of a directive, which is intended to ensure the effectiveness of those provisions by giving the persons concerned the possibility of relying on them against any incompatible national provision.

62. Hence, according to the Commission, if in a specific case there are sufficient indications to state that the conditions laid down in the directive obtain, there is no reason to deny the direct applicability of the directive. Moreover, it is in that sense that the Court ruled in the *Carbonari* case, which also dealt with the absence of prior 'recognition' by Member States of certain forms of training for a professional category (in that instance medical specialists) prescribed by a Community directive. In that case the Court held that despite the absence of measures by the State the relevant provision of the directive could have direct effect because the conditions it laid down were sufficiently precise for it to be possible in a particular case to determine that the necessary training requirements had been met. [33]

63. Similarly, the Commission continues, if there are grounds for considering that an organisation is in some way considered to be charitable in a Member State, it is for the competent authorities in that State to assess whether this is sufficient to meet the condition laid down in Article 13(A)(1)(g). For that purpose, it is not necessary that recognition be granted by way of legislation, given also that nothing in that provision authorises such a deduction [34] and that in fact this would make it too

33 — Judgment in Case C-131/97 *Carbonari and Others* [1999] ECR I-1103, in which the Court ruled on the direct applicability of the Annex to Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors, as amended by Council Directive 82/76/EEC of 26 January 1982. Point 1 of the Annex stipulates that the training of specialist doctors must be carried out in specific posts recognised by the competent authority, which must lay down the practical and theoretical rules for training. However, the Court stated that 'although the same provision requires that the rules be determined by the competent authorities, the requirements of full-time training listed under that point are sufficiently precise to enable the national court to determine which of the applicants in the main proceedings belonging to the category of trainee specialists fulfilled the requirements of full-time training in specialised medicine in accordance with the "coordination" directive and Directive 82/76 prior to the academic year 1991/92' (paragraph 34).

34 — On the contrary, as Kügler notes, subparagraphs (b) and (p) of the provision speak of 'duly' recognised situations, whereas that more restrictive adverb does not appear in subparagraph (g).

difficult to rely on the direct effect of the provision; recognition can also be granted by an administrative body and for reasons other than those contemplated in the provision in question.

64. The Commission then excludes the possibility that the direct applicability of the latter can be precluded by the provisions of Article 13(A)(2)(a) and (b) of the Sixth Directive. As we have seen (in paragraph 2), the first of these provisions gives Member States the right to make the granting of the exemptions provided for in the first paragraph of Article 13(A) subject to certain conditions; if the State has not availed itself of that right, the unconditional and sufficiently precise nature of subparagraph (1)(g) does not permit it to rely, 'as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in the directive, upon its failure to adopt the very provisions which are intended to facilitate the application of that exemption' (*Becker*, paragraph 33). The second provision, by contrast, lists the conditions in which the exemption may not be granted. In this case too, however, the Commission points out that, in accordance with the case-law of the Court, the mere possibility of such limitations does not provide grounds for excluding the unconditional and sufficiently precise nature of the provision in question. [35]

65. Finally, the Commission points out that even if the Court were to establish that Article 13(A)(1)(g) is not directly applicable, the Federal Republic of Germany would still be required, under Article 10 EC, to take all necessary measures to ensure full compliance with Community law, so that the national court would in any case be required to interpret Article 4(16) of the UStG in the light of the wording and purpose of the Sixth Directive in order to ensure its compatibility therewith.

66. Following the same line as the Commission but in more specific terms, Kügler also maintains that, in accordance with the

35 — See in support of this the judgment in Joined Cases 231/87 and 129/88 *Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and Others* v *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 32, in which the Court was asked to rule on the direct applicability of a provision of the Sixth Directive which allows the exemption from tax to be excluded subject to certain conditions (see the first and second paragraphs of Article 4(5) of the Sixth Directive:
'States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.
However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition').
The Court stated that given the merely conditional nature of the limitation, the provision may be relied upon before the national court, although its application involves an assessment of economic circumstances.

case-law of the Court,[36] recognition can also stem from other provisions and from the principles of the relevant legislation.

67. In particular, the applicant in the main proceedings states that the services it provides are closely associated with welfare and social security and that, as the Bundesfinanzhof also states,[37] its activities are financed by health insurance funds and by social security and welfare bodies. Moreover, even before 1992 various national provisions, of different kinds but all relating to the social security and welfare sectors, expressly mentioned private operators. These provisions include in particular those which from the early eighties onwards governed the special relations between on the one hand those providing services such as assistance, including outpatient medical assistance, and on the other the health insurance funds and social security and welfare bodies, in other words the organisations bearing the greater part of the cost of such services. The applicant also cites the legislation of certain Länder, administrative practices and provisions on the basis of which, in essence, tax exemption was granted for the activities in question on condition that they were provided by associations or by persons recognised by the health insurance funds.

68. Finally, the applicant points out that the line it advocates is above all more consistent with the objective of the law, in that it makes it possible to limit medical and social security expenses, and hence the contributions which subscribers pay to the health insurance funds and the social security bodies, even though the German Government retorts that other instruments could be used to limit such expenses.

(b) Assessment

69. I have reported the arguments of the parties at some length in order to bring out clearly the terms of the debate which took place among them and the nature of the disagreement which divides them. As we have seen, the Commission and the Federal Republic of Germany diverge mainly on a question of principle, namely the possibility that a provision such as Article 13(A)(1)(g) be recognised as being directly applicable. By contrast, the Finanzamt and Kügler concentrate more on the factors which, in the case in point, should or should not

36 — In particular, Kügler cites the judgments in Cases 29/84 *Commission* v *Germany* [1985] ECR 1661 and 361/88 *Commission* v *Germany* [1991] ECR I-2567.

37 — The Bundesfinanzhof points out, inter alia, that according to a recent judgment of the Bundesverfassungsgericht (Federal Constitutional Court), if the cost of health services is regularly charged to social security organisations, their exemption from tax does not conflict with the objective of Article 4(14) of the UStG (see the judgment in Case 2 BvR 2861/93, UR 1999, p. 498).

cause the applicant to be classified as a 'charitable organisation'. It hardly need be noted that, whereas the second question falls more within the sphere of assessment of the national judge and is conditioned by the solution of the first question, the first question falls within the direct jurisdiction of the Court of Justice. It is therefore on this question that attention must be focused here.

70. As we have seen, the central tenet of the German Government's position is that the freedom and discretion which the provision at issue grants to the Member States completely precludes the possibility of postulating the direct applicability of the provision. The Commission, for its part, in principle shares this line of argument but disputes the claim that the provision has general scope and that it can be deduced from this that it is absolutely impossible to recognise that a particular body is a charitable organisation, even when conclusive evidence is available.

71. Having thus delineated the boundaries of the central issue raised by the question under examination, I shall now proceed to examine more closely the arguments that support the position of the parties, beginning with those of the German Government.

72. As the German Government insistently states, it is certainly undeniable that the provision at issue leaves the Member States wide discretion as regards recognition of the organisations in question; I do not believe, however, that the argument is decisive in itself. As the Commission has pointed out, in the *Becker* judgment the Court explicitly stated with regard to the Sixth Directive but on the basis of established and wider case-law that 'the general nature of the directive in question or the discretion which... it leaves to the Member States may not be relied upon in order to deny any effect to those provisions which in view of their subject-matter may be relied upon to good purpose before a court even though the directive as a whole has not been implemented'. [38] It is therefore a matter of ascertaining in concrete terms whether, despite the discretion accorded to the Member States, the directive can also have direct effect.

73. Nevertheless, the German Government adds, the applicability of the provision in question is subject not to the exercise of a general discretionary power by the State concerned but to the adoption of an appropriate legislative provision by that

38 — Paragraph 30. See also, inter alia, the judgments in Cases C-10/92 *Balocchi* v *Ministero delle Finanze dello Stato* [1993] ECR I-5105, paragraph 34, and C-62/93 *BP Soupergaz* v *Greek State* [1995] ECR I-1883, paragraph 34. Also with regard to Article 13 of the Sixth Directive, see in the same vein the judgment in Case C-346/97 *Braathens Sverige* v Riksskatteverket [1999] ECR I-3419, paragraph 31, which relates to Article 8(1) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12), the introductory section of which is identical in substance to that of Article 13A(1) of the Sixth Directive, and the judgment in Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraphs 29-33, which deals with Article 13B of the Sixth Directive.

State. It seems to me, however, that the Commission is not wrong when it objects that nothing in the provision in question gives grounds for deducing that the 'recognition' of which it speaks must be granted in a specific form, let alone by law. Indeed, the argument of the German Government seems to me to be a mere presumption, very probably based on the fact that in Germany, as in other Member States, charges can be imposed only by law. It should be noted, however, that the case before us relates not to the introduction of new taxes but the granting of tax exemptions in the instances authorised, for all the Member States, by a Community provision; moreover, directives cannot be interpreted or applied according to individual state systems of law, as they must be implemented uniformly in all the Member States. The only indication to be gleaned from the provision at issue is therefore that the charitable nature of the organisations in question must be recognised, the methods and procedures for so doing remaining as a matter of principle the prerogative of the State involved, without other constraints or limitations.

74. If that is the case, the lack of appropriate legislative recognition of the organisations in question cannot be considered in itself such as to prejudice the direct applicability of the provision, but it must be ascertained whether the law of the Member State involved does not also make it possible to reconstruct, by other means, some form of recognition of the charitable nature of the organisation, albeit only de facto. Such verification is necessary, because we are dealing here with a right, in the form of a tax exemption, which the directive accords to taxpayers in a particular condition. It is true that it is first and foremost for the State to define that condition, but the Court has clarified, again in the *Becker* case (but not only there), that a Member State which has failed to adopt the implementing measures foreseen in the directive 'may not plead its own omission in order to refuse to grant to a taxpayer an exemption which he may legitimately claim under the directive' (paragraph 34). Hence, I repeat, if it is possible to reconstruct by other means the conditions for the recognition in question, the principles of Community law, and that of the effectiveness of the directives above all, require that the persons concerned not be prevented from exercising a right sanctioned by the directive in question.[39]

75. The German Government, however, adduces yet more objections to that conclusion. First, it states that in the *Comune*

39 — I would point out in this regard that in the judgment in the *Comune di Carpaneto Piacentino* case, where it had to be decided whether a provision of the Sixth Directive (the first subparagraph of Article 4(5)) granting tax exemption to 'public bodies' acting 'as public authorities' had direct effect, the Court stated that 'the only criterion making it possible to distinguish with certainty [between the activities performed by such bodies 'as public authorities' and those engaged in by them as persons subject to private law] is the legal regime applicable under national law' (paragraph 15). Having specified that it is therefore 'for the national court to classify the activity at issue' (ibid.), the Court held that the provision had direct effect in that 'the bodies and activities in regard to which the rule of treatment as non-taxable persons applies are clearly defined in that provision' (paragraph 31).

di Carpaneto Piacentino case no state regulation existed classifying the bodies indicated in the relevant provision because such classification was made by reference to national law; it could therefore be made by the court directly on the basis of such law, whereas in the present case specific action by the State is required. I consider, however, that this objection is based on the same petition of principle that I have examined and criticised above, in the sense that it takes for granted the point that in fact has to be established, namely whether action by the State is essential in this case.

76. Secondly, the German Government objects that, again in the *Comune di Carpaneto Piacentino* case but also in the *Carbonari* case cited previously, the conditions and requirements for recognition of the qualifications indicated in the relevant provisions could be reconstructed on the basis of the directive itself in the absence of appropriate state regulations, whereas Article 13A(1)(g) does not contain any information that can make up for the lack of measures by the State to classify charitable organisations.

77. I have no difficulty recognising that, for these very reasons, in the absence of appropriate legislation it is indeed much more difficult to identify such organisations; I do not believe, however, that it is absolutely impossible, as the German Government contends, and this is also the reason for the Commission's disagreement. I would point out first and foremost that the concept of 'charitable organisation' is not a technical and legal concept like that of 'body governed by public law', to take an example from the same measure. Hence it does not require a legislative definition, and the setting of formal identification criteria, but can be reconstructed on the basis of common concepts of the law. Secondly, I would not say that the directive did not provide any indication for reconstructing the concept in question. In addition to the general indications that can be gleaned from a systematic reading of the directive, it seems to me that some indications, albeit indirect ones, can also be deduced from specific provisions. I refer in particular to Article 13(A)(2), of which subparagraph (a), as we have seen in paragraph 2 above, lists a series of conditions which the Member States may from time to time apply to the exemptions contained in paragraph 1, hence including that laid down in subparagraph (g). These are, so to speak, 'maximum' conditions, in the sense that the Member States may decide not to impose them or to impose lesser conditions, but they cannot impose other or more burdensome conditions. This means that if a body meets these conditions, that is already a useful indication that the requirements of the provision are met or, better still, that there are no grounds for possibly precluding recognition of its status as a charitable organisation.

78. It is clear, however, that the possibility of granting such recognition will have to be

assessed essentially in the light of the law of the State involved. It will therefore be for the national court to assess each case on the basis of the principles of that law, and above all on the basis of the specific factors that are conclusive for that purpose, such as those which the parties in the present case have highlighted: the existence of specific provisions, whether national or regional, legislative or administrative, fiscal or welfare; the fact that associations engaging in the same activities as the applicant already enjoyed a similar exemption in consideration of their public interest; the fact that the costs of the services may have been borne largely by statutory health insurance funds or by social security or welfare bodies with which private operators such as the applicant had contractual relationships, and so forth (see paragraph 67 above). I repeat, it will certainly not be easy to overcome in this way the impediment of the lack of a clear and explicit provision from the State, but for the reasons of principle and other specific reasons I have outlined above, I consider that it is not possible, a priori and absolutely, to exclude the possibility of such an outcome.

79. Finally, I note that the solution envisaged here cannot be challenged by arguing that it would entail a broad interpretation of the Sixth Directive, in contrast to the opposite interpretative criterion, which has to be adopted in this regard, as has been stated repeatedly. This is because this solution does not extend the scope of the exemption beyond that laid down in the directive but merely makes it possible to grant the exemption to persons who would be entitled to it within the meaning of the directive. If anything, a problem of compatibility with the usual criteria for interpreting Community law arises for the opposite proposition, given that the provision in subparagraph (g) is an exception to the principle that 'the exemptions provided for in Article 13... have their own independent meaning in Community law... That must also be true of the specific conditions laid down for those exemptions to apply and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption' (see the judgment in *Bulthuis-Griffioen*, cited above, paragraph 18). In other words, if in doubt it is necessary as far as possible to opt for an interpretation that respects and, if anything, accentuates the 'independent' nature of the concept in question, given that such an interpretative criterion aims to avoid excesses, in one direction or another, in the interpretation of the directive and to favour its uniform application.

80. In conclusion, I consider that as a matter of principle a case can be made for the direct application of the provision in question and that it is therefore necessary to reply to the second part of the third question from the court of reference that the direct applicability of Article 13(A)(1)(g) of the Sixth Directive cannot be excluded, despite the absence of relevant legislation by the State involved, where the national court is able to determine, on the basis of all the conclusive evidence, that the taxpayer is an 'organisation recognised as charitable'.

V — Conclusion

81. In the light of the foregoing considerations, I therefore propose that the Court rule that:

'1. The exemption provided for in Article 13(A)(1)(c) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment is independent of the legal form of the person providing the medical care.

2. The exemption provided for in Article 13(A)(1)(c) of the Sixth Directive is applicable only to the turnover relating to therapeutic care provided by qualified nursing personnel, including such treatment provided on an out-patient basis, and to related services that are strictly necessary and physically and economically indissociable therefrom.

3. (a) General care and domestic help fall within the scope of Article 13(A)(1)(g) of the Sixth Directive.

   (b) It cannot be excluded that Article 13(A)(1)(g) of the Sixth Directive has direct effect, even in the absence of relevant legislation in the State concerned, where the national court is able to determine, on the basis of all the conclusive evidence, that the taxpayer is an "organisation recognised as charitable"'.