Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 26 September 2013 [1]

Case C-366/12

Finanzamt Dortmund-West
v
Klinikum Dortmund gGmbH

(Request for a preliminary ruling from the Bundesfinanzhof (Germany))

(VAT — Supply of cytostatics for the treatment of out-patients — Exemption for hospital and medical care and closely related activities — Whether 'closely related activities' must be services — Whether they must be provided by the person who provides the hospital or medical care — Whether they may be exempted if closely related to the provision of medical care not undertaken by a hospital or similar establishment)

1. European Union ('EU') law provides for exemption from VAT for, on the one hand, 'hospital and medical care and closely related activities undertaken by bodies governed by public law' or, under comparable social conditions, 'by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature' and, on the other hand, 'the provision of medical care in the exercise of the medical and paramedical professions'.

2. In the present request for a preliminary ruling, the German Bundesfinanzhof (Federal Finance Court) wishes to know how to apply those exemptions when chemotherapy drugs are dispensed in a hospital pharmacy and administered in the course of out-patient treatment provided on the hospital premises but by doctors acting in an independent capacity.

Relevant EU law

3. The case in the main proceedings concerns tax years 2005 and 2006, when the Sixth Directive [2] was the applicable EU legislation.

4. Under Article 2(1) of the Sixth Directive, the 'supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' was subject to VAT. In accordance with Articles 5(1) and 6(1) respectively, a supply of goods meant 'the transfer of the right to dispose of tangible property as owner' and a supply of services meant 'any transaction which does not constitute a supply of goods within the meaning of Article 5'. [3]

1 — Original language: English.

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). It was repealed and replaced by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which recast the structure and the wording of the Sixth Directive without, in principle, bringing about material changes (see recital 3 in the preamble).

3 — See Articles 2(1)(a), 14(1) and 24(1) of Directive 2006/112.

5. Article 12(3)(a) of the Sixth Directive required Member States to set a standard rate of VAT of not less than 15%. They could also apply one or two reduced rates of not less than 5% to supplies of the categories of goods and services specified in Annex H. [4]

6. In accordance with Article 13A(1)(b) and (c) of the Sixth Directive, the Member States were to exempt ('under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse')

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

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned'. [5]

7. However, Article 13A(2)(b) of the same directive provided:

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

— it is not essential to the transactions exempted,

— its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.' [6]

8. Annex H listed goods and services which could be subject to reduced rates of VAT. Item 3 on the list included: 'Pharmaceutical products of a kind normally used for health care, prevention of diseases and treatment for medical … purposes …' [7]

Relevant German law

9. Under the first sentence of point 1 of Paragraph 1(1) of the Umsatzsteuergesetz (Law on Turnover Tax) 2005 ('the UStG'), turnover tax (that is to say, VAT) is chargeable on 'supplies of goods and services which a trader, in the course of his business, makes for consideration within Germany'. Paragraph 3(1) defines a trader's supplies of goods as 'supplies by which he or a third party authorised by him entitles the recipient or a third party authorised by him to dispose of goods in his own name (transfer of the power of disposal)' and Paragraph 3(9) defines services as 'transactions which do not constitute a supply of goods'.

10. Paragraph 4 of the UStG lists exemptions from VAT. During the years in dispute, point 14 exempted 'transactions arising from the practice of the profession of doctor, dentist, lay medical practitioner, physiotherapist or midwife or a similar professional medical activity …', while point 16 exempted, subject to certain conditions, 'transactions closely related to the operation of hospitals'.

4 — See Articles 96 to 99 of Directive 2006/112.

5 — See Article 132(1)(b) and (c) of Directive 2006/112. The English version uses the term 'medical care' in both provisions, while some other language versions use different terms. However, the Court has held that the meaning is the same in both: see Case C-45/01 *Dornier* [2003] ECR I-12911, paragraphs 46 to 50.

6 — See Article 134 of Directive 2006/112.

7 — See item 3 of Annex III to Directive 2006/112.

11. During the years in dispute, Paragraph 116 of Book Five of the Sozialgesetzbuch (Social Security Code), ('the SGB V') provided that hospital doctors (not accredited to a health insurance scheme) who had completed further training could, with the consent of the hospital operator, be authorised to provide medical care under that scheme; and under Paragraph 116a, accredited hospitals specialising in the relevant field could be authorised to deploy such doctors in the provision of medical care under such a scheme in areas in which a shortfall in healthcare provision had been identified, in so far as and for as long as that was necessary to cover the shortfall.

Facts, procedure and questions referred

12. Klinikum Dortmund gGmbH ('Klinikum Dortmund') is a non-profit-making limited liability company which manages a hospital. During the years in dispute, it held an institutional authorisation under Paragraph 116a of the SGB V, which entitled the hospital to provide both in-patient and out-patient care. Out-patient care was also provided by hospital doctors employed by Klinikum Dortmund who, in that context, worked under an individual authorisation under Paragraph 116 of the SGB V.

13. Klinikum Dortmund provided chemotherapy treatment for cancer patients. The drugs administered (cytostatics) were produced in the hospital pharmacy, on the basis of a doctor's prescription issued for each individual patient. Where the cytostatics were used for in-patient hospital and medical care on the hospital premises, it is not contested that their supply was indeed exempt from VAT.

14. Cytostatics produced by Klinikum Dortmund were also used for out-patient medical care provided at the hospital by doctors acting in an independent capacity, and were assumed also to be exempt from VAT. However, the tax authority took the view, on the basis of new administrative directions (which are not binding on the courts), that the dispensing of drugs for consideration in the course of out-patient care for tumour patients was taxable from 2005. It amended Klinikum Dortmund's VAT assessments accordingly, levying VAT on the outputs but allowing deduction of relevant input tax. (It does not appear to be disputed that, if the same drugs had been administered by the same doctors acting also in an independent capacity but on private premises and not in the context of an individual authorisation under Paragraph 116 of the SGB V, the supply of the drugs would not have been exempt from VAT.)

15. Klinikum Dortmund's challenge to the reassessment was upheld by the first-instance court, and the tax authority has appealed on a point of law to the referring court, which seeks a preliminary ruling on the following questions:

'(1) Must a closely related activity be a service in accordance with Article 6(1) of [the Sixth Directive]?

(2) If question 1 is to be answered in the negative, is an activity closely related to hospital or medical care only if it was performed by the same taxable person as also provides the hospital or medical care?

(3) If question 2 is to be answered in the negative, is an activity closely related even if the care is exempt from tax not under Article 13A(1)(b) of [the Sixth Directive] but under subparagraph (c) of that provision?'

16. Written observations have been submitted by Klinikum Dortmund, the German Government and the European Commission. At the hearing on 13 June 2013, the same parties presented oral submissions and answered a number of questions which had been put by the Court in writing.

Assessment

Question 1

17. All the parties who have submitted observations consider that the expression 'closely related activities' in Article 13A(1)(b) of the Sixth Directive includes supplies of goods as well as supplies of services. I agree.

18. I acknowledge that there might be some doubt on linguistic grounds. Several language versions [8] use a word which corresponds to 'activities', a term which might be perceived as relating more easily to the supply of services rather than of goods, whereas the majority of language versions [9] use a word which corresponds to 'transactions', which might be seen more easily as covering both types of supply. However, if 'activities' are to be exempted from VAT, it follows that the term refers to something which must otherwise have been capable of being subjected to it. And, in the scheme of the legislation, only transactions (which can be supplies either of goods or of services but which must be one or the other) can be subject to VAT.

19. The Commission's original proposal for the Sixth Directive referred, in all language versions, to 'the supply of hospital and medical services, and supplies of goods incidental thereto'. [10] There is no indication that the change of wording in the version finally adopted by the Council was intended to exclude supplies of goods. If that had been the intention, it would surely have been made more explicit. It seems more likely, on the contrary, that the intention was to include supplies of services as well as of goods.

20. It is true that at least the Spanish version of Article 13A(1)(b) of the Sixth Directive contains wording which seems more clearly restrictive: 'prestaciones de servicios de hospitalización y asistencia sanitaria y las demás relacionadas directamente con las mismas'. A strict reading of that version [11] might suggest that only supplies of services are concerned.

21. According to consistent case-law, the wording used in one language version of an EU provision cannot serve as the sole basis for its interpretation or be made to override the other language versions. Where there is divergence between language versions, the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. [12] In the present regard, Article 13A(1) of the Sixth Directive lays down exemptions 'for certain activities in the public interest'. If it is in the public interest to exempt supplies of services closely related to hospital and medical care, then it is also in the public interest to exempt supplies of goods which have an equally close relationship. It seems to me, therefore, that the Spanish version of that provision cannot be made to override the others.

22. The referring court's own doubts derive in particular from two judgments of the Court – *Ygeia* [13] and *CopyGene* [14] – in which 'closely related activities' in Article 13A(1)(b) of the Sixth Directive were referred to in terms which suggested that they must be supplies of services.

8 — Apart from the English, see, for example, the Hungarian, Maltese and Swedish versions.

9 — Including all five language versions, with the exception of English, in which the Sixth Directive was originally adopted: Danish, Dutch, French, German and Italian.

10 — OJ 1973 C 80, p. 1, Article 14(1)(b).

11 — Literally, 'supplies of hospitalisation and healthcare services and others [i.e. other supplies of services] directly related to the same'.

12 — See, for example, Case C-41/09 *Commission* v *Netherlands* [2011] ECR I-831, paragraph 44 and case-law cited. See also Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36.

13 — Joined Cases C-394/04 and C-395/04 [2005] ECR I-10373, paragraph 25.

14 — Case C-262/08 [2010] ECR I-5053, paragraph 40.

23. However, as has been pointed out in the submissions to the Court, those judgments were concerned with factual situations which involved only supplies of services, and it is that which explains the language used. Moreover, in *Commission* v *United Kingdom*[15] the Court proceeded on the clear basis that supplies of goods qualified for exemption under Article 13A(1)(b) of the Sixth Directive, even though exemption could not be justified under Article 13A(1)(c).

24. I am therefore of the view that the expression 'closely related activities' in Article 13A(1)(b) of the Sixth Directive includes supplies of goods as well as supplies of services.

Question 2

25. Klinikum Dortmund and the Commission consider that, in order to benefit from the exemption for 'closely related activities' under Article 13A(1)(b) of the Sixth Directive, it is not essential for a supply to be made by the person who provides the 'hospital and medical care'.

26. The German Government takes the opposite view. Pointing to the wording of the provision (hospital and medical care and closely related activities 'undertaken by' certain defined providers), and to the Court's consistent case-law to the effect that exemptions from VAT must be interpreted strictly, it reasons that both the care and the related activities must be undertaken by the same person.

27. I do not agree with the latter position. The wording in question simply requires both supplies to be undertaken by providers falling within a certain definition.[16] It does not state that the provider must be the same in both cases. Nor does the Court's case-law state only that the terms used to specify exemptions are to be interpreted strictly. It adds that the interpretation must be consistent with the objectives underlying the exemptions and must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT; strict interpretation does not mean that the terms used must be construed in such a way as to deprive the exemptions of their intended effects.[17] And, as the Court declared in *Commission* v *France*,[18] the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT. To refuse exemption simply on the ground that the care and the related activities were not provided by the same person would run counter to that aim. Finally, in that same judgment, the Court treated the transmission of a blood sample by one laboratory to another as 'closely related' to the analysis carried out by the latter and as requiring the same VAT treatment under Article 13A(1)(b) of the Sixth Directive. It is thus clear that the Court does not require the care and the related activities to be provided by the same person in order for the latter to benefit from the exemption.

28. The German Government submits also that only activities undertaken by 'bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature' can benefit from the exemption, and that the doctors in issue in the main proceedings do not fall within that definition.

29. As the Commission rightly points out, that point belongs properly to the next question.

15 — Case C-353/85 [1988] ECR 817, paragraphs 33 to 35.

16 — See also the tabular analysis at point 27 of my Opinion in *CopyGene*, cited in footnote 14.

17 — See, for a recent example, Case C-174/11 *Zimmermann* [2012] ECR, paragraph 22 and case-law cited.

18 — Case C-76/99 [2001] ECR I-249, paragraph 23.

Question 3

30. The national court wishes to know, essentially, whether 'closely related activities' can benefit from exemption under Article 13A(1)(b) of the Sixth Directive if the care to which they are closely related is itself exempted not under that same provision but under Article 13A(1)(c). Klinikum Dortmund considers that they can, the German Government and the Commission that they cannot.

31. The activity in issue is the dispensing of drugs by Klinikum Dortmund and the care to which it is related is provided by doctors acting in an independent capacity. It appears to be accepted in the national proceedings, and in all the submissions to the Court, that the actual care provided by such doctors qualifies for exemption from VAT pursuant to Article 13A(1)(c) of the Sixth Directive, not Article 13A(1)(b), and I agree.

32. As the Commission points out, those provisions lay down separate exemptions for the provision of medical care. They are distinguished according not to the nature of the service but to the circumstances in which it is provided.

33. It is true that the Court has repeatedly stated in that regard that the criterion for drawing a clear distinction between the two exemptions is less the nature of the service than the place where it is provided.[19] However, that cannot in my view be interpreted as meaning that the provision of medical care must fall within Article 13A(1)(b) whenever it is provided *on the premises of* a body or establishment defined in that provision, if it is not also provided *by* that body or establishment. In that context, the words 'undertaken by' are clear and unequivocal.

34. It is also true that, in the not dissimilar circumstances of Article 13A(1)(g),[20] the Court has held that the terms 'establishment' and 'organisation' do not exclude natural persons.[21] However, Article 13A(1)(b) refers to bodies, hospitals, centres and establishments, whereas Article 13A(1)(c) refers to the exercise of professions, of which in principle only natural persons are capable. That contrasts with the situation as regards Article 13A(1)(g), which is not followed by any equivalent to Article 13A(1)(c). Such a contrast appears to militate against interpreting Article 13A(1)(b) as broadly as Article 13A(1)(g). Still, even on the assumption that Member States are entitled to recognise individual healthcare practitioners as 'duly recognised establishments' providing services 'under social conditions comparable to those applicable to bodies governed by public law', it is not suggested in the order for reference or in any of the observations that such recognition has been accorded to the doctors in issue. Indeed, it appeared from what was said at the hearing that the authorisation accorded under Paragraph 116 of the SGB V concerned only the possibility of cover under a health insurance scheme and did not affect the doctors' status in any other way.

35. I shall proceed, therefore, on the basis that the care provided by the doctors in the present case, acting independently of the hospital even though they provide the care on hospital premises, is exempt pursuant to Article 13A(1)(c) of the Sixth Directive.

36. It is clear from the wording of Article 13A(1)(b) of the Sixth Directive that, when hospital and medical care is exempt pursuant to that provision, activities closely related to that care benefit from the same exemption. A contrario, it may be inferred that, when medical care is exempt pursuant to Article 13A(1)(c), which makes no mention of closely related activities, the exemption does not extend beyond the provision of the care itself.

19 — See, for example, Case C-106/05 *L.u.P.* [2006] ECR I-5123, paragraph 22 and case-law cited; *CopyGene*, cited in footnote 14, paragraph 27 and case-law cited.

20 — Which exempts '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'.

21 — *Zimmermann*, cited in footnote 17, paragraph 57 and case-law cited.

37. In that regard, the Court declared in *Commission* v *United Kingdom*[22] that, 'apart from minor provisions of goods which are strictly necessary at the time when the care is provided, the supply of medicines and other goods, such as corrective spectacles prescribed by a doctor or by other authorised persons, is physically and economically dissociable from the provision of the service'.

38. That case was concerned particularly with the supply of prescribed spectacles, and the Court regarded the supply of prescribed medicines in the same light. In the circumstances considered, the acts of diagnosis (together with any minor and strictly necessary supplies of goods – such as, perhaps, the administration of eye-drops to enlarge the pupils) and prescription form a single supply falling within the exemption in Article 13A(1)(c) of the Sixth Directive. The same would presumably apply to the supply of any items – such as, for example, ointments or bandages – essential to any actual treatment performed by the practitioner in the course of a consultation. By contrast, the supply by an optician or pharmacist of any items prescribed by the practitioner is a separate supply which does not fall within that exemption.

39. If there were to be an exemption for drugs dispensed in the circumstances in issue in the present case, however, it seems to me that it would have to extend to all drugs dispensed on prescription, since the prescription of drugs by doctors, to be made up by pharmacists, must in principle always be regarded as closely related to the medical care which the doctors provide. Yet that would not be consistent with the judgment in *Commission* v *United Kingdom*. It is clear moreover that pharmaceutical products 'used for … treatment for medical … purposes' (a description which seems more apposite for drugs prescribed by a doctor than for over-the-counter remedies), are in principle subject to VAT, or they would not be listed in Annex H to the Sixth Directive.

40. In principle, therefore, it seems to me that the answer to Question 3 must be to the effect, essentially, that a supply of drugs in accordance with a prescription made out in the course of a provision of medical care cannot benefit from exemption under Article 13A(1)(b) of the Sixth Directive if the care to which it is closely related is itself exempted not under that same provision but under Article 13A(1)(c).

41. However, it might not necessarily follow that, in the specific circumstances of the main proceedings, the supply of the drugs cannot be exempted under Article 13A(1)(c) itself. The supply could perhaps be regarded not as a 'closely related activity' but as a supply 'which is strictly necessary at the time when the care is provided' and not 'physically and economically dissociable from the provision of the service', to use the Court's words in *Commission* v *United Kingdom*.[23]

42. A variant of that possibility might be that the supply and administration of the drugs should be regarded as, again in the Court's words, 'so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split'.[24] Or, perhaps, it should be regarded as ancillary to the principal service in that it 'does not constitute an end in itself, but a means of better enjoying the supplier's principal service'; that might apply to 'the supply of services which are logically part of the provision of [medical care] services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives'.[25]

22 — Cited in footnote 15, paragraph 33.

23 — See point 37 and footnote 22 above.

24 — See, for a very recent example, Case C-18/12 *Žamberk* [2013] ECR, paragraph 28 and case-law cited.

25 — See, for example, *CopyGene*, cited in footnote 14, paragraph 40 and case-law cited.

43. A different possibility might be a need to accord the supply the same VAT treatment regardless of whether the drugs were administered in the course of in-patient or out-patient treatment, in order to respect the principle of fiscal neutrality inherent in the VAT system, which, according to consistent case-law, precludes treating similar supplies, in competition with each other, differently for VAT purposes. [26]

44. Any evaluation of those possibilities must be based on rather more information as to the circumstances of the treatment than is contained in the order for reference. All necessary findings of fact in that regard must of course be made by the competent national court, but the Court asked the parties to consider at the hearing the relevance of a number of issues, including the precise nature of the medical care provided and the identity of the provider, the question whether that care could be provided without the supply of the drugs in question and the identity of the person to whom the right to dispose of the drugs as owner was transferred (in other words, the recipient of the supply).

45. I understood from the parties' answers that the treatment in question is agreed to comprise a series of interrelated activities. A doctor diagnoses the patient's precise condition and identifies a formulation for a cytostatic tailored to treat that individual condition; a therapeutic schedule is drawn up with the patient; the cytostatic is prescribed by the doctor and made up by the pharmacy; it is verified and complementary drugs may be added to alleviate side-effects; it is then administered by healthcare staff either under the supervision of the doctor or with the doctor kept informed of any problem which might require his intervention; at any stage it may be necessary for him to adjust the dosage or composition of the drugs administered, or modify the therapeutic schedule.

46. On the basis of that description it is clear that there is a therapeutic continuum, which encompasses both 'the provision of medical care in the exercise of the medical and paramedical professions' and a supply of drugs. It is also clear that, without the supply of the drugs, the medical care itself would serve no purpose; that supply is, therefore, 'strictly necessary at the time when the care is provided'.

47. However, I find it difficult to consider, at the same time, either that the supply of drugs is not 'physically and economically dissociable from the provision of the [medical care]' or that it is 'so closely linked [to the medical care] that they form, objectively, a single, indivisible economic supply, which it would be artificial to split'.

48. In that regard, it is necessary to consider by whom, and to whom, the supply of drugs is made. That question was addressed at the hearing and, although it was acknowledged that payment was made in almost every case by a private or public health insurance body, it seemed to be agreed that the 'right to dispose of [the drugs] as owner' is acquired by the patient. Neither the doctor nor the health insurance body may dictate to the patient whether to accept administration of the drugs or not. That makes it impossible to consider that the doctor passes on the supply of the drugs to the patient, as part and parcel of the medical care provided. It therefore seems necessary to proceed on the basis that the patient receives more than one supply: medical care from the doctor and healthcare staff; drugs from the hospital pharmacy.

49. Where separate supplies are made by separate persons, it seems inevitable that those supplies cannot 'form, objectively, a single, indivisible economic supply, which it would be artificial to split' or be 'physically and economically dissociable'. They may be (indeed, it appears that they *are*) 'closely related' and such a close relationship will qualify a supply of drugs to be exempted when the related provision of medical care is exempted under Article 13A(1)(b) of the Sixth Directive, but not when it is exempted under Article 13A(1)(c). In that regard, the separation between the person supplying the

26 — See, for example, *L.u.P.*, cited in footnote 19, paragraphs 24 and 32.

drugs and the person providing the medical care must in my view preclude the two from being regarded together as a single supply, regardless of the fact that neither supply can serve any useful purpose without the other – in contrast to, for example, the situation examined in *Deutsche Bank*,[27] where two comparably interlinked supplies were made by the same taxable person.

50. Similar reasoning leads me to the view that the supply of the drugs cannot be regarded as 'ancillary to [the] principal service in that it does not constitute an end in itself, but a means of better enjoying the supplier's principal service'. Where a doctor provides the diagnostic, prescription and supervision services outlined in reply to the Court's questions, it would be artificial to say that the drugs administered were supplied – by a different person – as 'a means of better enjoying those services'. The supply of the drugs is, logically, closely related to the doctor's services but it is discernibly separate from them and not a means of better enjoying them (or of benefiting from them under better conditions, in a more literal rendering of the wording used by the Court in French, the language of its deliberations). One might even, indeed, conceive of the supply of the drugs as the principal aspect of concern to the patient and the diagnosis, prescription and supervision of administration as means of benefiting from that supply under the best possible conditions.

51. It remains to be considered whether the principle of fiscal neutrality dictates a different outcome.

52. I agree with the Commission that it does not.

53. That principle cannot extend the scope of an exemption in the absence of clear wording to that effect. It is not a rule of primary law but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions.[28]

54. In that regard, the terms of Article 13A(1)(b) and (c) of the Sixth Directive draw a clear distinction between care undertaken by bodies governed by public law or duly recognised establishments operating under comparable social conditions and that provided – by other persons and under other social conditions – in the exercise of the medical and paramedical professions.

55. Where a difference in treatment is thus clearly set out in the Sixth Directive, it should not be overridden by a principle of interpretation which has no primacy over the legislative text.

56. It might none the less remain possible for a Member State to counteract any danger of distortion of competition by using the option of laying down conditions 'for the purpose of … preventing any possible … abuse' under Article 13A(1) of the Sixth Directive or refusing, pursuant to Article 13A(2)(b), to grant exemption to supplies which would otherwise be exempted under Article 13A(1)(b) if their basic purpose was 'to obtain additional income … by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax'. However, any such measure would involve limiting the exemption for transactions closely related to hospital and medical care within the meaning of Article 13A(1)(b), not extending it to those closely related to the provision of medical care in the exercise of the medical and paramedical professions within the meaning of Article 13A(1)(c). It would, in other words, involve imposing tax where it is not currently levied, rather than extending the scope of what is exempt from VAT.

57. I acknowledge that the view I have reached – that the supply of drugs may be subject to, or exempt from, VAT according to the context in which they are administered – may appear counter-intuitive. However, to say that Article 13A(1)(c) is meant, like Article 13A(1)(b), to include activities closely related to the care described would be to read into the former provision words which

27 — Case C-44/11 *Deutsche Bank* [2012] ECR, paragraphs 20 to 29; see also my Opinion in that case, points 26 to 32.

28 — See *Deutsche Bank*, cited in footnote 27, paragraph 45.

are not there. There may, admittedly, be a lacuna in the legislation as a consequence. If so, that is a matter for the legislature. It would not, however, appear to me to be appropriate to extend the ratio of the Court's judgment in *Commission* v *France*[29] to all cases in which costs might be increased by subjection to VAT, in the absence of any clear legislative intent to that effect.

Conclusion

58. In the light of all the above considerations, I am of the opinion that the Court should answer the questions raised by the Bundesfinanzhof to the following effect:

(1) The expression 'closely related activities' in Article 13A(1)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment – includes supplies of goods as well as supplies of services.

(2) In order to qualify for exemption as an activity closely related to hospital and medical care pursuant to Article 13A(1)(b) of Directive 77/388, it is not essential for a supply to be made by the person who provides the care in question.

(3) Supplies of goods or services which are

(i) closely related to the provision of medical care in the exercise of the medical and paramedical professions within the meaning of Article 13A(1)(c) of Directive 77/388,

(ii) physically and economically dissociable from the provision of such medical care and

(iii) not closely related to hospital and medical care within the meaning of Article 13A(1)(b) of the same directive

do not qualify for exemption pursuant to either of those two provisions.

29 — Cited in point 27, footnote 18, above.