Reports of Cases

OPINION OF ADVOCATE GENERAL WATHELET delivered on 5 April 2017[1]

Case C-616/15

European Commission
v
Federal Republic of Germany

(Failure of a Member State to fulfil obligations — Taxation — Value added tax (VAT) — Article 132(1)(f) of Directive 2006/112/EC — Exemption from VAT for the supply of services by independent groups of persons to their members — Restriction to independent groups whose members exercise a limited number of professions)

1. By the present action the European Commission is asking the Court to declare that, by restricting the exemption from value added tax (VAT) to groups whose members exercise a limited number of professions, the Federal Republic of Germany has failed to fulfil its obligations under Article 132(1)(f) of Directive 2006/112/EC.[2] The interpretation of that provision is also raised in *Commission* v *Luxembourg* (C-274/15), *DNB Banka* (C-326/15) and *Aviva* (C-605/15), which are currently pending before the Court.

I. Legislative framework

A. EU law

1. Sixth VAT Directive 77/388/EEC

2. Article 13A of the Sixth Directive 77/388/EEC[3] provided:

'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:

…

1 Original language: French.

2 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

3 Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, 'the Sixth Directive') was repealed and replaced, with effect from 1 January 2007, by the VAT Directive.

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

…

(f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;

...’.

3. Article 28(3) and (4) of that directive stated:

‘3. During the transitional period referred to in paragraph 4, Member States may:

(a) continue to subject to tax the transactions exempt under Article 13 or 15 set out in Annex E to this Directive;

…

4. The transitional period shall last initially for five years as from 1 January 1978. At the latest six months before the end of this period, and subsequently as necessary, the Council shall review the situation with regard to the derogations set out in paragraph 3 on the basis of a report from the Commission and shall unanimously determine on a proposal from the Commission, whether any or all of these derogations shall be abolished.’

4. Annex E of that directive, entitled ‘Transactions referred to in Article 28(3)(a)’, provided:

‘…

3. Transactions referred to in Article 13A(1)(f) other than those of groups of a medical or paramedical nature

…’

2. Eighteenth Directive 89/465/EEC

5. According to the preamble to the Eighteenth Directive 89/465/EEC:[4]

4 Council Directive of 18 July 1989 on the harmonisation of the laws of the Member States relating to turnover taxes — Abolition of certain derogations provided for in Article 28(3) of the Sixth Directive (OJ 1989 L 226, p. 21).

'Whereas Article 28(3) 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 [VAT]: uniform basis of assessment, as last amended by the Act of Accession of Spain and Portugal, allows Member States to apply measures derogating from the normal rules of the common system of [VAT] during a transitional period; whereas that period was originally fixed at five years; whereas the Council undertook to act, on a proposal from the Commission, before the expiry of that period, on the abolition, where appropriate, of some or all of those derogations;

Whereas many of those derogations give rise, under the Communities' own resources system, to difficulties in calculating the compensation provided for in Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from [VAT]; whereas, in order to ensure that that system operates more efficiently, there are grounds for abolishing those derogations;

Whereas the abolition of those derogations will also contribute to greater neutrality of the [VAT] system at Community level;

Whereas some of the said derogations should be abolished respectively from 1 January 1990, 1 January 1991, 1 January 1992 and 1 January 1993;

...'.

6. Article 1 of that directive provides:

'Directive 77/388/EEC is hereby amended as follows:

1. With effect from 1 January 1990 the transactions referred to in points 1, 3 to 6, 8, 9, 10, 12, 13 and 14 of Annex E shall be abolished.

...'

3. VAT Directive

7. Recitals 1 and 3 of the VAT Directive state:

'(1) 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 [VAT]: uniform basis of assessment has been significantly amended on several occasions. Now that new amendments are being made to the said Directive, it is desirable, for reasons of clarity and rationalisation that the Directive should be recast.

...

(3) To ensure that the provisions are presented in a clear and rational manner, consistent with the principle of better regulation, it is appropriate to recast the structure and the wording of the Directive although this will not, in principle, bring about material changes in the existing legislation. A small number of substantive amendments are however inherent to the recasting exercise and should nevertheless be made. Where such changes are made, these are listed exhaustively in the provisions governing transposition and entry into force.'

8. The first and second subparagraphs of Article 13(1) of the VAT Directive provide:

‘States, regional and local government authorities and other bodies governed by public law shall not be regarded as 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 those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.’

9. Article 132(1) of that directive, which appears in Chapter 2, entitled ‘Exemptions for certain activities in the public interest’, of Title IX of the directive, provides:

‘Member States shall exempt the following transactions:

(a) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto;

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

(d) the supply of human organs, blood and milk;

(e) the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians;

(f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;

…’.

B. German law

10. The second chapter, entitled ‘Exemption and reimbursement of tax’, of the Umsatzsteuergesetz (Law on turnover tax, UStG) includes, in Paragraph 4, a list of services exempt from VAT. Under Paragraph 4(14) of the UStG, in the version applicable to the facts in the main proceedings, the following are exempt:

‘(a) the provision of medical care in the exercise of the medical and paramedical professions or the profession of doctor, dentist, lay medical practitioner, physiotherapist, midwife…;

(b) hospital and medical care, including diagnosis, medical assessment, prevention, rehabilitation, obstetrics and hospice services and closely related activities undertaken by bodies governed by public law…;

…

(d) the supply of other services which groups whose members exercise professions referred to in point (a) or are part of establishments referred to in point (b) furnish to their members, where those services are directly necessary for the exercise of the activities referred to in point (a) or point (b) and where the groups merely claim from their members exact reimbursement of their share of the joint expenses;

…'.

II. Pre-litigation procedure

11. By letter of formal notice of 23 November 2009, the Commission informed the Federal Republic of Germany that it had doubts as to the compatibility with the VAT Directive of the German rules on the exemption from VAT for the supply of services by independent groups of persons (IGPs) who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity.

12. The Commission stated in that letter that German law (in this particular case Paragraph 4(14)(d) of the UStG) restricted that exemption to the supply of services by IGPs whose members carried on activities or professions in the health sector (namely those mentioned in points (a) and (b) of Paragraph 4(14) of the UStG), whereas the VAT Directive did not restrict the exemption in question to groups in certain professions but laid it down for all IGPs where those persons were exempt from VAT or were not taxable persons in relation to the activity which they carried on. The Commission therefore considered that German turnover tax law was not consistent with the objectives of the VAT Directive.

13. The Federal Republic of Germany replied to the letter of formal notice by a notification of 22 March 2010. In that notification, it confirmed that the German rules did exempt the supply of services by IGPs only if they were provided by groups of doctors, by persons exercising paramedical professions or by groups of hospitals or of establishments of a similar nature. It asserted that the restriction was justified because it was for the national legislature to examine which professions could benefit from the exemption in question without causing a distortion of competition. It stated that the German legislature had thus taken the view, following an examination, that the exemption in question was justified only for the health sector.

14. On 7 April 2011, the Commission sent a reasoned opinion to the German Government. In that reasoned opinion, the Commission expressed doubts as to the Federal Republic of Germany's argument that, in order to avoid distortion of competition, health activities and professions alone could benefit from the exemption in question. According to the Commission, the EU legislative procedure showed that the VAT Directive was intended specifically to extend the exemption to groups comprising other categories of persons. In addition, the Commission asserted that on a number of occasions German courts should have extended the scope of the exemption in question to professions other than those specified in German turnover tax law.

15. The Commission also stated that it did not understand on what basis the German legislature saw persistent distortions of competition if, in addition to the already exempt health professions, it were to grant the exemption in question to all sectors of the German economy. It maintained that the German legislature was not required to assess distortions of competition on the basis of a *general* analysis, but that, on the contrary, the exemption in question should be refused only if there is a *genuine risk* that the exemption may by itself, immediately or in the future, give rise to distortions of competition.

16. The Federal Republic of Germany replied to the reasoned opinion by notification of 6 June 2011. In that notification, it emphasised, first, the position occupied by the provision laying down the exemption in question in the scheme of the VAT Directive, namely in the chapter on exemptions for certain activities in the public interest. It concluded that the exemption could not be extended to all economic activities.

17. Second, the Federal Republic of Germany stated that the transposition into its domestic law specifically took account of the prohibition of distortions of competition (provided for in Article 132(1)(f) of the VAT Directive) by restricting the rule on exemption to certain professions in the health sector and that there was in principle no risk of a distortion of competition for other sectors.

18. Third, it submitted that it could not see which profession was wrongly excluded from the exemption in question by German law.

19. The Federal Republic of Germany therefore refused the request made to it by the Commission to take all the measures necessary to comply with the reasoned opinion.

20. As the German rules on turnover tax continue to restrict the exemption from VAT to IGPs carrying on an activity in the health sector, the Commission announced its decision to bring the matter before the Court, which it did on 20 November 2015.

III. Procedure before the Court

21. The Commission and the Federal Republic of Germany presented oral argument at the hearing on 15 February 2017.

IV. Assessment

A. Arguments of the parties

1. Commission

22. According to the Commission, the Federal Republic of Germany restricts to certain clearly defined professional groups the exemption from VAT laid down in Article 132(1)(f) of the VAT Directive for ‘the supply of services by [IGPs], who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity’. The exemption under the German VAT legislation applies only to groups whose members are doctors, exercise paramedical professions or carry on activities in the hospital and medical care sector.

23. The Commission argues that this is incompatible with Article 132(1)(f) of the VAT Directive. Neither the wording nor the objective or the drafting history of that article justifies such a restriction of the exemption from VAT to certain professional groups. On the contrary, the exemption should be granted to IGPs in any profession, provided their members are carrying on activities which are exempt from VAT.

24. The restriction provided for by the German VAT legislation is also not justified by the possibility of a general distortion of competition, as the possible existence of a distortion of competition if the exemption is applied can and should be assessed only in the light of the circumstances of the individual case. It is not possible make a general finding that distortions of competition exist for the supply of services by certain professions.

25. Furthermore, the fact that the exemption under Article 132(1)(f) of the VAT Directive requires an examination of the factual circumstances and individual [transactions] is also apparent from paragraph 77 of the letter drafted by the Bundesministerium der Finanzen [5] at the time of the amendment of Paragraph 4 of the UStG in 2009, from which the relevant version of that provision originates.

2. Federal Republic of Germany

(a) The exemption itself and its restriction to activities in the public interest

26. The Federal Republic of Germany asserts, first, that the exemptions laid down by the VAT Directive are collected in Title IX thereof, entitled ‘Exemptions’, and that Title IX is subdivided into ten chapters. It also observes that the exemption in question is one of the exemption situations set out in Article 132 of the VAT Directive and that that provision, whose wording has remained almost the same since the Sixth Directive entered into force, appears in Chapter 2 of the directive, entitled ‘Exemptions for certain activities in the public interest’. It is thus apparent from the position of the exemption in question in the general scheme of the VAT Directive that it can apply only to the supply of services by IGPs whose activities are in the public interest.

27. The Federal Republic of Germany submits that the exemption in question does not, however, apply to IGPs who are carrying on activities which are exempt from VAT that are not covered by Chapter 2 and that are not in the public interest. If the EU legislature had wished for that exemption to be applicable to all professions and activities which are exempt from VAT, it would have included that provision elsewhere, for example in Chapter 1 of Title IX on exemptions, entitled ‘General provisions’.

28. Banking and insurance groups, which are exempt from VAT pursuant to Article 135 of the VAT Directive, cannot thus be included within the scope of the exemption under Article 132(1)(f) of that directive.

29. The legislative proposals and communications previously issued by the Commission with a view to the amendment of the VAT Directive also confirm that the exemption in question applies only to IGPs who are carrying on activities in the public interest. Thus, on 28 November 2007, the Commission submitted a proposal for a directive concerning the ‘introduction of a cost-sharing group’ in the insurance and financial sector. [6] Although the exemption in question was already applicable to the supply of services in that sector, the Commission was not obliged to propose to include such supplies within the scope of the exemption.

5 Federal Ministry of Finance, Germany. Letter of 26 June 2009 (IV B 9 –S 7170/08/10009).

6 Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, COM(2007) 747 final of 28 November 2007.

30. Furthermore, in the document with reference MEMO/07/519[7] which accompanied that proposal for a directive, the Commission even acknowledged that '[t]he existing cost sharing relief provisions are unclear and not uniformly implemented. To remedy this, the proposal contains an industry specific exemption from VAT on cost sharing arrangements, including those which are cross-border. This change will enable institutions to pool their operations and to share costs between the group members without creating additional non-recoverable VAT.'

31. The Federal Republic of Germany also mentions the Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of [the VAT Directive] (COM(2009) 325 final). In that Communication, the Commission confirmed that 'it should be stressed that this Communication does not refer to the concept of "cost sharing arrangements", which on the basis of Article 132(1)(f) of the VAT Directive currently constitute a compulsory exemption for certain activities in the public interest and a new form of which was also introduced in the recent Commission proposal regarding the VAT treatment of insurance and financial services.'

32. The Federal Republic of Germany infers from this that, in the Commission's view, the exemption in question applies only to activities in the public interest. In addition, it maintains that it covers in particular the activities mentioned in Article 132(1)(b) to (e) of the VAT Directive, which precede the exemption laid down in point (f) and which relate to the health sector. Against this background, it asserts that, according to the Court's case-law, the exemptions under Article 132 of the VAT Directive are aimed at exempting only activities performed in the public interest which are listed and described in great detail in it (judgment of 10 June 2010, *Future Health Technologies*, C-86/09, EU:C:2010:334, paragraph 29 and the case-law cited) and that the terms used to specify those exemptions are to be interpreted strictly (judgment of 22 October 2015, *Hedqvist*, C-264/14, EU:C:2015:718, paragraph 34).

33. The Federal Republic of Germany adds that its argument that the exemption in question concerns the activities mentioned in points (b) to (e) of Article 132 of the VAT Directive is supported by the specific words chosen by the Court to explain the purpose of that exemption, which is to 'avoid an entity offering certain services from being required to pay that tax when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake activities essential to the provision of those services' (judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 37).

34. In this regard, the Federal Republic of Germany notes that the Court explicitly mentions '*professionnels*' [in the French version; English version: 'entities'] and that the VAT Directive uses the term 'profession' in only a small number of instances which, in the vast majority of cases, are connected with medical professions in the public interest. This suggests that, when the Court described the purpose of Article 132(1)(f) of the VAT Directive, it envisaged nothing more than a group of 'professionals' who are carrying on medical professions in the public interest.

35. According to the Federal Republic of Germany, its position is supported by the drafting history of Article 132(1)(f) of the VAT Directive. It asserts in this regard that in a Commission proposal for the Sixth Directive,[8] the exemption for IGPs was already included in the 'exemptions for certain activities in the public interest' and applied to 'services supplied to their members by independent groups of persons carrying on medical or paramedical activities, necessary for the exercise of their exempted activities'.

7 http://europa.eu/rapid/press-release_MEMO-07-519_en.htm?locale=en.

8 Commission Proposal for a sixth Council Directive on the harmonisation of Member States concerning turnover taxes — Common system of value added tax: Uniform basis of assessment, COM(73) 950 final, 20 June 1973 (*Bulletin of the European Communities*, Supplement 11/73, p. 13).

36. Returning to the first version of the Sixth Directive, the Federal Republic of Germany submits that the combined provisions of Article 28(3)(a) and point 3 of Annex E sought to ensure that the exemption laid down in Article 13A(1)(f) for the supply of services by IGPs of a medical or paramedical nature was immediately applicable, whilst the Member States could continue to tax similar supplies of services by other IGPs until 31 December 1989.

37. According to the Federal Republic of Germany, the transitional provision in Article 28(3)(a) of the Sixth Directive was not intended to restrict or extend the scope of Article 13A(1)(f) of the Sixth Directive. The abolition of the right to tax other IGPs with effect from 1 January 1990 does not therefore represent a paradigm shift in turnover tax. Rather, as is clear from the recitals in the Eighteenth Directive 89/465, it sought to eliminate certain purely practical difficulties outside the VAT system itself, in particular in calculating own resources accruing from VAT.

38. The Federal Republic of Germany maintains that it is also not possible to infer from the change from the Sixth Directive to the VAT Directive any evidence in support of the view taken by the Commission that entitlement to restrict the exemption in question to IGPs of a medical or paramedical nature was abolished. The change in directives did not, as such, bring about any material modification, as is apparent from recital 3 of the VAT Directive.

39. Lastly, the Federal Republic of Germany states that the interpretation of the terms used to define the exemptions laid down in the VAT Directive must be consistent with the objectives pursued by the exemption and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT (judgment of 22 October 2015, *Hedqvist*, C-264/14, EU:C:2015:718, paragraph 35).

40. According to the Court's case-law, the objective of the exemption in question is to avoid an entity offering certain services from being required to pay VAT when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake activities essential to the provision of those services (judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 37).

41. However, contrary to the claim made by the Commission, if the exemption were not applicable, it would be the IGP itself that would be required to pay VAT and not its members. The IGP would have to raise the price of its services by the amount of the VAT and thus charge it on to its members. The cost factor is not therefore the supply of services by the group, but the VAT included in the price.

42. According to the Federal Republic of Germany, the Commission's argument concerning the neutrality of VAT is ineffective. It states that, in accordance with the principle of fiscal neutrality (judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraphs 46 and 47), VAT must not be a burden on the trader, provided the input transactions for which he has paid VAT are used for the purposes of his own taxed transactions. The problem of non-deductibility of input tax is merely moved to the preceding stage if the exemption is applied to the supply of services by the group for its members, in so far as the IGP is not then entitled to deduct input tax. The cost factor present in the chain is thus maintained.

43. In the view of the Federal Republic of Germany, the real advantage of the exemption in question is that it is possible to exclude from taxation the added value created by the IGP for its members, at the stage of the provision of the service, or to obtain discounts or price advantages as a 'buying group' formed by its members. For political reasons, it should be possible to allow such advantages precisely for persons who are carrying on activities in the public interest. In view of that objective, banking and insurance groups cannot fall within the scope of the exemption in question, since they do not carry on activities in the public interest.

44. It should also be borne in mind that the exemption for financial services was conceived as a purely technical exemption, without any justification in relation to fiscal policy, and that it was introduced in particular in the light of difficulties connected with determining the taxable amount and the amount of VAT deductible (judgment of 22 October 2015, *Hedqvist*, C-264/14, EU:C:2015:718, paragraph 36). There are no difficulties in determining the taxable amount for the supply of services by a banking or insurance group for its members.

(b) The possibility of the exemption causing distortion of competition

45. Second, the Federal Republic of Germany asserts that in Germany the German legislature was fully entitled to assess the condition that the exemption in question cannot be likely to cause distortion of competition. It contests the Commission's arguments that it is not possible make a general finding that distortions of competition exist for the supply of services by certain professions.

46. The Federal Republic of Germany argues that, since a directive is binding only as to the result to be achieved, the German legislature was permitted, in order to achieve the objective laid down by Article 132(1)(f) of the VAT Directive, to choose this regulatory form and also, for the purposes of transposition, to conduct the assessment of the risk of distortion of competition itself.

47. In accordance with the Court's case-law, transposition by the legislative route best takes best account of the very principle of the creation of law and, as a general rule, constitutes an appropriate form of transposition. On the other hand, mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting proper fulfilment of obligations under the TFEU (judgment of 8 July 1999, *Commission* v *Belgium*, C-203/98, EU:C:1999:380, paragraph 14).

48. The Federal Republic of Germany asserts that the Commission is effectively seeking the introduction of legislation which virtually allows the competent tax authorities a margin of discretion similar to that which they would have if, in the absence of a legal basis, it was left to them to transpose the VAT Directive by administrative practice. However, the condition relating to the absence of distortion of competition is neither sufficiently precise nor unconditional from the point of view of its content, but must be specified at national level in order to make it possible to determine whether the exemption applies in a particular case (judgment of 26 June 2003, *Commission* v *France*, C-233/00, EU:C:2003:371, paragraph 76).

49. Furthermore, the mere fact that the German legislature does not reproduce literally the exemption laid down in Article 132(1)(f) of the VAT Directive is not contrary to the Court's case-law. It is not essential, in principle, for the provisions of the directive to be enacted in precisely the same words if the full application of the directive is actually ensured in a sufficiently clear and precise manner (judgments of 7 January 2004, *Commission* v *Spain*, C-58/02, EU:C:2004:9, paragraph 26; of 20 October 2005, *Commission* v *United Kingdom*, C-6/04, EU:C:2005:626, paragraph 21; and of 6 April 2006, *Commission* v *Austria*, C-428/04, EU:C:2006:238, paragraph 99).

50. In addition, the Federal Republic of Germany submits that, contrary to the claim made by the Commission, the national legislature may have recourse to a specific assessment of the risk of distortion of competition existing within certain professions and that such an assessment is also lawful where the legislature excludes certain professions in advance.

51. In this regard, the Federal Republic of Germany recalls that the Court has concluded that the Member States are not obliged to transpose literally into their national law the condition relating to the absence of distortion of competition in the second subparagraph of Article 4(5) of the Sixth Directive — a provision since replaced by the second subparagraph of Article 13(1) of the VAT Directive — or to lay down precise quantitative limits for treatment as non-taxable persons (judgment

of 17 October 1989, *Comune di Carpaneto Piacentino and Others*, 231/87 and 129/88, EU:C:1989:381, paragraph 23). It is even lawful for the Finance Minister to be instructed by a national law to determine in specific terms the activities bringing about distortions of competition (judgment of 14 December 2000, *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraphs 32 to 35).

52. However, enacting the condition relating to the absence of distortion of competition in precisely the same words in national law and assessing distortions of competition in the light of the circumstances of each individual case would give rise to an unacceptable impairment of legal clarity and legal certainty.

53. This holds in particular in the light of the fact that, according to the Court's case-law, the exemption must be refused if 'there is a genuine risk that the exemption may by itself, immediately or in the future, give rise to distortions of competition' (judgment of 20 November 2003, *Taksatorringen*, C-8/01, EU:C:2003:621, paragraph 64). The examination of that condition therefore requires an assessment of both the present competitive situation and the situation likely to exist in the future, an assessment which can be conducted only on the basis of complex economic studies for each area of activity. For the competent tax authorities at local level, such an examination of the prevailing complex economic circumstances in each individual case is quite simply impossible to conduct. In addition, it is not acceptable that the IGP and its members are not able to foresee with the necessary certainty whether or not the supply of services in question will be exempt from VAT for each future transaction.

54. Article 13(1) of the VAT Directive also shows that the relevant areas of activity in terms of competition may be determined by the legislature. In Annex I of that directive the EU legislature set out a list of activities for which distortions of competition can be presumed to exist in principle. With regard to Article 13(1) of the VAT Directive, the Court has held that, furthermore, there may exist, on the national level, other activities not mentioned in Annex I, the list of which may vary from one Member State to another or from one economic sector to another (judgment of 16 September 2008, *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraphs 35 and 36). This case-law clearly shows that the assessment of distortion of competition may be conducted by the legislature. According to the Federal Republic of Germany, this must hold *a fortiori* for national legislation which sets out certain areas of activity in which there is no risk of the existence of distortion of competition on the national market.

55. The Federal Republic of Germany adds that the aim of the condition that the exemption in question must not be likely to cause distortion of competition is to restrict its scope. It is thus intended to restore the general rule that any activity of an economic nature be subject to VAT and cannot therefore be construed narrowly (judgment of 16 September 2008, *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraphs 72 and 73).

56. Lastly, the Federal Republic of Germany submits that the Commission has not shown that an exemption for the supply of services by IGPs for their members does not give rise to distortion of competition in areas other than the health professions mentioned by the UStG.

57. In an action based on Article 258 TFEU, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 6 April 2006, *Commission* v *Austria*, C-428/04, EU:C:2006:238, paragraph 98 and the case-law cited). The Commission has not provided proof or circumstantial evidence that legislation applicable to a specific profession is inappropriate for transposing the condition relating to the absence of distortion of competition in Article 132(1)(f) of the VAT Directive.

58. The Federal Republic of Germany asserts that, in order to establish that such a method of transposition is inappropriate, the Commission should have demonstrated by specific facts that only enacting the condition relating to the absence of distortion of competition in the legislation in precisely the same words, with full delegation of decision-making powers to the competent tax authorities, would lawfully transpose Article 132(1)(f) of the VAT Directive. The Commission has not, however, provided such general proof.

59. First, contrary to the claim made by the Commission, it is not apparent from paragraph 77 of the letter from the Federal Ministry of Finance (see point 25 of this Opinion) that the Federal Republic of Germany itself calls into question whether its chosen method of transposition is appropriate.

60. The failure to mention other professional sectors in the UStG means that there is in any event a risk of distortion of competition for these other sectors. The fact that the health sector is mentioned does not mean that no distortion of competition is ever likely to occur in that sector. Rather, paragraph 77 of that letter specifies, by way of example, the specific kinds of supplies by medical practices which should be exempted from VAT in so far as those supplies render the services directly necessary for the exercise of the activities referred to in Paragraph 4(14)(a) or (b) of the UStG. The supplies at issue are, as is clear from paragraph 72 of that letter, the provision of medical facilities, apparatus and equipment, laboratory tests, x-rays and other technical services in the medical field.

61. On the other hand, if the group took charge of, inter alia, accounting, legal advice or the activity of a medical compensation fund for its members, there would then be, according to paragraph 73 of the letter, supplies which relate only indirectly to the provision of exempt medical supplies and which would not therefore be exempt from VAT. In paragraph 77 of that letter, it is stated that, in addition, those supplies are in competition with other undertakings with the result that there could also be a risk of distortion of competition which should be ruled out under Article 132(1)(f) of the VAT Directive.

62. Accordingly, the letter from the Federal Ministry of Finance offered only guidance for the purposes of the application of Paragraph 4(14)(d) of the UStG in conformity with the VAT Directive in each individual case for the activities of IGPs mentioned in Paragraph 4(14)(d) of the UStG. However, the circle of beneficiaries is certainly not thereby extended or reduced, nor is the legislative approach called into question as such.

63. Second, the decisions of the national courts mentioned by the Commission in paragraph 29 of the application also do not allow the conclusion to be drawn that the German legislature’s chosen method of transposition is not appropriate for transposing the exemption in question. The Federal Republic of Germany observes in this regard that the German courts could or even should have referred questions similar to those in the present case to the Court for a preliminary ruling but they failed to do so. Without an express ruling by the Court, it is not possible to infer from the mere fact that a national court has not referred a question to the Court for a preliminary ruling that the national court correctly interpreted the provision of EU law.

64. Third, the opinion of the Bundesrat (Federal Council, Germany) concerning the Entwurf eines Gesetzes zur Fortentwicklung der Finanzmarktstabilisierung (Draft law on the further development of financial market stabilisation), to which the Commission makes reference, does not provide any evidence to show that the chosen method of transposition in Paragraph 4(14)(d) of the UStG is not sufficiently appropriate. In addition, that proposal was rejected by the other legislative bodies. The Federal Republic of Germany therefore asserts that that proposal, which never became law, cannot be produced as evidence to show that, in the banking and insurance sector in any event, there is no risk of distortion of competition.

65. In making reference to paragraph 77 of the letter from the Federal Ministry of Finance (see point 25 of this Opinion), the Commission does not take account of the fact that the restriction of the exemption by the UStG to certain professions in the health sector does not mean that, in the view of the German legislature, distortion of competition is ruled out for all activities in that sector. The letter thus makes clear that a thorough examination of the condition relating to the absence of distortion of competition should be conducted having regard to the activities actually carried on by the IGPs benefiting from a preferential regime under Paragraph 4(14)(d) of the UStG and it contained clarifications on this point. According to the Federal Republic of Germany, it cannot be inferred *a contrario* that the national tax authorities may conduct an examination in each individual case of the condition relating to the absence of distortion of competition laid down in Article 132(1)(f) of the VAT Directive for all economic sectors and that such an examination is required by law.

66. In addition, the Commission has not produced sufficient evidence to show that the examination conducted by the German legislature with regard to the condition relating to the absence of distortion of competition is incorrect for the professions mentioned in Paragraph 4(14)(d) of the UStG.

67. As regards the decisions of the German courts to which the Commission makes reference, the Federal Republic of Germany states that the Bundesfinanzhof (Federal Finance Court, Germany) has not given a definitive ruling on the direct application of the exemption laid down in Article 132(1)(f) of the VAT Directive and has also not taken a view on the issue of distortion of competition in relation to the disputes brought before it. The judgments of the Bundesfinanzhof (Federal Finance Court) do not therefore allow the conclusion to be drawn that there would be no risk of distortion of competition if the exemption in question were extended to other professional sectors.

B. Analysis

68. I would point out, first of all, that the action brought by the Commission is directed only against the restriction by the Federal Republic of Germany of the exemption from VAT laid down by Article 132(1)(f) of the VAT Directive. Under the German transposing provision in Paragraph 4 of the UStG, the exemption is granted only to groups whose members are doctors, exercise paramedical professions or carry on activities in the hospital and medical care sector.

69. It is necessary to examine the two categories of arguments put forward by the Federal Republic of Germany to rebut the Commission's position: first, those concerning the scope *ratione personae* of Article 132(1)(f) of the VAT Directive and, second, those concerning the condition laid down in that article relating to the absence of distortion of competition.

1. First category of arguments put forward by the Federal Republic of Germany: the scope ratione personae of Article 132(1)(f) of the VAT Directive

70. The Commission's fundamental position is that the German legislation at issue is not consistent with Article 132(1)(f) of the VAT Directive in so far as the scope *ratione personae* of that provision is not limited to certain professions and that provision thus also applies to sectors other than the health sector, without being restricted to activities in the public interest, and in particular to the banking and insurance sector. In the alternative, the Commission asserts that, even if that provision covered only IGPs who are carrying on activities in the public interest, its scope *ratione personae* would still not be restricted to IGPs whose members exercise professions in the health sector. The Federal Republic of Germany disputes both the broad interpretation and the narrower interpretation of the scope *ratione personae* of Article 132(1)(f) of the VAT Directive advocated by the Commission.

71. In its defence, the Federal Republic of Germany submits that it is clear from the wording and the position of Article 132(1)(f) of the VAT Directive, and from its drafting history and its objectives, that the scope *ratione personae* of the exemption in question is *restricted to IGPs active in the health sector or at least who are carrying on certain activities in the public interest* (to the exclusion of banks and insurance companies, for example).

(a) Schematic analysis

72. It seems appropriate at this point to return to the actual notion of 'group' used in Article 132(1)(f) of that directive.

73. It relates to cost sharing groups, as a group does not necessarily have legal personality and may be based on a simple contractual agreement.

74. This method must also be viewed in conjunction with Article 11 of the VAT Directive, which permits Member States to regard *as a single taxable person* 'any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links'.[9]

75. This VAT group method has not been implemented by all the States, in particular the French Republic, but it has been applied by the Federal Republic of Germany,[10] where VAT groups are widely used, which diminishes the effects of the legislation challenged by the Commission.

76. In France[11] the non-use of the possibility available under Article 11 was explained by the fact that recourse to cost sharing groups allowed the same result to be achieved as recourse to VAT groups, namely non-imposition of VAT on transactions between group members, with the advantage that the scope of the cost sharing group could be wider than that of the VAT group. The two methods have

9 In this regard, see in particular Bouchard, J.-C., *TVA et groupement de moyens de fait*, Revue de droit fiscal, No 7-8, 14 February 2013, pp. 150 et seq., De Duve, B., *Unité fiscale et association de frais: le régime de la TVA*, Revue pratique des sociétés, 110e année (2011), 1 trimestre, pp. 5 to 26; Lhote, L. and Warscotte, Q., *Carnet de route au cœur des fictions TVA: entre l'unité TVA et le GAP*, in 'TVA, taxer, déduire, exonérer et punir', 2015, pp. 263 to 282; Swinkels, J., *The Phenomenon of VAT Groups under EU Law and Their VAT-Saving Aspects*, International VAT Monitor, January/February 2010, IBFD, pp. 36 to 42; Swinkels, J., *The EU VAT Exemption for Cost-Sharing Associations*, International VAT Monitor, January/February 2008, IBFD, pp. 13 to 21; Bernaerts, Y., *Unité et groupement autonome de personnes — Des instruments performants et/ou controversés?*, Journal de droit fiscal, July-August 2007, pp. 193 to 240; Parolini, A., *European VAT and Groups of Companies*, in 'Maisto, G. (ed.), International and EC Tax Aspects of Groups of Companies, EC and International Tax Law Series', Vol. 4, IBFD, 2008, p. 120. Amand, C., *VAT on financial services: the unanswered questions*, ERA Forum (2008) 9:357-376, p. 373; and Libert, F., *Les associations de frais — Aspects TVA*, R.G.F., 10 October 1997, p. 304 et seq.

10 The VAT groups regime has been implemented in 16 Member States: Belgium, the Czech Republic, Denmark, Germany, Estonia, Ireland, Spain, Cyprus, Hungary, the Netherlands, Austria, Romania, Slovakia, Finland, Sweden and the United Kingdom. See van Norden, G.-J., *State of Play in Respect of the Skandia America Corporation Case*, EC Tax Review, 2016/4, p. 211. Bouchard, J.-C., op. cit., mentions that 17 Member States have implemented this regime.

11 In France Article 261 B of the Code général des impôts (General Tax Code) transposes the intra-group VAT exemption mechanism. See Revue de droit fiscal, No 45, 6 November 2014, LexisNexis, p. 28.

the same effect, however, as internal transactions do not exist within a VAT group and are not therefore subject to VAT, and the situation is the same in a cost sharing group because, '[a]lthough the solutions offered by the cost sharing association [under Article 132(1)(f) of the VAT Directive] and VAT grouping [under its Article 11] are different, their results are effectively the same'.[12]

77. Furthermore, and conversely, in the United Kingdom the non-transposition of Article 132(1)(f) of the VAT Directive has been explained by the fact that the same objectives could be achieved by VAT groups (even though that article was nevertheless ruled to be directly applicable by a tribunal in the United Kingdom[13]).

78. Like a VAT group, the group within the meaning of Article 132(1)(f) of the VAT Directive is thus transparent from the point of view of VAT. It does not operate either as a purchaser, a seller or an agent and does not therefore act as a taxable person as such vis-à-vis its members in the services which it provides to them.

79. In fact, the directive should not have referred to the exemption of the supply of services by IGPs but should have excluded such transactions from VAT.

80. The incurring of expenditure by the group and the passing on of the costs incurred to its members equally are, as it were, internal group expenditure. There is no price. There are therefore no supplies for consideration and no risks taken by reason of a price, but simply the provision of resources with costs being allocated among members depending on the use that each of them makes of those resources. They are, as it were, transactions of a shared office which acts as an internal implementing body for a group, a cog in an undertaking, an implementing organ, but not an undertaking as such, at least for transactions relating to use of common resources within the group.

81. This characterisation refers to paragraph 88 of the judgment of 29 April 2004, *EDM* (C-77/01 EU:C:2004:243)[14] and to a recital of a judgment of the French Conseil d'État (Council of State) of 6 February 1984 in Société d'analyses financière et économique,[15] which stated that 'according to administrative doctrine, where a number of undertakings entrust one of them with the performance of common tasks or where such tasks are performed by a separate company specially created for that purpose, the sums received by the latter company, if they constitute exact reimbursement for goods or services supplied to the other undertakings, do not constitute taxable transactions for the purposes of VAT'.

12 'Under the former, if B is a member of a cost sharing association and A is the umbrella organi[s]ation, the services rendered by A to B are exempt from VAT and, under the latter, if A and B are members of the same VAT group, the services rendered by A to B are ignored for VAT purposes. In both cases, B is enabled to avoid non-deductible input tax, which means that, in the end, C does not have to incorporate hidden VAT in the price charged to the final consumer. It is no coincidence that Art. 13(A)(1)(f) of the Sixth Directive [now Article 132(1)(f) of the VAT Directive] is called a quasi-grouping arrangement'. At the same time, however, '[i]n the absence of VAT grouping rules, the exemption for cost sharing associations is the only way for taxable persons engaged in exempt activities or non-taxable persons to reduce the VAT cost on services under Belgian law. Although their effects are the same, VAT grouping and cost sharing associations have a different scope and different target groups. Cost sharing associations are only aimed at reducing the VAT costs of services rendered to their members. Those members have in common that, in view of their activities, they have no or a limited right to deduct input VAT. VAT grouping is aimed at eliminating the financing of VAT on intra-group transactions, including supplies of goods. The members of VAT groups may have a full, limited or no right to deduct input VAT. The exemption for cost sharing associations offers a (limited) alternative to VAT grouping in Belgium to certain groups of taxable and non-taxable persons. Despite its limitations and complexities, the exemption is frequently used in practice and it is particularly effective in neutralizing the VAT cost of centrally purchased services'. See Vyncke, K., Cost Sharing Associations as an Alternative to VAT Grouping in Belgium, International VAT Monitor, IBFD, 2006, pp. 340 and 346.

13 See VAT and Duties Tribunal, London, decision 14081 of 15 and 16 February 1996 (Peterborough Diocesan Conference and Retreat House).

14 'Consequently, operations such as those at issue in the main proceedings, carried out by the members of a consortium in accordance with the provisions of a consortium contract and corresponding to the share assigned to each of them in that contract, do not constitute supplies of goods or services "effected for consideration" within the meaning of Article 2(1) of the Sixth Directive, nor, consequently, a taxable transaction thereunder. The fact that such operations are carried out by the member of the consortium which manages it is irrelevant in that respect'.

15 Conseil d'État, 7 / 9 SSR, 6 February 1984, 37882, published in *Recueil Lebon*.

82. Furthermore, I think that it is immaterial whether or not the IGP is a taxable person. Article 132(1)(f) of the VAT Directive does not lay down any requirement in respect of IGPs in terms of taxable status. It establishes a single requirement, namely that the *members* of the group are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons.[16]

83. This schematic analysis leads me to conclude that, even if it would have been more accurate to refer to exclusion from VAT, the exemption under Article 132(1)(f) of the VAT Directive cannot be restricted to transactions of IGPs active in areas in the public interest (which would exclude the banking and insurance sector) or *a fortiori* solely to the health sector.

(b) Teleological approach

84. The objective of the exemption in question is to exempt the supply of services to persons who are themselves non-taxable or exempt. The purpose of that exemption is thus 'to avoid an entity offering certain services from being required to pay [VAT] when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake activities essential to the provision of those services'.[17]

85. The exemption at issue therefore essentially seeks to avoid persons grouped in an IGP having to pay VAT on services provided by that IGP, an amount which they could not deduct.[18]

86. This objective justifies the exemption in question being applied to all IGPs whose members are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, including IGPs in the banking and insurance sectors (to which the exemption laid down in Article 135 of the VAT Directive is applicable) and, of course, IGPs who are carrying on activities in the public interest other than in the health sector.

87. I note that this exemption is subject to very strict conditions, namely that the services in question are rendered by an IGP to its members, that the members are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, that those services are directly necessary for the exercise of their activity, and that the groups merely claim from their members exact reimbursement of their share of the joint expenses, all provided that such exemption is not likely to cause distortion of competition.

88. As regards the Federal Republic of Germany's arguments concerning the neutrality of VAT, even if they were correct, they would be ineffective. Whilst it is true that the exemption in question cannot ensure fiscal neutrality, as the 'problem' of non-deductibility of VAT is merely 'moved',[19] this would clearly be applicable both to IGPs active in the health sector and to any other IGP.

16 This point is disputed. See the Opinions of Advocate General Kokott in *Commission* v *Luxembourg* (C-274/15, EU:C:2016:750), *DNB Banka* (C-326/15) and *Aviva* (C-605/15). With regard to the question whether a VAT group, as provided for in Article 11 of the VAT Directive, must itself have the status of a taxable person or whether that must be the case only at the level of its members, see Vyncke, K., *VAT Grouping in the European Union: Purposes, Possibilities and Limitations*, International VAT Monitor, July/August 2007, p. 255.

17 Judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 37. That judgment concerned Article 13A(1)(f) of the Sixth Directive, a provision since replaced by Article 132(1)(f) of the VAT Directive. The wording and position in the scheme of the two directives were identical, although Article 132(1)(f) of the VAT Directive refers to 'persons', not 'professionals'.

18 As Advocate General Mischo has explained, the purpose of this exemption is to unify conditions of competition in a market covered simultaneously by large undertakings, capable of offering their services through the use of their internal resources alone, and other, smaller, undertakings, obliged to call upon external assistance in order to offer the same services (see his Opinion in *Taksatorringen*, C-8/01, EU:C:2002:562, point 120).

19 Defence, paragraphs 53 and 54.

89. In any event, the Federal Republic of Germany acknowledges that, in view of the objective of the exemption in question, it covers IGPs who are carrying on activities in the public interest [20] outside the health sector. Consequently, the arguments which it puts forward with reference to the objective of that exemption manifestly cannot justify interpreting it as being restricted to IGPs in the health sector.

(c) Textual approach

(1) The drafting history of the provision in question

90. First of all, the very drafting history of Article 132(1)(f) of the VAT Directive precludes the restriction of the exemption solely to IGPs in the health sector, as is practised in the Federal Republic of Germany.

91. The Commission Proposal for the Sixth Directive on the harmonisation of legislation of Member States concerning turnover taxes [21] initially provided in Article 14 A(1)(f) that only 'services supplied by the independent professional groups of a medical or like nature to their members for the purposes of their exempted activities' were to be exempted. That proposal ultimately led to the Sixth Directive, which, however, departed from it, as, in Article 13A(f), Article 28(3)(a) and Annex E thereof, it laid down a general exemption for IGPs, irrespective of the sector in which they were active, nevertheless permitting Member States to restrict that exemption, when transposing it into national law, without being able to exclude medical and paramedical professions.

92. This possibility was abolished by the legislature with effect from 1 January 1990, [22] which means that from that date Member States are no longer authorised to restrict the exemption from VAT for IGPs solely to the health professions. [23]

93. Article 132(1)(f) of the VAT Directive reproduced the wording of Article 13A(1)(f) of the Sixth Directive. This also led to the exemption of groups in respect of all exempt professions. The authorisation, which was abolished from 1990, to restrict that exemption to the health professions was not reintroduced in the VAT Directive adopted in 2006. This analysis also clearly rebuts the Federal Republic of Germany's view that it is authorised to restrict the exemption to the health professions.

(2) The wording of the provision at issue

94. However, the Federal Republic of Germany submits that the restriction of the exemption laid down in Article 132(1)(f) of the VAT Directive to activities in the public interest is immediately evident from the wording of Article 132 and from its position in the scheme of the directive. [24]

20 Defence, paragraphs 55 and 56.

21 See footnote 8 of this Opinion. The Commission proposal is on its website: https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/COM(1973)950_en.pdf.

22 See Article 1 of the Eighteenth Directive 89/465.

23 Contrary to the assertion made by the Federal Republic of Germany, it cannot be inferred from the recitals of the Eighteenth Directive 89/465 that the previously applicable derogations were abolished only for reasons of simplifying the calculation of own resources accruing from VAT. The grounds for the adoption of that directive include the fact that the abolition of the existing derogations also contributed to 'greater neutrality of the [VAT] system at [Union] level' (see the third recital reproduced in point 5 of this Opinion).

24 Defence, paragraphs 14 to 39.

95. I note, first of all, that the wording of Article 132(1)(f) of the VAT Directive does not contain any restriction to a determined or determinable professional sector,[25] *a fortiori* solely to the activities mentioned in the preceding points of that provision, which relate inter alia to health,[26] the only restriction being that only services rendered by an IGP to its members are exempt.

96. In addition, those members must be persons who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons. I concur with the Commission that whilst the VAT Directive thus designates the beneficiaries of the exemption, it merely states, as regards the area of professional activity of its members, that they must be activities which are exempt from VAT or in relation to which the members are not taxable persons. Subject to this proviso, that provision of the VAT Directive thus applies to all economic sectors.

97. Nothing in the Court's case-law indicates any other restriction on the exemption laid down in Article 132(1)(f) of the VAT Directive.

98. With regard to Article 13A(1)(f) of the Sixth Directive, whose wording was almost identical and which occupied the same position in the scheme of the directive as Article 132(1)(f) of the VAT Directive, which has since replaced it,[27] the Court ruled in the judgment of 15 June 1989, *Stichting Uitvoering Financiële Acties* (348/87, EU:C:1989:246, paragraph 14) that 'Article 13(A)(1)(f) of the Sixth Directive makes express reference only to [IGPs] supplying services to their members. That is not the position where one foundation supplies services exclusively to another foundation, neither of the foundations being a member of the other. Since the conditions for exemption are precisely formulated, any interpretation which broadens the scope of Article 13(A)(1)(f) of the Sixth Directive would be incompatible with the objective of that provision'.

99. Furthermore, in the judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621), the Court recognised that insurance transactions which were exempt under Article 13(b)(a) of the Sixth Directive came under the exemption for cost sharing. The Court has thus already extended the exemption to activities which do not have a medical or social objective.

100. Second, it is interesting to note that, at the hearing on 30 June 2016 in *DNB Banka* (C-326/15), all the parties except the Federal Republic of Germany, namely DNB Banka AS, the Governments of Luxembourg, Poland and the United Kingdom and the Commission, took the position in essence that, contrary to the claim made by the Federal Republic of Germany, Article 132(1)(f) of the VAT Directive was in fact applicable to financial and insurance services.

101. It is necessary, however, to make a clarification since, although the Polish Government asserted in *DNB Banka* (C-326/15) that 'it is difficult to agree with the Federal Republic of Germany when it states that the exemption does not apply to the financial sector. Poland cannot see any legal basis in the directive for such a claim. Article 132 [of the VAT Directive] states that the activity must be exempt from VAT. There is no sectoral restriction. Poland has never applied such sectoral restrictions in its tax practice', at the hearing in the other connected case *Aviva* (C-605/15) on 7 December 2016, the Polish Government maintained that 'the question of the applicability of Article 132 to insurance operators [had] to be answered in the negative. The exemption in question is not at all applicable to [IGPs] operating in the insurance sector. The exemption being discussed today stems from Article 132 of the directive, which relates entirely to activities in the public interest. Insurance activity is exempt from VAT but is not considered by the directive to be an activity in the public interest and has not been exempted in the light of this public interest aspect'.[28]

25 As the Federal Republic of Germany itself seems to acknowledge (defence, paragraph 16).

26 How can the exclusion of the other paragraphs of Article 132 of the VAT Directive then be justified?

27 I note that the wording of Article 132(1)(f) of the VAT Directive refers to 'persons' and not 'professionals'.

28 See transcript of that hearing, p. 15.

102. In the judgment of 5 October 2016, *TMD* (C‑412/15, EU:C:2016:738), regarding Article 132(1)(d) of the VAT Directive, the Court held that the supply of human blood could benefit from the exemption under that provision only if it contributed directly to activities in the public interest (paragraph 33), thereby excluding ‘industrial’ plasma, since it was intended to be incorporated into an industrial production, in particular with a view to manufacturing medicinal products. That judgment does not alter my reasoning in the present case in so far as it is not disputed that the supply of human blood was included in Article 132(1) of the VAT Directive precisely by virtue of its character as an activity in the public interest and that the exemption therefore had to be restricted to activities having that character. The question raised in the present case is also precisely whether or not the exemption laid down in point (f) is subject to the same condition (of being restricted to activities in the public interest) and I propose that it be answered in the negative.

(3) The title of Chapter 2 of the VAT Directive and the provision at issue

103. The fact remains that the exemption in question is included in Chapter 2 of the VAT Directive, entitled ‘Exemptions for certain activities in the public interest’, and that all the other subparagraphs of paragraph 1 of Article 132 relate to activities in the public interest.[29]

104. In my view, the mere fact that the chapter to which Article 132 of the VAT Directive belongs is entitled ‘Exemptions for certain activities in the public interest’ does not detract from the uniformity of its wording[30] and that the title of a chapter is merely indicative for the purposes of the interpretation of the provisions contained therein.[31]

105. The position of Article 132(1)(f) of the VAT Directive in the chapter entitled ‘Exemptions for certain activities in the public interest’ does not therefore, it itself, show that the legislature intended to restrict the scope of application of the exemption in question.

106. Furthermore, the position of that exemption in the VAT Directive can be explained by historical reasons, as the Commission has acknowledged[32] that the title of Article 132 of the VAT Directive was the result of careless drafting.

107. I note that the Commission’s initial proposal for the Sixth Directive[33] actually envisaged restricting the exemption to activities in the public interest. Thus, in that proposal the exemption was — correctly from a schematic point of view — fully contained in that title, which was maintained. However, when the scope of the exemption was modified in the course of the legislative process, the EU legislature neglected to change the position in the directive of point f of paragraph 1 of Article 132 of the VAT Directive.

108. The Commission attempted to remedy this in particular by its Proposal for a Directive of 28 November 2007[34] relating to insurance and financial service undertakings, although, according to the Commission, it can be inferred from this that it considered that Article 132(1)(f) of the VAT Directive was not applicable to insurance and financial service undertakings exempt from VAT under

29 I repeat that, even if it did follow from the position of the exemption in question within the VAT Directive that it covered only IGPs carrying on activities in the public interest (quod non), this certainly would not mean that the exemption would be restricted to IGPs in the health sector, contrary to the claim made by the Federal Republic of Germany. In such a case, the exemption would in any event also have to be extended to IGPs carrying on other professional activities in the public interest which are exempt from VAT, such as activities linked to welfare and social security work, education, sport and culture. I am referring to Article 132(1)(g), (i), (m), (n) and (q) of the VAT Directive.

30 See, by analogy, judgment of 1 March 2016, *Alo and Osso* (C‑443/14 and C‑444/14, EU:C:2016:127, paragraph 25).

31 See, by analogy, with regard to the combined nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), judgment of 12 June 2014, *Lukoyl Neftohim Burgas* (C‑330/13, EU:C:2014:1757, paragraph 33).

32 See Commission’s reply, paragraphs 9 and 14.

33 See footnotes 8 and 21 of this Opinion.

34 See footnote 6 of this Opinion. See in this regard De Duve, B., op.cit., p. 8 et seq.

Article 135. For the Commission, that proposal for a directive sought to clarify in general the rules governing exemption from VAT for insurance and financial services, including cost sharing (paragraph 1 of the explanatory memorandum), but the Federal Republic of Germany asserts that, in paragraph 3 of the explanatory memorandum, it is stated that the proposal entails the 'introduction of a cost-sharing group', which tends to indicate that that notion did not exist for the sectors in question. It is difficult not to conclude that the careless drafting persisted. In any case, the proposal was withdrawn by the Commission [35] and, moreover, it post-dates the VAT Directive.

109. I observe in this regard that between 2007 and 2013 there was also other work to reform VAT, from which it is apparent that the Member States and the Commission proceeded from the idea that the exemption for activities of IGPs was applicable to the banking and financial sectors and that it was not envisaged to withdraw it. This point was in any event made by the Grand Duchy of Luxembourg at the hearing in *DNB Banka* (C-326/15). When questioned about this subject at the hearing in the present case, the Commission confirmed that this was the situation, except in the Federal Republic of Germany.

110. Aside from the fact that a chapter title can be merely indicative and evidently cannot prevail over the uniformity of the actual wording of the provision, it is not clear from the foregoing that the EU legislature intended to reserve the exemption laid down in Article 132(1)(f) of the VAT Directive for IGPs carrying on activities in the public interest. *A fortiori*, these elements cannot call into question the conclusions which can be drawn from the schematic and teleological approaches and the analysis of the wording of the provision at issue.

(d) Interim conclusion

111. In the light of the foregoing considerations, I take the view that, despite the imperfections in the wording of the VAT Directive, the exemption laid down in Article 132(1)(f) of that directive may not be restricted to activities in the public interest or *a fortiori* to the health sector.

2. Second category of arguments put forward by the Federal Republic of Germany: the condition laid down in Article 132(1)(f) of the VAT Directive relating to the absence of distortion of competition

(a) Arguments of the parties

112. According to the Commission, the restriction under the German VAT legislation is also not justified by the possibility of a general distortion of competition. The possible existence of a distortion of competition if the exemption is applied can be assessed only in the light of the circumstances of the individual case. It is not possible make a general finding that distortions of competition exist for the supply of services by certain professions and for services rendered by a group, which are directly related to them, which is disputed by the Federal Republic of Germany.

113. Unlike the Commission, however, the Federal Republic of Germany considers that there is no need to ascertain in each case whether there is a risk of distortion of competition and that the national legislature may rely on standard categories in the transposition process. It considers that this position is supported by the fact that the national legislature is not obliged to transpose a directive literally and that an examination in each individual case is quite simply impossible to conduct for the tax authorities concerned. [36]

35 OJ 2016 C 155, p. 3.
36 Defence, paragraphs 67 to 86.

(b) Assessment

114. It is common ground between the Federal Republic of Germany and the Commission that the exemption laid down in Article 132(1)(f) of the VAT Directive is subject to a proviso. The grant of the exemption may be refused if there is a risk that the exemption may by itself, immediately or in the future, cause distortions of competition.

115. With regard to the condition relating to the absence of distortion of competition mentioned in Article 132(1)(f) of the VAT Directive, the Court's case-law states that the Member States are not obliged to transpose that condition literally into their national law.[37] In actual fact, this point is also not disputed by the parties.[38]

116. Looking more precisely at the disagreement between the Federal Republic of Germany and the Commission in the present case, the judgment of 19 December 2013, *Bridport and West Dorset Golf Club*, C-495/12, EU:C:2013:861, examined the power conferred on the Member States by Article 133(d) of the VAT Directive to make the granting of certain exemptions from VAT subject in each individual case to the condition that those exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

117. In that judgment the Court ruled that this 'power conferred on the Member States — the scope of which falls to be determined in the context of the conditions set out in Article 133(a) to (c) of [the VAT Directive] — does not extend to the adoption of general measures such as the measure at issue in the main proceedings limiting the scope of those exemptions. According to the case-law of the Court on the corresponding provisions of the Sixth Directive, a Member State may not, by making the exemption in Article 132(1)(m) of that directive subject to one or more of the conditions laid down in Article 133 of the directive, alter the scope of that exemption'.[39]

118. Accordingly, I concur with the Commission that Article 132(1)(f) of the VAT Directive requires an examination in each individual case whether there is a risk of distortion of competition. Only such an examination in each individual case makes it possible to determine the exemption from VAT, with a view to refusal, 'if there is a genuine risk that the exemption may *by itself*, immediately or in the future, *give rise to* distortions of competition' (emphasis added), as the Court ruled with regard to Article 13(1)(f) of the Sixth Directive, which preceded Article 132(A)(1)(f) of the VAT Directive, in its judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621, paragraph 65). Accordingly, it is a genuine risk that must be determined and I think that it is impossible to assess the existence of distortion of competition generally for services supplied by certain professions and for services of an IGP which are directly related to them.

119. According to the Commission, the fact that the exemption set out in Article 132(1)(f) of the VAT Directive requires an examination of the factual circumstances and individual transactions is also apparent from paragraph 77 of the letter drafted by the Federal Ministry of Finance[40] in 2009 at the time of an amendment of Paragraph 4 of the UStG, from which the relevant version of that provision originates. In paragraphs 71 to 78 of that letter, entitled 'Turnover tax; introductory letter for Paragraph 4(14) of the UStG, in the version in force with effect from 1 January 2009', the Federal

37 With regard to the criterion of 'significant distortions of competition' mentioned in the second subparagraph of Article 4(5) of the Sixth Directive, a provision since replaced by Article 13 of the VAT Directive, see, by analogy, judgment of 17 October 1989, *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraph 23).

38 See, in particular, defence, paragraph 75, and Commission's reply, paragraph 24.

39 Paragraph 35, where the Court refers to the judgment of 7 May 1998, *Commission* v *Spain* (C-124/96, EU:C:1998:204, paragraph 21).

40 See point 25 of this Opinion.

Ministry of Finance states that the exemption is applicable only if the services are supplied by IGPs for members belonging to a health profession mentioned in Paragraph 4(14) of the UStG and if they are used directly for exempt transactions of those members. Paragraph 77 of that letter states that the exemption may not lead to a distortion of competition:

'In accordance with Article 132(1)(f) of the VAT Directive, the exemption may not cause distortion of competition. It may therefore apply only to the other supplies of groups of medical practices and apparatus pooling groups, but not to cases where a group takes charge of, for example, accounting, legal advice or the activity of a medical compensation fund for its members'.

120. That document postulates an examination in each individual case. Why would that examination be possible for the health sector and impossible for others, such that it is presumed that a distortion of competition exists for the latter?

121. Although a Member State may legitimately define in greater detail the condition relating to the absence of distortion of competition set out in Article 132(1)(f) of the VAT Directive, it must ensure that such more detailed definition does not restrict or extend the scope of the exemption under Article 132(1)(f) of the VAT Directive.

122. Furthermore, it would seem that German turnover tax law has been a source of practical problem for the German courts to the extent that, contrary to the wording of Paragraph 4 of the UStG and by virtue of the direct applicability of EU law, certain decisions of those courts have already led to the exemption in question being extended [41] to IGPs in other professions not covered by Paragraph 4 of the UStG, taking the view that groups of social organisations, such as health centres, [42] or insurance groups, such as sickness insurance funds, [43] should come under the exemption. On each occasion, they have stated that the grant of the exemption required the authorities to satisfy themselves, by means of an examination (it would seem, in each individual case) of the absence of distortion of competition.

123. As the Commission added, certain draft laws submitted to the German Parliament also show that the German legislature does not connect the risk of distortion of competition to the extension of the exemption to IGPs in the banking and insurance sector. [44]

124. Lastly, it does not seem that the German legislature conducted a thorough analysis of a genuine and general risk of a distortion of competition for any sector other than the health sector, [45] whereas the rule laid down in Article 132(1)(f) of the VAT Directive is the exemption and the risk of distortion of competition must therefore be proved.

125. Although it is not disputed that, in an action for failure to fulfil obligations, the burden of proof lies with the Commission, I think that the Federal Republic of Germany went too far in asserting at the hearing that it falls to the Commission to prove the absence of a risk of distortion of competition for sectors not covered by the exemption under the German legislation. This would be similar to a *probatio diabolica*.

126. In conclusion, I consider that the restriction under the German legislation cannot be justified by a genuine and general risk of distortion of competition for all IGPs other than those active in the health sector.

41 At the hearing the Federal Republic of Germany preferred to speak of a reconsideration of the restriction of the exemption, as provided for by the German legislation at issue.

42 Judgment of the Bundesfinanzhof (Federal Finance Court) of 30 April 2009, No V R 3/08.

43 Judgment of the Bundesfinanzhof (Federal Finance Court) of 23 April 2009, No V R 5/07.

44 See the statement by the Bundesrat (Federal Council) on the Draft law on the further development of financial market stabilisation, Bundestag printed paper 16/13384 of 12 June 2009, p. 5.

45 The representative of the German Government stated at the hearing that he 'imagined' that the German legislature had conducted such an analysis.

V. Costs

127. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

VI. Conclusion

128. For these reasons, I propose that the Court should:

– declare that, by restricting to groups whose members exercise a limited number of professions the exemption for the supply of services by independent groups of persons carrying on an activity which is exempt from VAT, or in relation to which they are not taxable persons, to their members for the direct purposes of the exercise of that activity where those groups merely claim from their members exact reimbursement of their share of the joint expenses, the Federal Republic of Germany has failed to fulfil its obligations under Article 132(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and

– order the Federal Republic of Germany to pay the costs.