Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 21 December 2016*

Case C-633/15

London Borough of Ealing
v
Commissioners for Her Majesty's Revenue and Customs(Request for a preliminary ruling

from the First-tier Tribunal (Tax Chamber) (United Kingdom))

(VAT — Exemptions — Supplies of services closely linked to sport — Exclusion of the exemption in the event of a risk of distortion of competition to the disadvantage of commercial enterprises subject to VAT))

I – **Introduction**

1. The request for a preliminary ruling concerns the interpretation of point (d) of the first paragraph and the second paragraph of Article 133 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2. This request has been made in proceedings between the London Borough of Ealing and the Commissioners for Her Majesty's Revenue and Customs (the United Kingdom tax and customs authority; 'the tax authority') concerning the chargeability of value added tax (VAT) on entrance fees to sports facilities received by the London Borough of Ealing.

II – **Legal context**

A – *EU law*

3. Article 13A of Sixth Council Directive 77/388/EEC of 19 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — common system of value added tax (OJ 1977 L 145; 'the Sixth Directive'), entitled 'Exemptions for certain activities in the public interest', provides as follows:

'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:

…

* Original language: French.

(m) certain services closely linked to sport or physical education supplied by non-profit-making organisations to persons taking part in sport or physical education;

…

2.

(a) Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b), (g), (h), (i), (l), (m) and (n) of this Article subject in each individual case to one or more of the following conditions:…

— exemption of the services concerned shall not be likely to create distortions of competition such as to place at a disadvantage commercial enterprises liable to value added tax;

…'

4. In accordance with Article 28(3)(a) of that directive, Member States could, during a transitional period, continue to subject to VAT the transactions exempt under Article 13 or 15 set out in Annex E to that directive.

5. Point 4 of that annex contained the exemption provided for in Article 13A(1)(m) of the Sixth Directive. Point 4 was repealed, with effect from 1 January 1990, by point 1 of Article 1 of Eighteenth Council Directive 89/465/EEC 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; 'the Eighteenth Directive'), point 1 of Article 1 is worded as follows:

'[The Sixth Directive] is hereby amended as follows:1. With effect from 1 January 1990 the transactions referred to in points 1, 3 to 6 … of Annex E shall be abolished.

Those Member States which, on 1 January 1989, subjected to value added tax the transactions listed in Annex E, points 4 and 5, are authorised to apply the conditions of Article 13A(2)(a), final indent, also to services rendered and goods delivered, as referred to in Article 13A(1)(m) and (n), where such activities are carried out by bodies governed by public law.'

6. Directive 2006/112, in accordance with Articles 411 and 413, repealed and replaced, with effect from 1 January 2007, the EU legislation on value added tax, including the Sixth Directive. According to recitals 1 and 3 of Directive 2006/112, the recast text of the Sixth Directive was necessary in order to ensure that all the applicable provisions were presented in a clear and rational manner, in a reworked structure and version without, in principle, bringing about material changes. The provisions of that directive are thus, in essence, identical to the corresponding provisions of the Sixth Directive.

7. Article 13(1) of Directive 2006/112 provides as follows:

'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.

…'

8. Article 132(1)(m) of that directive, which features in Chapter 2 of Title IX, entitled 'Exemptions for certain activities in the public interest', provides as follows:

'Member States shall exempt the following transactions:

…

the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education'.

9. In the words of Article 133 of Directive 2006/112:

'Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points … (m) and … of Article 132(1) subject in each individual case to one or more of the following conditions:

…

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

Member States which, pursuant to Annex E [to the Sixth Directive], on 1 January 1989 applied VAT to the transactions referred to in Article 132(1)(m) and (n) may also apply the conditions provided for in point (d) of the first paragraph of this Article when the said supply of goods or services by bodies governed by public law is granted exemption'.

B – *United Kingdom law*

10. During the transitional period referred to in Article 28(3) of the Sixth Directive, the United Kingdom of Great Britain and Northern Ireland continued to tax sporting services closely linked to sport and physical education supplied by non-profit-making bodies. Under Group 10 of Schedule 6 of the Value Added Tax Act 1983, only two of those supplies of services were exempt from VAT: (i) the grant by any profit-making or non-profit-making body of a right to enter a sporting competition where the consideration for that right is allocated wholly towards the financing of a prize or prizes awarded in that competition and (ii) the grant by a non-profit-making body established for the purposes of sport or physical recreation of a right to enter a competition in such an activity.

11. With effect from 1 January 1994, the United Kingdom exempted sporting services supplied by non-profit-making bodies to individuals, save for a number of exceptions. In accordance with Group 10 of Schedule 9 of the Value Added Tax Act 1994, that exemption was to apply to:'1. The grant of a right to enter a competition in sport or physical recreation where the consideration for the grant consists in money which is to be allocated wholly towards the provision of a prize or prizes awarded in that competition.

2. The grant by an eligible body established for the purposes of sport or physical recreation, of a right to enter a competition in such an activity.

3. The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part.'

12. Note 2A to Group 10 defines 'eligible body' as meaning a non-profit-making body which meets certain conditions. According to Note 3 to Group 10, non-profit-making bodies governed by public law (namely local authorities, Government departments and public entities on the list published in 1993 by the Office of Public Service and Science) cannot be regarded as 'eligible bodies' within the meaning of Item 3 of Group 10 of Schedule 9 of the Value Added Tax Act 1994.

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

13. The London Borough of Ealing is a local authority which operates sports facilities, such as gymnasia and swimming pools. During the period 1 June 2009 to 31 August 2012 it paid the VAT collected on the admission charges to those sports facilities.

14. Being of the view that those supplies of services should be exempt from VAT, pursuant to Article 132(1)(m) of Directive 2006/112, the London Borough of Ealing requested reimbursement from the tax authorities of the VAT which had been paid in respect of those services. Its request was refused on the ground that the national legislation excluded from that exemption supplies of sporting services by local authorities, such as the London Borough of Ealing, in accordance with point (d) of the first paragraph of Article 133 of that directive.

15. The London Borough of Ealing brought an action against that decision before the First-tier Tribunal (Tax Chamber) (United Kingdom). Before that tribunal, it maintained that the United Kingdom could not rely on the second paragraph of Article 133 of that directive, since the national legislation had not subjected all supplies of sporting services to VAT on 1 January 1989, but had exempted some supplies of such services. In addition, that provision did not allow local authorities to be excluded from the exemption in respect of sporting services, while exempting the same services provided by other non-profit-making organisations. Last, as under Article 133 the question whether that exemption would be likely to cause distortion of competition had to be evaluated in each individual case, it did not allow Member States to exclude all local authorities from that exemption.

16. The referring tribunal states that the London Borough of Ealing does not claim to be acting as a public authority within the meaning of Article 13(1) of Directive 2006/112 when providing its services. It acts as a non-profit-making body, within the meaning of the exemption provided for in Article 132(1)(m) of that directive, whose services supplied are closely linked to sport and are intended for persons pursuing sport.

17. According to that tribunal, it is solely the meaning, scope and application of point (d) of the first paragraph and the second paragraph of Article 133 of that directive that have given rise to the dispute in the main proceedings. In that regard, the referring tribunal states that there is no objective difference for customers between the nature of the services supplied by the London Borough of Ealing and those supplied by other non-profit-making bodies.

18. In, those circumstances, the First-Tier Tribunal (Tax Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the United Kingdom entitled, pursuant to the final paragraph of Article 133 of [Directive 2006/112], to impose the condition contained in [point] (d) of that article on bodies governed by public law, (i) in circumstances where the relevant transactions were treated by the United Kingdom as taxable on 1 January 1989, but other sporting services were subject to exemption on that date and (ii) in circumstances where the relevant transactions had not first been granted exemption under national law before the United Kingdom sought to impose the condition contained in [point (d) of the first paragraph of] Article 133 [of that directive]?

(2) If the answer to [Question] (1) above is in the affirmative, is the United Kingdom entitled to impose the condition contained in [point] (d) of [the first paragraph of] Article 133 [of Directive 2006/112] on non-profit-making bodies governed by public law without also applying that condition to non-profit-making bodies which are not governed by public law?

(3) If the answer to [Question] (2) above is in the affirmative, is the United Kingdom permitted to exclude all public non-profit-making bodies from the benefit of the exemption contained in Article 132(1)(m) [of Directive 2006/112] without having considered in each individual case whether the granting of exemption would be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT?'

IV – **Procedure before the Court**

19. The present request for a preliminary ruling was lodged at the Court on 30 November 2015. The London Borough of Ealing, the United Kingdom Government and the European Commission have submitted written observations.

20. A hearing took place on 26 October 2016, during which the London Borough of Ealing, the United Kingdom Government and the Commission presented their oral observations.

V – **Analysis**

A – *Preliminary observations*

21. The general rule in VAT matters, laid down in Article 2(1)(a) and (c) of Directive 2006/112, is that the supply of goods and services for consideration within the territory of a Member State is to be subject to VAT.

22. Article 13 of Directive 2006/112 excludes from the concept of taxable person for the purposes of VAT bodies governed by public law in respect of the activities or transactions in which they engage as public authorities. On the other hand, where a non-profit-making body governed by public law acts in the same way as bodies other than those governed by public law (that is to say, in the same way as private economic operators), it is subject to VAT in respect of the taxable activities and transactions.

23. Under Article 132(1) of Directive 2006/112, Member States are required to exempt a large number of cases, in favour of certain activities of general interest, including, in point (m) of that provision, sporting services, where they are supplied by non-profit-making bodies. The objective sought by the EU legislature is to encourage involvement in sport and physical activity, owing to the benefits which these provide for the population in terms of physical development and health.

24. By way of derogation from the rule laid down in Article 132(1)(m), the first paragraph of Article 133 of that directive confers on Member States the option to make the grant of the exemption to non-profit-making bodies other than those governed by public law subject to four different conditions, including, in point (d) of that provision, the condition relating to competition. According to that condition, 'the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT'.

25. All Member States may apply that derogation.

26. In only the Member States which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services,** the second paragraph of Article 133 of Directive 2006/112 offers the possibility of an additional derogation, whereby those States may make the grant of the exemption to non-profit-making bodies governed by public law subject only to the condition relating to competition, namely the condition set out in point (d) of the first paragraph of Article 133 of that directive. It is true that the other conditions set out in that provision and, in any event, the conditions set out in points (a) and (b) are addressed more naturally to non-profit-making bodies governed by private law.***

27. It follows from the foregoing that more favourable tax treatment is reserved for non-profit-making bodies governed by public law both in Member States which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services and in Member States which had not made use of that option.

28. In short, Member States which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services may make the grant of the exemption subject to compliance with the four conditions laid down in the first paragraph of Article 133 where the supplier of the sporting services at issue is a non-profit-making body other than one governed by public law, whereas in the case of non-profit-making bodies governed by public law, the grant of that exemption can be made subject only to the condition relating to competition.

29. Member States which had not made use of the option offered by Annex E to the Sixth Directive can make only the exemption granted to non-profit-making bodies other than those governed by public law subject to conditions, as non-profit-making bodies governed by public law are definitively exempted on the basis of Article 132(1)(m) of that directive. If the Member States do not impose such conditions, the services in question are definitively exempted for all non-profit-making bodies.

30. It is apparent from the request for a preliminary ruling that the United Kingdom is one of the Member States which on 1 January 1989 applied VAT to sporting services in application of Annex E to the Sixth Directive.

31. It is apparent that the United Kingdom legislation at issue in the main proceedings automatically excludes non-profit-making bodies governed by public law (including local authorities such as the London Borough of Ealing) from the benefit of the exemption from VAT for sporting services,**** without any reference to the condition relating to competition to compliance with which the United Kingdom may make the grant of the exemption subject pursuant to the second paragraph of Article 133 of Directive 2006/112.

32. The Court might thus take the view that the questions referred for a preliminary ruling are purely hypothetical, since it is asked whether the United Kingdom is permitted to impose on bodies governed by public law the condition relating to competition laid down in point (d) of the first paragraph of Article 133 of that directive and, if so, on what conditions, even though that condition is nowhere laid down in the United Kingdom legislation or the explanatory notes issued by the United Kingdom administration. It would then be necessary to conclude that the VAT applied to the sporting services

** According to the Commission, the Member States affected by that provision are the Federal Republic of Germany and the United Kingdom.

*** According to point (a) of the first paragraph of Article 133 of Directive 2006/112, 'the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied'. Under point (b) of that provision, 'those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned'. According to point (c) of the first paragraph of Article 133 of that directive, 'those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT'.

**** With the exception of the rights to enter a sports competition, which are exempt from VAT for all non-profit-making bodies.

supplied by non-profit-making bodies governed by public law had no legal basis, since the rule is exemption, possibly subject to conditions, which is not the case in regard to the United Kingdom rule, which, as the United Kingdom stated at the hearing, quite simply excludes the supply of those services from the exemption.

33. All of the parties which took part in the hearing confirmed, moreover, that the United Kingdom legislation does not refer expressly to the condition relating to competition set out in point (d) of the first paragraph of Article 133 of that directive.

34. Nonetheless, the referring tribunal, the parties to the main proceedings and the Commission proceed on the assumption that the exclusion of local authorities from the benefit of the exemption from VAT on the supply of sporting services is the consequence of the United Kingdom's use of the option granted to it by the second paragraph of Article 133 to make the grant of the exemption to non-profit-making bodies governed by public law subject to fulfilment of the condition that it is not 'likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT'. *****

35. At the hearing, the London Borough of Ealing stated that the United Kingdom authorities claim that they are entitled to rely on the condition relating to competition, a concept which is to be understood as the manifestation of their decision to exclude local authorities from the exemption because their activities necessarily cause distortions of competition.

36. The United Kingdom Government's representative agreed with the London Borough of Ealing's comments on that point, taking the view that that position was justified by the danger that local authorities would subsidise sports activities and that a distortion of competition was the result of their 'likely conduct'.

37. The Commission took the same view and recognised that the condition relating to competition was nowhere expressly stated in the United Kingdom legislation, but that that was not necessary owing to the latitude left to Member States by that directive. ******

38. On the assumption that the Court accepts the argument that the United Kingdom legislation implicitly imposed the condition relating to competition, I shall base my reasoning in the remainder of this Opinion on the assumption that, so far as the United Kingdom legislature and tax authority are concerned, the grant of the exemption from VAT on sporting services supplied by non-profit-making bodies governed by public law is 'likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT' ******* *in all cases*. Although the condition is implicitly present in the United Kingdom legislation, it is presumed, however, that it is never fulfilled.

B – *First question referred*

39. By its first question, the referring tribunal asks, in essence, whether the second paragraph of Article 133 of Directive 2006/112 authorises a Member State to impose on bodies governed by public law the condition relating to competition laid down in point (d) of the first paragraph of Article 133 of that directive where, pursuant to Annex E to the Sixth Directive, on 1 January 1989 that Member State subjected only some supplies of sporting services to VAT and exempted others.

***** Point (d) of the first paragraph of Article 133 of that directive, to which the second paragraph of Article 133 refers.

****** Although the Commission's representative quoted, with regard to the discretion left to Member States, a proverb that might apply in the present case: 'Give him an inch, he will take a mile'.

******* Point (d) of the first paragraph of Article 133 of Directive 2006/112.

40. I agree with the United Kingdom Government and the Commission that the answer to that question must be in the affirmative.

41. As is clear from its wording, the second paragraph of Article 133 of Directive 2006/112 does not require that all sporting services must have been subject to VAT on 1 January 1989 in order for the Member State to be able, at the end of the transitional period, to impose the condition relating to competition on non-profit-making bodies governed by public law. Quite to the contrary, it refers generally to Member States 'which, pursuant to Annex E [to the Sixth Directive], on 1 January 1989 applied VAT to the transaction referred to in Article 132(1)(m) …', which was the case of the United Kingdom.

42. Although the position might have been clearer had the reference been to Member States 'which, pursuant to Annex E [to the Sixth Directive], on 1 January 1989 applied VAT [*to some*] transactions referred to in Article 132(1)(m) …'********, such a contrary interpretation would not be consistent with the aim of the Sixth Directive,********* which was to permit Member States, during a transitional period, to extend the arrangements under which those supplies of sporting services were subject to VAT. In other words, it was previously open to Member States to make the supply of sporting services subject to VAT, but they were not required to do so. It follows that on 1 January 1989 VAT did not necessarily have to be applied to all supplies of sporting services.

43. The London Borough of Ealing contends that a literal and strict interpretation of the phrase 'when the said supply of goods or services by bodies governed by public law is granted exemption' in the second paragraph of Article 133 of Directive 2006/112 required the United Kingdom to exempt the transactions at issue when amending its legislation in 1994, before applying the condition relating to competition.

44. That is not how I interpret that provision. The actual words used by the EU legislature run counter to that interpretation. The provision at issue refers to the supply of services which 'are exempt' and not to those which 'were exempt' at the time. The fact that a Member State chooses to exempt sporting services and at the same time to use the condition relating to competition cannot be regarded as incompatible with EU law. Quite to the contrary, that approach is identical to that adopted by point 1 of Article 1 of the Eighteenth Directive,********** whereby the EU legislature had required Member States 'which, pursuant to Annex E [to the Sixth Directive], on 1 January 1989 applied VAT [to the supply of sporting services]' to exempt them from 1 January 1990 at the same time as it had allowed them to make the grant of the exemption to non-profit-making bodies subject to conditions.

45. The fact that the United Kingdom was not required to exempt the supply of sporting services from VAT before applying the condition relating to competition is even based on the requirement that Directive 2006/112 be interpreted and applied in a manner consistent with the Eighteenth Directive.

46. In fact, Directive 2006/112 is merely a recasting of the earlier VAT directives, in particular the Sixth and Eighteenth Directives, and contains no substantive changes.*********** The wording of Article 1 of the Eighteenth Directive brought to an end, as from 1 January 1990, the transitional period during which sporting services supplied by non-profit-making bodies could continue to be subject to VAT. That article is also at the origin of the second paragraph of Article 133 of Directive 2006/112.

******** Emphasis added.

********* See Article 28(3)(a), in conjunction with Annex E, point 4, of the Sixth Directive. The transitional nature of those provisions, which permitted a temporary derogation from the exemption in the case of the supply of sporting services laid down in Article 13A(1)(m) of that directive, implies that they did not preclude the partial exemption of the supply of those services. See, by analogy, judgment of 29 April 1999, *Norbury Developments* (C-136/97, EU:C:1999:211, paragraphs 19 and 20).

********** See point 5 of this Opinion.

*********** See recitals 1 and 3 of the directive.

47. Nor does Article 1 of the Eighteenth Directive use the words 'where the [supply of sporting services] by bodies governed by public law is granted exemption', which suggests that it was not envisaged that an additional condition would be added in order for Member States to be able to apply the condition relating to competition to non-profit-making bodies governed by public law. That article required only that the transactions in question were subject to VAT on 1 January 1989 in order for the Member State concerned to be able to impose the condition relating to competition on the activities carried out by non-profit-making bodies governed by public law.

48. For those reasons, I propose that the Court's answer to the first question should be that point (d) of the first paragraph and the second paragraph of Article 133 of Directive 2006/112 must be interpreted as meaning that it allows Member States to impose the condition relating to competition on non-profit-making bodies governed by public law even if sporting services other than those that were subject to VAT on 1 January 1989 were granted exemption on that date and even if the sporting services in question were not granted exemption under national law before the Member State applied the condition laid down in point (d) of the first paragraph of Article 133 of Directive 2006/112.

C – *Second question referred*

49. By its second question, the referring tribunal asks, in essence, whether the second paragraph of Article 133 of Directive 2006/112 authorises a Member State which, pursuant to the Sixth Directive, on 1 January 1989 applied VAT to sporting services to impose VAT on sporting services********** supplied by non-profit-making bodies governed by public law********** when it exempts other non-profit-making bodies without imposing on them any of the conditions laid down in the first paragraph of Article 133 of that directive, and in particular the condition relating to competition laid down in point (d) of that provision.

50. I propose that this question should be answered in the negative, for the following reasons.

51. As I stated in points 23 and 24 of this Opinion, Article 132 of Directive 2006/112 imposes on Member States the principle that sporting services supplied by all non-profit-making bodies, whether governed by public law or not, are to be exempted from VAT. However, there are exceptions to that principle, since Article 133 of that directive sets out the conditions to which Member States may subject the grant of the exemption.

52. All Member States may make the exemption from VAT of sporting services supplied by non-profit-making bodies other than those governed by public law subject to the four conditions laid down in points (a) to (d) of the first paragraph of Article 133.

53. Only Member States which on 1 January 1989 applied VAT to sporting services supplied by non-profit-making bodies, whether governed by public law or not, may *also* (as from 1 January 1990) make that exemption subject only to the condition relating to competition laid down in point (d) of that provision.**********

********** Apart from the rights to enter sports competitions.

********** By imposing on them the condition relating to competition set out in point (d) of the first paragraph of Article 133 of that directive and by taking the view that that condition is never satisfied in regard to them.

********** See the second paragraph of Article 133 of that directive. As I have observed in point 26 of the present Opinion, it seems to me that the conditions set out in points (a) to (d) of that provision are more appropriate to be applied to non-profit-making bodies governed by private law than to those governed by public law.

54. That said, the wording of the second paragraph of Article 133 raises a number of problems. Inter alia, it allows Member States which on 1 January 1989 applied VAT to sporting services pursuant to Annex E to the Sixth Directive to apply '*the conditions* provided for in point (d) of the first paragraph', although only one single condition is provided for in that point. Nor does it specify to whom those conditions may be applied, although it refers to the exemption in question only with respect to non-profit-making bodies governed by public law.

55. Furthermore, it uses the terms 'when the said supply of … services by bodies governed by public law is granted exemption', which might give the impression that certain Member States may continue to apply VAT to sporting services supplied by non-profit-making bodies governed by public law, which to my mind would be contrary to the exemption rule established by the EU legislature.

56. Given that lack of clarity in the wording of the second paragraph of Article 133 of that directive, I find that the wording of point 1 of Article 1 of the Eighteenth Directive, to which Directive 2006/112 is not supposed to have made the slightest substantive change,********** is clearer.

57. According to that provision, 'Member States which, on 1 January 1989, subjected to [VAT] the transactions [relating to sporting services] are authorised to apply [the condition relating to competition] also to services rendered … as referred to in Article 13A(1)(m) …, where such activities are carried out by bodies governed by public law'.

58. That wording shows clearly, in the first place, that the exemption of sporting services supplied by bodies governed by public law must be the rule, even in Member States which, like the United Kingdom, applied VAT to those services on 1 January 1989 pursuant to Annex E to the Sixth Directive, and, in the second place, that for non-profit-making bodies governed by public law the exemption may be made subject to the condition relating to competition.

59. According to the Court's case-law, moreover, the conditions to which the Member State may make the grant of the exemption subject 'do not in any way affect the definition of the subject matter of the exemptions',********** as Member States '[may not] make that exemption subject to any conditions other than those laid down in [the directive].**********

60. It follows that if the difference in treatment in favour of non-profit-making bodies governed by public law********** is, as the Commission observes, inherent in Directive 2006/112, the Member States cannot alter either the sense or the extent of that difference.

61. However, in the present case the United Kingdom legislation at issue reverses that difference in treatment by not making the grant of the exemption to non-profit-making bodies other than those governed by public law subject to compliance with any of the conditions laid down in the first paragraph of Article 133 of that directive, whereas it generally excludes local authorities from the advantage of the exemption by implicitly presuming that the condition relating to competition imposed on them can never be satisfied in their regard.

62. That legislation assumes a very different reading of Article 133 of that directive from my reading of it, namely that the two paragraphs of that article are independent of each other, to such an extent that they leave the Member States which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services an unfettered discretion as to whether to grant the exemption.

********** See recitals 1 and 3 of that directive.

********** Judgment of 7 May 1998, *Commission* v *Spain* (C-124/96, EU:C:1998:204, paragraph 11).

********** Judgment of 7 May 1998, *Commission* v *Spain* (C-124/96, EU:C:1998:204, paragraph 18 and the case-law cited).

********** See points 24 to 27 of this Opinion.

63. I consider that that reading is contrary to both the wording of the second paragraph of Article 133 and the principle of fiscal neutrality.

64. Like point 1 of Article 1 of the Eighteenth Directive, the second paragraph of Article 133 of Directive 2006/112 provides that Member States which, pursuant to Annex E to the Sixth Directive, on 1 January 1989 applied VAT to sporting services 'may *also*' ********** make the grant of the exemption to non-profit-making bodies governed by public law subject to the condition relating to competition.

65. To my mind, the use of the word 'also' implies that those Member States can make the grant of the exemption to non-profit-making bodies governed by public law subject to that condition only where they already do so for other non-profit-making bodies.

66. I arrive at the same result on the basis of the principle of fiscal neutrality, which, in VAT matters, is the expression of the general principle of equal treatment.

67. It should be borne in mind that the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are in competition with each other, differently for VAT purposes. **********

68. In this instance, the sporting services supplied by the London Borough of Ealing (namely, in particular, admission to gymnasia and swimming pools) are certainly similar to the same services supplied by bodies other than those governed by public law. The supplies of services in question are thus in competition with each other and should therefore be treated in the same way. Why pay VAT to go to the swimming pool, depending on whether it is operated by a non-profit-making body governed by public law or a non-profit-making body governed by private law?

69. For those reasons, I propose that the Court's answer to the second question should be that the second paragraph of Article 133 of Directive 2006/112 must be interpreted as meaning that a Member State which, pursuant to the Sixth Directive, on 1 January 1989 applied VAT to sporting services can make the grant of the exemption from VAT to non-profit-making bodies governed by public law subject to the condition relating to competition laid down in point (d) of the first paragraph of Article 133 of that directive only when it also applies that condition to the services supplied by other non-profit-making bodies.

D – *Third question referred*

70. I shall address the third question only if the Court should hold that the United Kingdom was entitled to make the grant of the exemption from VAT on sporting services supplied by non-profit-making bodies governed by public law subject to the condition relating to competition laid down in point (d) of the first paragraph of Article 133 of Directive 2006/112 even if it did not apply that conditions to services supplied by other non-profit-making bodies.

71. By its third question, the referring tribunal asks the Court whether the second paragraph of Article 133 of Directive 2006/112 allows Member States which, pursuant to the Sixth Directive, on 1 January 1989 applied VAT to sporting services to exclude all non-profit-making bodies governed by public law from the benefit of the exemption of supplies of those services without having ascertained, in each individual case, whether the grant of that exemption was likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

********** Emphasis added.

********** See judgments of 8 May 2003, *Commission* v *France* (C-384/01, EU:C:2003:264, paragraph 25 and the case-law cited), and of 10 November 2011, *The Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 32 and the case-law cited).

72. To my mind, a Member State cannot generally exclude all non-profit-making bodies governed by public law from the exemption, even if on 1 January 1989 it applied VAT to sporting services.

73. As I have indicated in point 23 of this Opinion, the rule established by Article 132(1)(m) of Directive 2006/112 requires Member States to exempt from VAT the supply of sporting services by non-profit-making bodies.

74. Even at the time when Article 13A(1) of the Sixth Directive provided that 'Member States shall exempt [sporting services] 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', the Court had held that '[those] conditions … [did] not in any way affect the definition of the subject matter of the exemptions envisaged by that provision'.**********

75. The Court had also held that 'there [was] nothing in that provision to the effect that a Member State, when granting an exemption for a certain supply of services closely linked to sport or physical education provided by non-profit-making bodies, [might] make that exemption subject to any conditions other than those laid down in Article 13A(2)'.**********

76. Since Directive 2006/112 did not alter the conditions laid down in Article 13A(2) of the Sixth Directive, it follows from that case-law that Member States are under an obligation to grant the exemption provided for in Article 132(1)(m) of Directive 2006/112, and the only conditions which they may impose are those defined by Articles 132 and 133; no additional conditions can be imposed.

77. As regards the conditions for the grant of the exemption laid down in Article 133 of that directive, and more specifically the condition relating to competition, the Court has held that '[that] power … [did] not extend to the adoption of general measures … 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'.**********

78. On that basis, the Court has declared that a number of provisions of the laws of the Member States, and in particular a provision of Spanish law that limited the scope of the exemption to private sports bodies or establishments of a social nature whose membership or admission fees did not exceed a certain amount, were contrary to Articles 132 and 133 of that directive.**********

79. It is in the context of that analysis that it is necessary to address the question by which the referring tribunal seeks to ascertain whether a Member State may exclude all non-profit-making bodies governed by public law from the benefit of the exemption of supplies of sporting services without having considered in each individual case whether the granting of that exemption would be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

********** Judgment of 7 May 1998, *Commission* v *Spain* (C-124/96, EU:C:1998:204, paragraph 11 and the case-law cited).

********** Judgment of 7 May 1998, *Commission* v *Spain* (C-124/96, EU:C:1998:204, paragraph 18). In reality, those conditions remained as such in Article 132 of Directive 2006/112.

********** Judgment of 19 December 2013, *Bridport and West Dorset Golf Club* (C-495/12, EU:C:2013:861, paragraph 35 and the case-law cited). See also, to that effect, judgment of 25 February 2016, *Commission* v *Netherlands* (C-22/15, not published, EU:C:2016:118, paragraph 38).

********** Judgment of 7 May 1998, *Commission* v *Spain* (C-124/96, EU:C:1998:204, paragraph 19).

80. On that point, the parties' positions diverge. On the one hand, the London Borough of Ealing considers that the evaluation of the risk of distortion of competition must be carried out, as in the case of non-profit-making bodies other than those governed by public law, 'in each individual case',********** taking into account the circumstances particular to each sporting activity.

81. The United Kingdom Government and the Commission, on the other hand, maintain that, in accordance with the judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 48 to 53), the evaluation of that risk cannot be carried out at the local level of each non-profit-making body but, on the contrary, must be carried out generally at national level.

82. That judgment concerned the interpretation of Article 4(5) of the Sixth Directive (now Article 13 of Directive 2006/112), which provided that 'bodies governed by public law [should] not be considered taxable persons in respect of the activities or transactions in which they engage[d] as public authorities, even where they collect[ed] dues, fees, contributions or payments'.

83. With regard to that provision, the Court held in paragraph 53 of the judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505) that 'the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead, must be evaluated by reference to the activity in question, as such, *without such evaluation relating to any local market in particular*'.**********

84. According to the London Borough of Ealing, that case-law is only partly applicable by analogy********** in the present case, since Article 13 of Directive 2006/112 relates to a different problem, namely the determination of whether or not a body governed by public law is a taxable person. The issue in the present case, by contrast, is not whether the body in question has the status of a taxable person but whether competition would be distorted if it were granted the exemption.

85. I share that view. The first subparagraph of Article 13(1) of that directive concerns the status as taxable persons of bodies governed by public law and provides that they 'shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities'. Article 13(2) of that directive establishes the link with the exemption of sporting services provided for by Article 132(1)(m) of that directive and provides that 'Member States may regard activities, exempt under Articles 132 … [of that directive], engaged in by bodies governed by public law as activities in which those bodies engage as public authorities'.

86. According to the referring tribunal, the London Borough of Ealing, in supplying sporting services, does not claim to be acting as a public authority within the meaning of that Article 13, and the tax authority does not dispute this.

87. Furthermore, an application of the principle established in paragraph 53 of the judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505) would be contrary to the wording of Article 133 of Directive 2006/112, which provides that the connection between the grant of the exemption and compliance with certain conditions, including the condition relating to competition, must be made 'in each individual case'.

********** First paragraph of Article 133 of Directive 2006/112.

********** Emphasis added.

********** Like the Commission, the London Borough of Ealing accepts that distortions of competition should be evaluated by reference to the sporting activity in question.

88. Admittedly, that qualification appears only in the first paragraph of that article, which concerns non-profit-making bodies other than those governed by public law. However, there is no convincing reason, and none is put forward by the United Kingdom Government or the Commission, that would justify the same condition being applied differently in the case of non-profit-making bodies that are governed by public law.

89. The terms used in the other language versions of Directive 2006/112 make it even clearer that the analysis of the conditions laid down in the first paragraph of Article 133 of that directive must be applied individually for each body. As examples, I would refer, in addition to the English version ('in each individual case'), to the Greek ('χωριστά για κάθε περίπτωση') and German ('im Einzelfall') versions.

90. The Commission refers to the difficulties which local authorities and private operators would face, according to paragraphs 49 to 51 of the judgment of 16 September 2008, *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505), if they had to examine 'each individual case', and in particular the need to carry out a 'systematic re-evaluation, on the basis of often complex economic analyses, of the conditions of competition on a multitude of local markets, the determination of which may prove particularly difficult since the markets' demarcation does not necessarily coincide with the areas over which the local authorities exercise their powers'. **********

91. Why, however, would that evaluation not be feasible in the case of non-profit-making bodies governed by public law when it would be feasible in the case of the other bodies? **********

92. For those reasons, I propose that the Court's answer to the third question should be that the second paragraph of Article 133 of Directive 2006/112 must be interpreted as meaning that it does not allow a Member State to exclude, generally, all non-profit-making bodies governed by public law from the benefit of the exemption of supplies of sporting services without having considered in each individual case whether the granting of that exemption would be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

VI – **Conclusion**

93. Consequently, I propose that the Court should answer the questions for preliminary ruling referred by the First-tier Tribunal (Tax Chamber) as follows:

(1) Point (d) of the first paragraph and the second paragraph of Article 133 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that it allows Member States to impose the condition relating to competition on non-profit-making bodies governed by public law even if sporting services other than those that were subject to VAT on 1 January 1989 were granted exemption on that date and even if the sporting services in question were not granted exemption under national law before the Member State applied the condition laid down in point (d) of the first paragraph of Article 133 of Directive 2006/112.

(2) Point (d) of the first paragraph and the second paragraph of Article 133 of Directive 2006/112 must be interpreted as meaning that a Member State which, pursuant to Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes —

********** Paragraph 49 of that judgment.

********** It is, moreover, strange to note that the United Kingdom legislation prescribes such an analysis of each individual case with regard to the exemption from VAT applicable to cultural services, as explained at length in point 3.8 of VAT Notice 701/47: culture.

Common system of value added tax: uniform basis of assessment, on 1 January 1989 applied VAT to sporting services can make the grant of the exemption from VAT to non-profit-making bodies governed by public law subject to the condition relating to competition laid down in point (d) of the first paragraph of Article 133 of that directive only when it also applies that condition to the services supplied by other non-profit-making bodies.

(3) The second paragraph of Article 133 of Directive 2006/112 must be interpreted as meaning that it does not allow a Member State which, pursuant to Directive 77/388, on 1 January 1989 applied VAT to sporting services to exclude, generally, all non-profit-making bodies governed by public law from the benefit of the exemption of supplies of sporting services without having considered in each individual case whether the granting of that exemption would be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.