Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
Delivered on 11 July 2019[1]

Case C-400/18

Infohos
v
Belgische Staat

(Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation, Belgium))

(Reference for a preliminary ruling — VAT — Exemptions — Independent groups of persons — Supplies of services to members and non-members)

1. Does an independent group of persons that comprises a number of Public Centres for Social Welfare, to which the group provides services of public interest, lose its VAT-exempt status with regard to the services which it provides to those members if it decides also to provide services to third parties?

2. That is, in essence, the question raised by the Belgian national court, which is asking the Court of Justice to assess the compatibility with EU law of a provision of national law which makes a VAT exemption for independent groups of persons that comprise Public Centres for Social Welfare subject to the condition that they provide services exclusively to members.

I. Legal framework

A. EU law

3. Article 13 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment,[2] which deals with exemptions within the territory of the country, provides:

'A. Exemptions for certain activities in the public interest

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

…

1 Original language: Italian.

2 OJ 1977 L 145, p. 1.

(f) services supplied by independent groups of persons whose activities are exempt from or are not subject to value added tax, for the purpose of rendering their members the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition'.

4. Article 13A(1)(f) of the Sixth Directive corresponds to Article 132(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,[3] which repeals and replaces Directive 77/388. However, despite that repeal, the Sixth Directive applies in this instance, since the facts of the case in the main proceedings predate the entry into force of Directive 2006/112.

B. Belgian law

5. Article 44(2)(1a) of the Btw-wetboek (Belgian VAT Code) ('the VAT Code'), in the version applicable to the facts of the case, provides for VAT exemption in the case of:

'The supply of services to their own members by independent groups of persons that carry on an activity which is exempted under this article or in relation to which they are not taxable persons, where those services are directly necessary for the carrying on of that activity and where the groups undertake to claim from their members only the exact reimbursement of the share of joint expenses for which each member is liable, provided that that exemption is not likely to cause distortion of competition; the King shall stipulate the conditions for the application of this exemption'.

6. Article 2 of Koninklijk Besluit nr. 43 van 5 juli 1991 met betrekking tot de vrijstelling op het stuk van de belasting over de toegevoegde waarde ten aanzien van de door zelfstandige groeperingen van personen aan hun leden verleende diensten (Royal Decree No 43 of 5 July 1991 on the exemption from value added tax of supplies of services by independent groups of persons to their members) (Belgische Staatsblad, 6 August 1991) ('the Royal Decree') provides:

'The supply of services to their own members by independent groups of persons governed by Article 1 shall be exempt provided that:

1. The activities of the group consist exclusively in the provision of services directly in the interest of the members themselves and all the members carry on an activity that is exempt under Article 44 of the [VAT] Code or in respect of which they are not taxable persons'.

II. The facts, the main proceedings and the question referred for a preliminary ruling

7. Infohos, the appellant in the main proceedings, is an association for health and hospital informatics that was set up by various Openbare centra voor maatschappelijk welzijn (Public Centres for Social Welfare) ('PCSWs').[4] Infohos provides hospital information technology services to its affiliated PCSWs. In addition to the services which it provides to its own members, it also provides services to non-members. On 5 September 2000 it concluded an agreement with IHC-Group NV for the joint development, at the behest of Infohos, of new or innovative software applications for the hospitals affiliated to it as members.

3 OJ 2006 L 347, p. 1.

4 It is apparent from the case file that Infohos was established as a public body on 21 February 1986 by the PCSWs of Aalst, Blankenberge, Bruges, Ghent, Kortrijk, Ostend and Ronse. Article 3 of the deed of establishment defines the object of the association as providing, analysing, organising and managing computer systems to support the management of the hospitals of its members, and associated activities carried on by its members.

8. Infohos did not register itself as a taxable person for VAT purposes, since it considered that it could not be regarded as such under Article 6 of the VAT Code [5] and that it was, in any event, exempt under Article 44(2)(1a) of that code.

9. On 20 April 2005, following a tax inspection, the Belgian tax authorities decided that the services which Infohos and IHC-Group NV (which was not a member of the group) had provided to each other were subject to VAT. Moreover, according to the tax authorities, the fact that taxable transactions had been performed for non-members meant that even the transactions performed for members of Infohos were subject to VAT and that Infohos was therefore no longer entitled to benefit from the exemption under Article 44(2)(1a) of the VAT Code for services provided to its own members.

10. On 13 December 2005 the tax authorities set out that finding in an official report and, on the basis of that report, a summons to pay was issued which was declared enforceable.

11. On 22 May 2007, by document lodged at the Rechtbank van eerste aanleg Brugge (Court of First Instance, Bruges, Belgium), Infohos challenged the summons to pay and sought the stay of its execution. It also sought a declaration that the sums requested were not payable. In the alternative, it sought an order for the annulment of the fines imposed, or at least a substantial reduction in those fines, the reimbursement of all the sums collected pursuant to the summons to pay, together with interest, and an order for the defendant to pay the costs.

12. By judgment of 23 February 2009, the court of first instance held that the conditions for applying the exemption under Article 44(2)(1a) of the VAT Code were not satisfied and that the appellant was liable for VAT in respect of all the services that it had provided, to members and non-members alike.

13. Infohos brought an appeal against that judgment before the Hof van Beroep te Gent (Court of Appeal, Ghent, Belgium). By judgment of 21 September 2010, that court held that Infohos could not rely on the exemption under Article 44(2)(1a) of the VAT Code because it had also provided services to non-members and applying the exemption would therefore have distorted competition. Nevertheless, it also held that, as a hybrid taxable person, Infohos could claim reimbursement from the Belgian State, in the sum of EUR 117 781.03.

14. On 5 July 2012 the tax authorities brought an appeal on a point of law before the Hof van Cassatie (Court of Cassation, Belgium). By judgment of 31 October 2014, the Hof van Cassatie (Court of Cassation) set aside the judgment of the Hof van Beroep te Gent (Court of Appeal, Ghent) on the ground that it is contradictory to assert, on the one hand, that Infohos cannot invoke Article 44(2)(1a) of the VAT Code because it provides services not only to its members but also to non-members, which implies that it is a fully taxable person, and, on the other, that it can claim that it is a hybrid taxable person, within the meaning of Article 46 of the VAT Code, and thus entitled to benefit from the exemption in respect of the services provided to its members, in proportion to the supply of services to non-members, with a right to deduct restricted to the taxable supplies made to non-members.

15. The Hof van Cassatie (Court of Cassation) referred the case to the Hof van Beroep Antwerpen (Court of Appeal, Antwerp, Belgium). By judgment of 20 September 2016, that court held that the granting of permission to sell for consideration software applications belonging either exclusively to the appellant or jointly in undivided shares to the appellant and IHC-Group NV comes within the scope of Article 18(1)(2)(7) of the VAT Code and that the supply in question must therefore be

5 Article 6 of the VAT Code provides that public establishments are deemed not to be taxable persons in so far as concerns the activities they carry on or the transactions they perform as public authorities, even if, in return for such activities and transactions, they charge fees of one kind or another.

regarded as taxable. It also held that, since Infohos does not confine itself to providing services to its members, but also — through IHC-Group NV, with which it has concluded a cooperation agreement — sells to non-members software applications developed either by itself or at its behest, it is not entitled to rely on the exemption under Article 44(2)(1a) of the VAT Code for any of its activities.

16. Infohos then appealed that decision before the Hof van Cassatie (Court of Cassation), arguing that the condition for applying the exemption stipulated in Article 2(1) of the Royal Decree, which is that the independent group of persons ('IGP')[6] may provide services exclusively to its own members, is not laid down in Article 13A(1)(f) of the Sixth Directive and the provision of national law is therefore not compatible with EU law.

17. The referring court, the Hof van Cassatie (Court of Cassation) notes that the Hof van Beroep Antwerpen (Court of Appeal, Antwerp) held that a narrow interpretation of Article 13A(1)(f) of the Sixth Directive and, in particular, of the condition, laid down in that provision, that IGPs may claim from their members only the exact reimbursement of their share of the joint expenses, means that services cannot also be provided to non-members. In addition, since Infohos did not confine itself to providing services to its members, but also sold marketing application software to third parties, it could not rely on the exemption for any of its activities.

18. The issue that has thus arisen can be resolved, according to the national court, only by means of interpretation of Article 13A(1)(f) of the Sixth Directive.

19. The Hof van Cassatie (Court of Cassation, Belgium) therefore stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Must Article 13A(1)(f) of Directive 77/388/EEC of 17 May 1977, now Article 132(1)(f) of Directive 2006/112/EC of 28 November 2006, be interpreted as permitting Member States to attach an exclusivity condition to the exemption provided for therein, whereby an independent group which also supplies services to non-members is also fully liable for VAT for the services supplied to its members?'

III. Legal analysis

20. By its request for a preliminary ruling, the referring court asks, in essence, whether Article 13A(1)(f) of the Sixth Directive precludes national legislation, such as the Belgian legislation at issue, pursuant to which exemption from the payment of VAT for IGPs applies only if IGPs provide services exclusively to group members.

21. If that is not the case, and a national provision of that kind is considered to be compatible with EU law, it would then follow that, in every instance in which an IGP supplies services also to persons that are not members, the IGP would be liable for VAT even in respect of services supplied to its own members.

6 'Independent groups of persons' (IGPs) are associations of individuals or undertakings which independently supply goods or services to their own members.

22. The status of the appellant in the main proceedings as an IGP and the fulfilment, with regard to its activities — at least those which it carries on for its own members – of the criteria laid down in Article 13A(1)(f) of the Sixth Directive, and thus of the prerequisites for the services supplied to be exempt from the payment of VAT, are not specifically in dispute. Both these points may therefore be regarded as established in the present case. In any event, it is for the national court to ascertain whether, in the particular circumstances of the case, the conditions laid down in Article 13A(1)(f) of the Sixth Directive are satisfied.[7]

23. Moreover, I would add that the national court is also required to assess whether the offer of services to non-members is in line with the IGP's social objective. Indeed, if activities for non-members fall outside the scope of the IGP's objective, then the consequences of that must be assessed on the basis of national law.

24. In essence, two different answers to the question referred for a preliminary ruling are proposed by the interested parties that have submitted observations in these proceedings.

25. The first, proposed by the European Commission and the appellant in the main proceedings, is in the negative and thus suggests that a provision of national legislation, such as the provision of Belgian legislation at issue, pursuant to which exemption from VAT is conditional on the group's services being offered exclusively to members, is incompatible with EU law.

26. In particular, that view rests on the premiss that to exclude IGPs which also supply services to non-members from the exemption laid down in Article 13A(1)(f) of the Sixth Directive would reflect an excessively narrow interpretation of that provision and thus make it difficult, if not impossible, to implement the exemption.

27. I would make clear in this regard that the supply of services to third parties by an IGP would be permissible only if it were subject to normal taxation (unless the services were exempt for some other reason), in accordance with Article 2 of the Sixth Directive, which defines the scope of that directive.

28. According to this first view, the freedom to supply services to persons outside the group cannot, therefore, be called into question by any additional exclusivity condition unconnected with the content of Article 13A(1)(f) of the Sixth Directive.

29. The second view, put forward by the Belgian Government and the Portuguese Government, is that the question referred should be answered in the affirmative and that a provision of national legislation, such as the provision of Belgian legislation at issue, pursuant to which exemption from VAT is conditional on the group's services being offered exclusively to members, is compatible with EU law.

30. It is argued that the need for exclusivity flows from the provision itself, in that it stipulates, inter alia, that the exemption is to be granted unless it would produce distortion of competition, which would arise in the event of services being supplied to third parties, given that an IGP is principally created for the sole purpose of offering services to its members.

31. It is also argued that the role of the exclusivity condition is to ensure the proper implementation of the principle of fiscal neutrality.

32. The first of these two views seems the more persuasive to me, as I shall further clarify.

7 See, to that effect, judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 27.

33. It is necessary, in the first place, to ascertain whether the introduction of such an exclusivity condition is consistent with a literal, systematic and teleological interpretation of Article 13A(1)(f) of the Sixth Directive,[8] and, in the second place, to ascertain whether the Member States have any discretion in introducing such a condition.

A. Interpretation of Article 13A(1)(f) of the Sixth Directive by reference to the aims of that directive and the purpose of the exemptions

34. The wording of Article 13A(1)(f) of the Sixth Directive contains no mention whatsoever of any requirement for the services to be supplied exclusively to the group's own members.

35. According to the settled case-law of the Court, VAT exemptions — which, as I will explain in point 41 below, are autonomous concepts of EU law — must be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.

36. However, that strict interpretation on the part of the Member State when transposing the directive must not go so far as to render implementation of the scheme of exemptions so excessively difficult as to rob them of their effect as autonomous concepts.[9]

37. Therefore, it is necessary to consider the underlying purpose of Article 13A(1)(f) of the Sixth Directive.

38. The purpose of the Sixth Directive on VAT[10] is to harmonise national laws so as to establish a common system of value added tax and, thus, a uniform basis of assessment.

39. That objective is further specified in the ninth recital of that directive in the following terms: 'Whereas the taxable base must be harmonised so that the application of the Community rate to taxable transactions leads to comparable results in all the Member States'.[11]

40. Indeed, as the eleventh recital of the Sixth Directive goes on to state, 'a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States'.

41. It follows, as the Court has already had occasion to make clear, that the objective of the uniform collection of the Communities' own resources in all the Member States can be attained only if the exemptions are interpreted and applied in a harmonised fashion, which means that they must be conceived of as autonomous concepts of EU law.[12]

8 In so far as concerns the interpretation of this provision, see judgment of 21 September 2017, *DNB Banka*, C-326/15, EU:C:2017:719, paragraph 29 and the case-law cited, according to which it is necessary, when interpreting a provision of EU law, to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.

9 Again, with reference to the interpretation of the same provision, see, to that effect, judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 30 and the case-law cited. There, the Court states that, although a strict interpretation is necessary, that does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect or to make the exemptions more or less inapplicable.

10 Like that of Directive 2006/112, currently in force.

11 Ninth recital of the Sixth Directive.

12 See, on this point, judgments of 15 June 1989, *Stichting Uitvoering Financiële Acties*, 348/87, EU:C:1989:246, paragraph 11, and of 14 December 2006, *VDP Dental Laboratory*, C-401/05, EU:C:2006:792, paragraph 26.

42. More specifically, Article 13A(1)(f) of the Sixth Directive lays down a VAT exemption of which certain IGPs may avail themselves, namely those which operate a self-help system, or in other words, groups whose objective is to provide their members with the services that are directly necessary for the pursuit of their activities (which must be exempt from or not subject to value added tax) and which confine themselves to claiming from their members exact reimbursement of their share of the joint expenses.

43. The purpose of such an exemption is, in fact, 'to create an exemption from VAT in order 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'[13] and also 'to exempt from VAT certain activities in the public interest with a view to facilitating access to certain services and the supply of certain goods by avoiding the increased costs that would result if they were subject to VAT'.[14]

44. As is apparent from the observations which it has lodged, the Commission has, in the absence of an interpretation of the exemption provision by the Court of Justice, stated in various working papers on VAT that neither the particular nature of the exemption nor the need to interpret it strictly justify any prohibition that precludes persons availing themselves of the exemption from also carrying on activities for third parties (provided that they are subject to taxation).[15]

45. It is therefore not apparent either from the underlying purpose of Article 13A(1)(f) of the Sixth Directive or from the exemptions laid down therein that it is necessary to introduce an exclusivity condition with regard to the services offered by IGPs to their own members, and the Commission has stated as much in official documents.

46. To conclude on the question of whether a provision such as the Belgian provision at issue is consistent with the aims of the exemption, I would observe that it in any event appears to be too stringent to be proportionate to the objective pursued.

47. The Court has on several occasions pointed out that, in accordance with the principle of proportionality, which is one of the general principles of EU law, the means employed for the implementation of the Sixth Directive must be appropriate to achieving the objectives stated in that measure and must not go beyond what is necessary in order to attain them.[16]

48. The loss of the exemption even for transactions for the benefit of members, on the other hand, could upset the balance of the provision of EU law with a punitive intention that is alien to the spirit of the directive.

49. It would appear to be more correct to focus, in the implementation of the exemption, on the activity that the entity is engaged in, rather than on the nature of the entity itself.

13 Judgments of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 37, and of 21 September 2017, *Commission* v *Germany*, C-616/15, EU:C:2017:721, paragraph 56.

14 Judgments of 21 September 2017, *DNB Banka*, C-326/15, EU:C:2017:719, paragraph 33 and the case-law cited, and of 21 September 2017, *Commission* v *Germany*, C-616/15, EU:C:2017:721, paragraphs 47 and 48 and the case-law cited concerning the aim of Article 132(1)(f) of Directive 2006/112.

15 As is apparent from the case file, the VAT Committee has expressed a view on this aspect, with reference to Article 132(1)(f) of Directive 2006/112. However, the Commission considers that that interpretation should also apply to Article 13A(1)(f) of the Sixth Directive, which was previously in force, given that the content of the two provisions is identical. See Article 398 of Directive 2006/112/EC and Working Paper No 654 of 3 March 2010, section 3.4(a).

16 Judgment of 23 November 2017, *Di Maura*, C-246/16, EU:C:2017:887, paragraph 25, and, by analogy, judgment of 26 April 2012, *Commission* v *Netherlands*, C-508/10, EU:C:2012:243, paragraph 75.

50. This means that the exemption must apply solely to services which IGPs supply to their members; it does not mean that IGPs may offer services solely to their members. In that regard, the Court has already held that services supplied by IGPs to their members are covered by the exemption contained in Article 13A(1)(f) of the Sixth Directive, even if those services are supplied to only one or several of those members. [17]

51. It is the activity performed for the IGP's members, for purposes which the provision of EU law seeks to protect, that is deserving of protection, and thus exemption, rather than the nature of the entity, in the sense that it should be treated as attracting exemption only if it offers services exclusively to the members of the group. Naturally, this is subject to the proviso that the national court should ascertain that the entity claiming the exemption meets the requirements laid down in the Sixth Directive. [18]

B. Discretion of the Member States

52. Article 13A(1) of the Sixth Directive provides that the Member States are to lay down conditions 'for the purpose of ensuring the correct and straightforward application of … exemptions … and of preventing any possible evasion, avoidance or abuse'.

53. Point (f) thereof adds that the exemption must not be 'likely to produce distortion of competition'.

54. The discretion which the Member States have in laying down the conditions for entitlement to the exemption cannot extend to altering the substantive definition of the exemptions listed in that directive. [19]

55. The Member States cannot, therefore, introduce provisions that would deprive the exemption of its substantive content or render its application more difficult or impossible. [20]

56. Such a situation would arise in the event that, on implementing that directive, a Member State were to adopt stringent measures of a general nature, such as those laid down in Article 2 of the Royal Decree, which restrict the scope of the exemption.

57. The intention of the words 'for the purpose of ensuring the correct and straightforward application of … exemptions' is, in my view, that the Member States should be able to introduce national regulations that will make it relatively easy for economic operators to apply exemptions and possibly also streamline inspection procedures.

58. Those words certainly cannot be construed, as the arguments of some of the parties seem to suggest, as being intended merely to facilitate the inspection tasks of the competent authorities.

17 Judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 43.

18 Judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 27.

19 On this point, see judgments of 14 December 2006, *VDP Dental Laboratory*, C-401/05, EU:C:2006:792, paragraph 26 and the case-law cited, and of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 39 and the case-law cited.

20 See, again, judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 30 and the case-law cited.

59. Moreover, there is no indication in the case file of how it might be excessively difficult for the national authorities to apply and monitor the correct application of the exemptions laid down in the directive. [21]

60. It will fall to the national court to ascertain whether persons availing themselves of the exemptions prepare orderly, separate accounts that make it possible for the competent authorities to carry out the necessary checks.

61. The wording in Article 13A(1) of the Sixth Directive which I have mentioned does not, however, justify the introduction of a stringent exclusivity condition, which, as I have said, is not covered by the wording of that provision of EU law and would be alien to its underlying purpose.

62. The same applies to the other limb of that provision, which permits the Member States to lay down conditions for the purpose 'of preventing any possible evasion, avoidance or abuse'.

63. Those words do not support the conclusion that it is necessary to add a further provision, not contained in the directive, which requires the services to be performed exclusively for members.

64. The possible supply of services to third parties cannot be regarded as something which might encourage evasion, avoidance or abuse, provided that any such supply is duly recorded separately in the group's accounts and is conditional upon payment of the VAT due.

65. Lastly, as regards the risk of distortions of competition, this might be more difficult to analyse, but, in my view, the same conclusion may be drawn regarding IGPs' freedom to supply services also to third parties who are not members.

66. The Court has had occasion to clarify that 'the grant of VAT 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'. [22]

67. As Advocate General Kokott has already confirmed, the existence of a distortion of competition cannot be predetermined in the abstract for certain sectors. The Sixth Directive does not, therefore, allow the national legislature any discretion regarding the introduction of an abstract provision that dispenses with an *in concreto* assessment of the distortion of competition. [23]

68. A provision such as the Belgian provision at issue, on the other hand — from what I am given to understand from the case file, inasmuch as the Belgian Government puts forward the possible distortion of competition as the principal reason for the introduction of the exclusivity condition — simply makes the general and rigid assumption, leaving no room for assessment on the court's part, that the supply of services to third parties distorts competition in the particular market in question.

69. The Court has already confirmed that, in order to determine whether the application of the exemption mentioned in Article 132(1)(f) of Directive 2006/112 to a specific activity is likely to cause distortion of competition, it is certainly possible for the national legislature to lay down rules which are easily managed and supervised by the competent authorities. However, those conditions do not

21 On this point, see Article 398 of Directive 2006/112/EC and Working Paper No 654 of 3 March 2010, section 3.4(a), which mentions potential impediments and practical difficulties for national authorities, albeit these are said not to differ from the practical difficulties which arise in numerous other situations in which it is necessary to examine activities which are subject to tax and activities which are tax-exempt. Moreover, the Commission has observed that this analysis of the situation has been taken up and developed in the working document accompanying the Green Paper on the future of VAT (SEC(2010) 1455 final of 1 December 2010) and in further works of the VAT Committee (Article 398 of Directive 2006/112/EC, Working Paper No 856 of 6 May 2015, section 3.1.10)

22 Judgment of 20 November 2003, *Taksatorringen*, C-8/01, EU:C:2003:621, paragraph 64, and Opinion of Advocate General Kokott in *Aviva*, C-605/15, EU:C:2017:150, point 68.

23 Opinion of Advocate General Kokott in *DNB Banka*, C-326/15, EU:C:2017:145, point 22.

concern the definition of the content of the exemptions laid down by that directive, and the condition relating to the absence of distortion of competition, mentioned in Article 132(1)(f) of Directive 2006/112, does not have the consequence of permitting Member States to limit the scope of that exemption in a general manner. [24]

70. The exemption could give rise to a distortion of free competition if the majority of the services were supplied to persons who are not members or if the services provided to non-members were also exempted from VAT.

71. Neither of those situations may be assumed from the interpretation proposed and it must, therefore, be concluded that, on this point too, the arguments in favour of the need for an exclusivity condition — which are not supported by any evidence — are unconvincing.

C. Restrictions on the freedom of IGPs to supply services to third parties who are not members

72. The conditions for the application of the exemption under Article 13A(1)(f) of the Sixth Directive may, as noted by the Commission in the observations which it has lodged in this case, be summarised as follows: the services must be supplied by an independent group of persons; the group must be engaged in an activity that is exempt from or not subject to tax; the purpose of the supply must be to provide its own members with services that are directly necessary for the performance of their activities; such groups must merely claim from their members exact reimbursement of their share of the joint expenses.

73. All of these conditions must be verified by the national court.

74. Bearing in mind the teleological and systematic interpretation I have suggested, I would however clarify that certain additional conditions will apply to the exemption from VAT of services supplied to members in the event that the entity also offers services (subject to VAT) outside the group.

75. In the first place, it will be necessary for the services offered to members to be quantitatively predominant by comparison with those supplied to third parties, which should therefore account for no more than a residual part of the group's activities. [25]

76. This is to prevent IGPs from deviating from their purpose and also to avert the application of the legislation for tax-avoidance ends, which would be likely to distort competition.

77. In the second place, and again so that IGPs do not deviate from their purpose, the entity claiming the exemption will need to demonstrate that there are reasons of technical efficiency for carrying on activities for third parties other than members, from which members might also benefit in the future.

78. Checking both of these matters is the responsibility of the national court, which must apply the interpretative criteria I have described in reaching its conclusion as to whether or not an entity that provides services both to its own members and to third parties is entitled to the exemption.

24 Judgment of 21 September 2017, *Commission* v *Germany*, C-616/15, EU:C:2017:721, paragraph 65 and the case-law cited and paragraph 67.

25 It is apparent from the case file that, on 1 July 2016, following a request for clarification put to the Belgian Government by the Commission, a new scheme of exemptions for IGPs came into force. In particular, the new Article 44(2a) of the VAT Code provides that, in the event that an IGP also supplies services to non-members, the services which it supplies to its own members will attract the exemption if those transactions account for the majority of the IGP's activities.

79. With those provisos, which are necessary in order to preserve the alignment of the aims of the exemptions with the aims of the directive, there is even less likelihood of distortions of competition and a greater likelihood of the aim of the exemptions being attained, that aim being to offset the competitive disadvantage suffered by IGPs by comparison with undertakings which procure services from their own employees or through a VAT group.[26]

IV. Conclusion

80. In light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Hof van Cassatie (Court of Cassation, Belgium) as follows:

Article 13A(1)(f) of Directive 77/388/EEC of 17 May 1977, now Article 132(1)(f) of Directive 2006/112/EC of 28 November 2006, must be interpreted as not permitting Member States to attach to the exemption laid down therein an exclusivity condition in accordance with which an independent group that also supplies services to persons who are not members is fully liable for VAT, even in respect of the services which it supplies to its members.

It is for the national court to ascertain whether the conditions for the application of the exemption laid down in that provision are satisfied. Where services are also supplied to persons who are not members, the national court must, so that the purpose of the exemption is not undermined, check that the services supplied to non-members are not quantitatively predominant by comparison with those supplied to members and that there are reasons of technical efficiency for the services supplied to non-members from which members might also benefit.

26 Opinion of Advocate General Kokott in *Aviva*, C-605/15, EU:C:2017:150, point 67.