OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 30 January 2003 [1]

I — Introduction

1. All the questions which the Landesgericht Innsbruck and the VAT and Duties Tribunal, London Tribunal Centre, have referred to the Court of Justice for a preliminary ruling in these cases, and to which this joined Opinion relates, concern the scope of the exemption in respect of 'the provision of medical care' under Article 13A(1)(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (hereinafter 'the Sixth Directive').

2. The particular situation in Case C-212/01 involves the assessment by a doctor, acting as an expert instructed by a court or pension insurance institution, of the disability or ability of an applicant for a pension. Case C-307/01 concerns a range of medical activities, some carried out at the request of employers or insurers, and some involving the preparation of medical certificates or reports designed to establish medical fitness or whether the conditions for particular legal claims are satisfied.

3. Both cases raise questions relating, in particular, to the scope of the judgment in the case of *D.*, [2] in which the Court decided that the establishment of genetic affinity through biological tests does not fall within the scope of Article 13A(1)(c) of the Sixth Directive.

II — Legal background

A — *Community law*

4. Article 13A(1) of the Sixth Directive exempts certain 'activities in the public interest' from VAT.

1 — Original language: German.

2 — Judgment of 14 September 2000 in Case C-384/98 [2000] ECR I-6795.

5. Article 13A(1)(c) of the Sixth Directive 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:

...

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

B — *National law*

1. Case C-212/01

6. Tax exemptions in respect of the medical professions are governed by Paragraph 6(1) of the Umsatzsteuergesetz (Law on Turnover Tax, or UstG) in Austria. That provision reads as follows in material part:

'Of turnover falling within Paragraph 1(1)(1), the following are exempt from tax:

...

19. Turnover from activity as a doctor, dentist, psychotherapist, midwife or self-employed supplier within the meaning of Paragraph 52(4) of Federal Law BGBl. No 102/1961 in the edition published in BGBl. No 872/1992 and of Paragraph 7(3) of Federal Law BGBl. No 460/1992; services supplied by associations whose members belong to the aforesaid professions are, as regards their members, also exempt from tax, to the extent that such services are used directly for carrying out the transactions that are exempt from tax under this provision and to the extent that the associations charge to their members only the exact reimbursement of the respective share of the common expenses;...'

2. Case C-307/01

7. Item 1(a) in Group 7 — 'Health and Welfare' — in Schedule 9 to the Value Added Tax Act 1994 describes as one of the supplies that is exempt from VAT under Section 31 of the Act the following:

'1. The supply of services by a person registered or enrolled in any of the following:

(a) the register of medical practitioners...;'

8. In addition, note (2) states as follows in relation to that provision:

'(2) Paragraph... (a)... of item 1 include[s] supplies of services made by a person who is not registered or enrolled in any of the registers... specified in [that paragraph] where the services are wholly performed or directly supervised by a person who is so registered or enrolled.'

III — Facts, procedure and questions referred for a preliminary ruling

A — *Case C-212/01*

9. The background to the questions referred in Case C-212/01 is an action before the Landesgericht Innsbruck as employment and social security court in which, owing to the death of the plaintiff, Ms Margarete Unterpertinger, in the course of the proceedings, the only question which remains to be determined is that of costs.

10. The original subject-matter of the dispute was a claim brought by Ms Unterpertinger against a notice from the Pensionsversicherungsanstalt der Arbeiter (Workers' Pension Insurance Institution, hereinafter 'the defendant'). The Landesgericht Innsbruck as employment and social security court was called upon to determine whether the defendant should award the plaintiff a disability pension in the statutory amount from 1 August 1999.

11. The defendant claimed before the court that there was a range of occupations on the general employment market that the

plaintiff could still perform. The plaintiff, on the other hand, submitted that she was disabled within the meaning of the law.

12. In order to assess the conflicting allegations made in the proceedings, the national court, on 3 April 2000, ordered various expert medical reports to be obtained.

13. After those reports had been obtained, the plaintiff died suddenly, and the national court accordingly held that the proceedings had been cut short.

14. The only point still at issue was the costs of the proceedings. The defendant and the expert continued to be parties to the proceedings in regard to the outstanding matters.

15. The latter, an expert instructed by the Landesgericht Innsbruck as employment and social security court, and a specialist in psychiatry and neurology, invoiced VAT for the services supplied by him as an expert.

16. At the hearing for presenting oral argument, the defendant, which is in any event required to bear the costs incurred on instructing expert witnesses, pursuant to Paragraph 77 of the Austrian Arbeits- und Sozialgerichtsgesetz (Law on Employment and Social Security Courts), raised fee objections against the expert's fee note, in so far as it included VAT at 20%. With the exception of that sum, all the fee rates were accepted as to both basis and amount. The expert's fees were paid out without VAT in the first instance.

17. The Court notified the parties that it would give a written decision in respect of the 20% VAT. That is the context in which the present request for a preliminary ruling has been made.

18. Under the Austrian Gebührenanspruchsgesetz (Law on Entitlement to Fees), an expert is entitled to recover turnover tax on his fee if, and to the extent that, his services are subject to turnover tax.

19. By its question the national court is therefore asking whether or not the medical services supplied by the medical witness are exempt from turnover tax.

20. In the view of the national court, it is not absolutely clear from the wording of Paragraph 6(1)(19) of the Umsatzsteuerge-

setz whether medical examinations whose purpose is to establish invalidity, incapacity to work or disability are covered by the exemption, or are excluded. The court points out that, despite differences in wording, the provision represents the transposition into Austrian law of Article 13A(1)(c) of the Sixth Directive, and must therefore be interpreted in conformity with the Directive.

21. Accordingly, the Landesgericht Innsbruck as employment and social security court has, by an order of 9 May 2001, referred the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

'1. Is Article 13A(1)(c) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, to be interpreted as meaning that the exemption from value added tax provided for therein does not apply to turnover from the activity of a doctor which consists in determining the disability or ability of a person applying for a pension?

2. Is the judgment of the Court of Justice of the European Communities in Case C-384/98 *D* v *W* to be interpreted as meaning that medical examinations and expert opinions based on them for the purpose of establishing or excluding disability, incapacity to work or invalidity do not fall within the scope of application of the provision referred to in Question 1 above, whether or not the doctor who acts as an expert is instructed by a court or a pension insurance institution?'

B — *Case C-307/01*

22. Dr d'Ambrumenil is a medical practitioner. He initially worked in that capacity in the National Health Service, and then treated patients at his private practice until 1997. He also acted extensively as an expert medical witness before courts and tribunals and as a mediator and arbitrator.

23. In 1994 Dr d'Ambrumenil formed a limited company, Dispute Resolution Services Limited (hereinafter 'DRS'), which now carries on substantially all of his business activities, with the exception of minor activities that do not relate to medical or legal work.

24. These business activities involve providing a number of different types of service, such as conducting medical examinations and tests and issuing medical certificates.

25. By a letter of 29 September 1997, Dr d'Ambrumenil was informed of a decision by the Commissioners of Customs and Excise finding that some of the services provided by him and/or DRS fell within Item 1(a) of Group 7 in Schedule 9 to the Value Added Tax Act and were therefore exempt from VAT.

26. The purpose of the main proceedings is to adjudicate on an appeal brought by Dr d'Ambrumenil and DRS [3] against that decision. The matter at issue is how certain services are properly to be treated for VAT purposes. Whilst Dr d'Ambrumenil and DRS consider that the services in question constitute taxable supplies, the Commissioners of Customs and Excise — the respondents in the main proceedings — are of the view that the services are exempt under the provisions of the Value Added Tax Act that transposed Article 13A(1)(c) of the Sixth Directive.

27. It has been possible to resolve the dispute by agreement of the parties or court decision with regard to some of the services. But the national tribunal is unsure of the correct interpretation of Article 13A(1)(c) of the Sixth Directive in connection with the remainder of the medical activities. It describes these activities in the order for reference as follows:

— Conducting medical examinations of individuals for employers. This involves a physical and/or mental examination of a prospective employee carried out for the prospective employer and may involve completing a standard questionnaire. It does not involve the provision of medical treatment or advice to the prospective employee as to his medical condition. On certain occasions the prospective employee will be a current or former patient of Dr d'Ambrumenil to whom he has provided medical treatment or advice in the past; on other occasions the individual will be neither a current nor a former patient of Dr d'Ambrumenil.

— Conducting medical examinations of individuals for insurers. This activity involves a physical and/or mental examination of the prospective insured for the purposes of permanent health insurance or life assurance, and may involve completing a standard questionnaire. It does not involve the provision of medical treatment or advice to the prospective insured as to his medical condition. On certain occa-

3 — Hereinafter 'the appellants in the main proceedings'.

sions the individual will be a current or former patient of Dr d'Ambrumenil to whom he has provided medical treatment or advice in the past; on other occasions the individual will be neither a current nor a former patient.

— Testing for other purposes. The taking of blood or other bodily samples to test for the presence of viruses, infections, or other diseases, including, in particular, the HIV virus. This activity is conducted on behalf of, and for the benefit of, employers or insurers and may or may not be in respect of current or former patients of Dr d'Ambrumenil.

— Medical certificates. Certification of medical fitness, for example as to fitness to travel, at the request of the individual who may or may not be a current or former patient of Dr d'Ambrumenil. It involves the use of Dr d'Ambrumenil's medical skills and may involve a physical or mental examination.

— Certificates as to a person's health for other purposes, such as war pensions. This involves, for example, certifying, for the purpose of establishing entitlement to a war pension, that an individual has symptoms resulting from injuries sustained while on military service. It normally involves a physical examination of the individual, who may or may not be a patient of Dr d'Ambrumenil, but does not involve treatment of the symptoms.

— Medical reports regarding personal injuries. The preparation of expert medical reports regarding issues of liability and the quantification of damages for individuals contemplating litigation before courts and tribunals. It involves the use of Dr d'Ambrumenil's medical skills to evaluate the cause, extent and prognosis of the injury and may involve examination of the prospective plaintiff. It does not involve treatment of the prospective plaintiff's condition.

— Medical reports regarding medical negligence. The preparation of expert medical reports for individuals contemplating litigation regarding professional medical negligence. It involves the use of medical skills as to the cause, extent and prognosis of the injury, liability and the quantification of damages, and may but does not normally involve examination of the individual. It does not involve treatment of the individual's medical condition.

28. The national tribunal also observes in the order for reference that the judgment of the Court of Justice in the case of *D.* makes it clear that the involvement of a doctor for the purpose of investigating and providing an opinion in relation to a question of paternity is not covered by the exemption, but that, unlike the activities at issue in the present case, that is a procedure that has nothing to do with the health of any person.

29. By a decision of 6 June 2001 the VAT and Duties Tribunal, London Tribunal Centre, accordingly referred the following question to the Court of Justice for a preliminary ruling:

'1. Is Article 13A(1)(c) of Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes to be interpreted as covering the following activities when performed in the exercise of the medical profession as defined by the Member State:

(a) conducting medical examinations of individuals for employers or insurance companies,

(b) the taking of blood or other bodily samples to test for the presence of viruses, infections or other diseases on behalf of employers or insurers,

(c) certification of medical fitness, for example, as to fitness to travel,

(d) giving certificates as to a person's medical condition for purposes such as entitlement to a War Pension,

(e) medical examinations conducted with a view to the preparation of expert Medical Reports regarding issues of liability and the quantification of damages for individuals contemplating personal injury litigation,

(f) the preparation of Medical Reports

(i) following the examinations referred to in (e) and

(ii) based on medical notes but without conducting a medical examination,

(g) medical examinations conducted with a view to the preparation of expert Medical Reports regarding professional medical negligence for individuals contemplating litigation, and

(h) the preparation of Medical Reports

(i) following the examinations referred to in (g) and

(ii) based on medical notes but without conducting a medical examination?'

IV — Arguments of the parties

A — *Case C-212/01*

30. The Austrian Government, like the Commission, did not submit observations on the second question referred separately but answered both questions together.

31. In the view of the *Austrian Government*, the question whether or not the activities of an expert in proceedings before a social security court are subject to turnover tax has been sufficiently clarified by the judgment in the *D.* case.[4] In that decision, the Court of Justice declared that a medical service which consisted 'not in providing care to persons by diagnosing and treating a disease or any other health disorder' was subject to turnover tax. If, as the judgment suggests, the exemption in Article 13A(1)(c) of the Sixth Directive only applies to medical services having a therapeutic aim, then the expert services of a doctor whose involvement is confined to establishing the disability or ability of an applicant for a pension for the purpose of the award of a disability pension must also be assumed not to be exempt. That conclusion is supported, *inter alia*, by the principle that provisions that contain exemptions from turnover tax are to be interpreted strictly.

32. The *Commission's* arguments accord for the most part with those of the Austrian Government. The Commission submits that, contrary to the position under Paragraph 4(1)(19) of the Austrian Umsatzsteuergesetz, under Article 13A(1)(c) of the Sixth Directive, not all activities carried on by a doctor are exempt. The Commission disagrees with the United Kingdom's view that the notion of a doctor's function in Council Directive 93/16/EEC to facilitate the free movement of doctors and the

4 — Cited in footnote 2.

mutual recognition of their diplomas, certificates and other evidence of formal qualifications [5] can be transposed to this case. That directive has a different purpose from the Sixth Directive, and it does not comprehensively define a doctor's function. In the judgment in the case of *D.*,[6] the Court clearly stated which medical activities do not fall within the scope of 'the provision of medical care'. The Court confirmed that jurisprudence, which differentiates according to what the aim of the medical intervention is, in its judgment of 11 January 2001 in the case of *Commission* v *France*.[7] None the less, the therapeutic aim, which is the determining factor under that case-law, is to be understood widely; check-ups and prevention are included. In general, the question does not turn on the nature of the activity or of the individual medical procedure, but on the purpose of the doctor's intervention.

33. In the Commission's view, however, establishing whether an applicant for a pension is disabled for the purpose of court proceedings does not have a therapeutic aim, as the sole purpose is to resolve a question of law. Accordingly, this exercise must, for turnover tax purposes, be treated in the same way as the activity of expert witnesses from other disciplines such as, say, accountants or engineers, and it is therefore not exempt under Article 13A(1)(c). The fact that the expert was appointed to give an opinion by the court is thus irrelevant. The purpose of the medical intervention alone is material.

34. As to the question, which came up especially at the hearing, of the practicability of deducting VAT when not all medical services are exempt, the Commission submitted that the difficulties this poses are no greater than those that arise in other cases where goods and services are used for both taxable and exempt transactions. The amount of VAT that is deductible is calculated not by reference to the individual item used, but as a proportion of the whole of the taxable person's turnover.

35. The *United Kingdom* submits that the activities at issue in this case, namely carrying out a medical examination and then determining a person's state of health, — in effect, therefore, in its submission, making a medical diagnosis —, are central functions of the medical profession and therefore fall within the scope of the exemption in Article 13A(1)(c) of the Sixth Directive.

5 — Council Directive of 5 April 1993 (OJ 1993 L 165, p. 1), hereinafter 'Directive 93/16'.

6 — Cited in footnote 2.

7 — Judgment in Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 24.

36. The United Kingdom contends that it follows both from the wording of the exemption, and from a comparison with Directive 93/16,[8] which is applicable to this extent, that the function of the medical profession goes beyond simply providing medical treatment *stricto sensu*. For example, the activity of the medical profession includes prophylactic medicine, such as vaccinations, treatment in the areas of family planning and obstetrics, and cosmetic surgery. That is why, in the case of pathology, both the taking and the analysis of medical samples were, in Case C-76/99 *Commission* v *France*,[9] found to be exempt under Article 13A(1)(b). The Court further rejected an especially narrow interpretation of the exemption in that case, referring to its purpose, which is to ensure that access to hospital treatment and medical care is not hindered by increased costs. Similarly, the activity of examining and giving an opinion on a person's state of health — for instance, in the context of periodic health checks — must fall within the exemption, regardless of whether the examination leads to the administering of medical treatment in the stricter sense.

37. The medical activity in point here is the making of a diagnosis. The issue raised by the questions referred for a preliminary ruling is whether the purpose for which the diagnosis and/or examination is carried out, or the person who instructed that it be carried out, affects the applicability of the exemption.

38. As to the first question referred, the United Kingdom Government concludes that no sensible or workable distinction can be drawn in regard to the exemption on the basis of the purpose for which or reasons why a medical diagnosis is sought. The tax treatment of a service cannot depend on the results of the examination or the motives of the patient in seeking it. Such criteria could, in any event, be easily circumvented.

39. As to the second question referred, the United Kingdom draws attention to the difference between this case and the situation in the case of *D*. Unlike the activities here, the establishing by an expert of paternity, which was at issue in that case, had nothing to do with health. The procedure at issue in this case, in contrast, is concerned with the diagnosis of diseases, which does fall within the exemption, according to the decision in *D*.[10]

8 — The United Kingdom bases its argument that Directive 93/16 may be transposed to this case on the decision in Case C-349/96 *Card Protection Plan* [1999] ECR I-973, paragraph 18.

9 — Cited in footnote 7.

10 — Judgment in *D*. (cited in footnote 2), paragraph 18.

40. Nor, in the United Kingdom's submission, can the identity of the person requesting the examination or diagnosis be the determining factor. A number of the exemptions in Article 13A and 13B of the Sixth Directive are dependent on the identity of the supplier or the recipient of goods or services. However, no condition relating to the identity of the recipient was introduced into Article 13A(1)(c). To imply such a condition into that provision would be tantamount to restricting the exemption in a way which is not supported by its wording. And once again, this provision could be easily circumvented.

B — *Case C-307/01*

41. In view of the *appellants in the main proceedings*, it follows from the judgments of the Court of Justice in the cases of *D.* [11] and *Commission* v *United Kingdom* [12] that the activities described in the question referred for a preliminary ruling do not fall within the exemption in Article 13A(1)(c) and are therefore taxable. That is because that case-law, and the judgment in the case of *Commission* v *France* [13] — though the latter is not otherwise relevant to this case — make it clear that 'the provision of medical care' within the meaning of that provision only encompasses activities having a therapeutic aim.

42. They argue that the exemptions in Article 13 of the Sixth Directive are exceptions to the general principle that all services supplied by a taxable person for consideration are subject to VAT. As such the exemptions are, pursuant to the judgment in the case of *Stichting Uitvoering*, [14] to be interpreted strictly. However this does not mean that they must be given the narrowest meaning possible, but that an exemption is to be understood as not extending beyond what falls within the natural meaning of the words.

43. The wording of the exemption requires that two conditions be met. First of all, the service must be performed in the exercise of a medical or paramedical profession and, secondly, it must constitute medical care. There is no doubt that the first condition is met in this case because Dr d'Ambrumenil performs the services in the exercise of his medical profession. However, his services cannot be described as involving the provision of medical care. The words 'medical care' cannot encompass all activities car-

11 — Cited in footnote 2.

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

13 — Cited in footnote 7, paragraph 24.

14 — Judgment in Case 348/87 *Stichting Uitvoering* [1989] ECR 1737, paragraph 13.

ried out by a person in the exercise of the medical profession. If they did, then the second condition would be otiose and the Directive could simply have exempted 'services', as in Article 13A(1)(e).

44. The words 'medical care' necessarily connote an activity designed to protect human health, and involving care of a patient. That interpretation is also consistent with the spirit and purpose of Article 13A of the Sixth Directive, which is to promote the protection of human health. That includes pure diagnosis and examination, if done for the purpose of ascertaining whether a person is suffering from a medical condition, with a view to treating it if possible. However, a diagnosis or examination alone does not constitute medical care — even where it is undertaken by a doctor — if it is carried out for some other purpose, such as to determine the premium payable on an insurance policy.

45. Nor does the fact that not all medical activities are covered by the exemption give rise to any problems with regard to the deduction of VAT. Health professionals already carry out taxable transactions in the United Kingdom, such as the sale by dentists of toothbrushes, and there are appropriate methods for calculating the proportion of VAT that is deductible.

46. The appellants in the main proceedings argue that none of the activities enumerated in the order for reference are performed for the purposes of protecting the health of any person or curing or treating any medical condition. They are not carried out for any therapeutic purpose and are no different in essence from paternity testing with which the case of *D.* was concerned, and should not therefore be exempt.

47. The *United Kingdom* in its observations essentially repeats its arguments in Case C-212/01. It contends that, like the making of diagnoses and conducting of examinations, the activities described in the order for reference are central functions of the medical profession and therefore fall entirely within the scope of the exemption in Article 13A(1)(c) of the Sixth Directive. As in Case C-212/01, these activities involve the use of medical skill in order to give a medical opinion on a person's state of health, except that this case does not involve acting as an expert appointed by a court. However both cases raise the question whether either the purpose for which the diagnosis and/or the examination are carried out, or the identity of the person commissioning them, affects the applicability of the exemption. The United Kingdom says not. Nor is the confidential relationship between the patient and the person

treating him, or the degree of confidence that exists, to which the Court referred in Case C-353/85, [15] an appropriate criterion, and it ought not to be so construed. Whether the examination is carried out by the patient's own doctor or another doctor cannot be material.

48. The United Kingdom points to the fact that all the activities described in the order for reference involve the making of a medical diagnosis for the purpose of being communicated to a third party, with the diagnosis being commissioned by the third party in some cases. At any rate Dr D'Ambrumenil is in all cases providing medical care by using his medical knowledge to diagnose a patient's state of health. This can be distinguished from the act, exemplified by the case of *D.*, of giving an opinion on a question of paternity, which has nothing to do with health.

49. In its observations the *Commission* in some ways goes further than in Case C-212/01. Like the appellants in the main proceedings, it points out that doctors do not enjoy a general exemption from VAT, and that there are numerous activities undertaken in the exercise of the medical profession that do not fall within the scope of the exemption in Article 13A(1)(c); that much is clear from the wording of the provision alone. The scope of the exemption depends on what is meant by 'medical care'. In the case of *D.*, the Court held on this point that the medical intervention must have a therapeutic aim, broadly construed, in other words, its aim must be the diagnosis, treatment and, so far as possible, the cure of diseases and health disorders. The Court reiterated its emphasis on this requirement in the case of *Commission* v *France*. Application of this test does not give rise to any special problems, at least no more than are raised by the interpretation of other tax exemptions. The Commission also affirms that it does not consider the identity of the person who commissions the medical procedure to be relevant.

50. Like the United Kingdom, the Commission also points to the purpose of the exemption, which is to ensure that access to medical treatment is not made more difficult by increased costs, and agrees with the United Kingdom's view that the identity of the person who requests the medical examination is not material to the applicability of the exemption. Nor, however, is the use of medical knowledge and skill decisive, as the words 'medical care' imply something narrower, which is why Directive 93/16 is not of assistance in this context.

15 — Judgment in Case C-353/85 (cited in footnote 12), paragraph 33.

51. As regards the individual activities at issue here, the Commission sees no reason to distinguish between the services described at points (e) to (h) of the order for reference. What is common to all these is the purpose of the examination, which is to determine the victim's physical condition and the origin and extent of the harm alleged to have been suffered, in order to assess any potential damages. Such an examination, at least where the expert is not the victim's own physician, does not have any therapeutic aim or direct connection with the medical treatment of that harm. The taxation of such services consequently has no impact on the ease of access to healthcare. The same may be said of points (c) and (d). Where a medical certificate is issued in the context of a routine consultation or ongoing medical care, the provision of the certificate may be regarded as merely ancillary to the main purpose of the service, which is the medical care of the person concerned. But the resolution of that question is a matter for the national tribunal.

52. As regards examinations and tests carried out for employers and insurers, described in points (a) and (b) of the order for reference, in the Commission's view there is a distinction to be made according to the circumstances. If the examination is to establish suitability for future employment, or to determine whether a person is a suitable risk, particularly if it is carried out by a doctor chosen by the employer or insurer, it should be regarded as a taxable supply. The position may be different in relation to periodic medical examinations which are routinely required by employers or insurers. Such examinations may have a therapeutic aim, in that they encourage the persons concerned to discuss their state of health with the doctor and to obtain appropriate recommendations. Such examinations do involve a relationship of doctor and patient, unlike examinations requested solely for the purpose of determining aptitude for employment or assessing an insurance risk. These medical activities may therefore be deemed to be covered by the exemption. The same applies to the preparation of certificates and the carrying out of examinations in so far as they form part of the ongoing provision of medical care by a doctor to his patient. The other types of service set out in the order for reference are taxable supplies.

V — Appraisal

53. As there is a significant degree of overlap between the questions raised in these two cases, I propose to begin by considering the scope of the exemption in Article 13A(1)(c) of the Sixth Directive in general, before looking in detail at the individual questions referred in each case.

A — *General observations on the scope of the exemption in Article 13A(1)(c) of the Sixth Directive*

54. I should like to start by considering the issue raised by the United Kingdom, concerning the extent to which, under the Sixth Directive, conclusions may be drawn from Directive 93/16 as to the scope of the exemption here.

55. In the *Card Protection Plan* case,[16] on which the United Kingdom relied, the Court found that there was 'no reason for the interpretation of the term "insurance" to differ according to whether it appears in the directive on insurance or in the Sixth Directive'. That merely signifies that terms which appear in more than one directive can sometimes have the same meaning. This is not to say, however, that, under the Sixth Directive, all medical activities potentially within the scope of Directive 93/16 are covered by the exemption, not least because the purpose of Directive 93/16, which is to facilitate the exercise of the right of establishment and the free movement of services for doctors, is different from that of the Sixth Directive.

56. The object of Article 13A of the Sixth Directive is to exempt certain activities that are in the public interest from VAT, limited, however, to the activities which are specifically set out and described in detail therein.[17] In addition it is settled case-law that the exemptions constitute independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the Directive[18] and are to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person.[19]

57. The scope of the exemption for activities in the medical field in Article 13A(1)(c) of the Sixth Directive must therefore be determined in the light of a corresponding interpretation of that provision in the overall context of the general scheme for VAT, and no automatic inferences may be made on the basis of the scope of application of Directive 93/16.

16 — Judgment in case C-349/96 (cited in footnote 8), paragraph 18.

17 — Cf, *inter alia*, the judgments in Cases C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 45, and C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 18.

18 — Cf, for instance, Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21; *Stichting Uitvoering* (cited in footnote 14), paragraph 11; and Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 18.

19 — Cf, *inter alia*, the judgments in the case of *D.* (cited in footnote 2), paragraph 15, *SDC* (cited in footnote 18), paragraph 20, and *Stichting Uitvoering* (cited in footnote 14), paragraph 13.

58. With regard, therefore, to the scope of the exemption, as the appellants in the main proceedings in Case C-307/01 correctly stated, the wording of Article 13A(1)(c) of the Sixth Directive makes it clear that two conditions must be met. There must be provision of medical care, and it must be supplied by a person who possesses the necessary professional qualifications for a medical or paramedical profession. [20]

59. It is common ground that the services in question in both these cases were provided by a doctor. The question is therefore whether those services, by reason of their intrinsic nature, fall within Article 13A(1)(c). The point at issue, then, is the interpretation of the words 'provision of medical care'.

60. In its judgment in the case of *D.*, [21] the Court found that those words do not extend to establishing the genetic affinity of individuals. The orders for reference in both of the present cases stem from doubts as to whether that decision transfers to the medical services at issue here. What is uncertain is what particular factor causes the service of establishing paternity, as exemplified in the case of *D.*, to fall outside the exemption in Article 13A(1)(c).

61. The United Kingdom, and the national tribunal in Case C-307/01, [22] regard as critical the fact that, unlike the activities in this case, establishing paternity, as in the case of *D.*, has nothing to do with the health of any person.

62. That approach differentiates between a medical act whose object is purely to establish certain biological characteristics and one whose object is to ascertain a person's state of health.

63. However the Commission rightly rejected such a distinction, based on the type of medical act, or the actual medical procedure carried out or treatment given. It is not, to my mind, possible to infer such a distinction from the decision in *D.*, nor would it be practicable to do so.

64. It is, for example, conceivable that the test which the Court found not to qualify as care in the case of *D.*, or one like it, might be necessary in order to establish whether a person is suitable as an organ donor. If the United Kingdom's argument were to be accepted, then this test too would fall outside the exemption, even though it clearly forms part of, or is a prerequisite

20 — Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 27.

21 — Cited in footnote 2.

22 — See point 28 above.

to, the provision of medical care. The same would be true, for instance, of ascertaining a person's blood group, which also involves determining a biological characteristic by scientific tests, and has no bearing *per se* on any person's state of health.

65. Furthermore, in view of the complexity of the human organism and the corresponding multiplicity of methods of treatment which a doctor is necessarily called upon to administer in the exercise of his profession, it does not seem either very helpful or even possible to distinguish between various individual methods or medical procedures according to whether they are more or less central to or characteristic of the medical profession. There can be no question that establishing paternity, as in the case of *D.*, requires specialist medical knowledge and therefore falls within the tasks of the medical profession. That is exactly the reason for engaging a doctor as an expert. The application of medical skill, or the 'central functions of the medical profession', on which the United Kingdom bases its argument, at least in part, cannot therefore be decisive.

66. As regards the question whether a medical procedure is exempt from VAT, then, neither the nature of the medical intervention nor its centrality in terms of the functions of the medical profession is decisive; as the Court's case-law on the words 'provision of medical care' in Article 13A(1)(c) to date makes clear, the crucial issue is, rather, the aim of the medical intervention.

67. In its decision in the case of *D.*, the Court found, on the basis of a comparison of the various language versions of Article 13A(1)(c), that the term 'does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders'.[23] Therefore services 'not having a therapeutic aim' must, in view of the principle that any provision establishing an exemption from VAT is to be interpreted strictly, be excluded from the scope of Article 13A(1)(c) of the Sixth Directive.[24] The Court of Justice has confirmed that case-law in its judgments in the cases of *Commission* v *France*[25] and *Kügler*.[26]

68. It may therefore be concluded from the case-law that, when determining whether a medical procedure is to be exempted from VAT, it is the purpose of the procedure that is decisive. Not all activities carried out by

23 — Judgment in *D.* (cited in footnote 2), paragraph 18.
24 — Ibid., paragraph 19.
25 — *Commission* v *France* (cited in footnote 7), paragraph 24.
26 — *Kügler* (cited in footnote 20), paragraphs 38 and 39.

a doctor are exempt — only those having a 'therapeutic aim'.

69. In order correctly to determine the scope of the words 'the provision of medical care' in Article 13A(1)(c) of the Sixth Directive, it is also necessary to have regard to the rationale behind the exemption.

70. The Court has stated with respect to Article 13A(1)(b) that 'the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT'. [27] It is to be noted in that regard that subparagraph (c) of Article 13A(1) of the Sixth Directive is intended, in conjunction with subparagraph (b), to regulate comprehensively exemptions for services in the area of medical care. Article 13A(1)(b) covers services provided in hospitals, and subparagraph (c) covers medical care provided outside hospitals, both at the private address of the person providing the care and at the patient's home, or at any other place. [28]

71. Taken together, the two exemptions therefore serve to promote access to healthcare — whether in hospitals or otherwise — by keeping treatment costs down. [29]

72. It is apparent from both the purpose of the exemption, as just set out, and the case-law of the Court that, contrary to the United Kingdom's view, activities whose direct purpose is not to cure but is merely preventive do constitute activities with a 'therapeutic aim' which are to be regarded as involving the provision of medical care and thus exempt.

73. Indeed it is precisely preventive medicine that helps to keep medical costs down, both on an individual level and in national economic terms. Preventive medical procedures must therefore be covered by the exemption in order to ensure consistency with its purpose, which is to facilitate access to medical treatment.

27 — *Commission* v *France* (cited in footnote 7), paragraph 23.

28 — See the judgment in *Kügler* (cited in footnote 20), paragraph 36. See also my Opinion in Case C-45/01 *Christoph-Dornier-Stiftung* [2002] ECR I-12911, points 45 and 46.

29 — See the Opinion of Advocate General Saggio in *D.* (cited in footnote 2), point 16.

74. Furthermore, the Court has stated explicitly that only medical care provided 'for the purpose of prevention, diagnosis or treatment' qualifies for exemption under Article 13A(1)(c). [30]

75. It may therefore be said in general that the classification of a medical procedure for the purposes of Article 13A(1)(c) depends on whether the procedure may be characterised as care provided with a view to 'prevention, diagnosis or treatment', and must be assessed in the light of the purpose of that provision, which is to exempt from tax such medical services as are supplied to protect or restore a person's health, and which ought therefore to be available to individuals at as low a cost as possible.

76. It is clear from the foregoing that the Court excluded establishing the genetic affinity of individuals from the scope of Article 13A(1)(c) of the Sixth Directive in the case of *D.*, not because the object of that test was to ascertain a person's biological characteristics rather than their state of health, but because the medical procedure in that case served a purpose that was other than therapeutic, namely the drawing up of an expert opinion.

30 — See the judgment in *Kügler* (cited in footnote 20), paragraph 40.

77. The activities described in the orders for reference in Cases C-212/01 and C-307/01 are therefore to be assessed with a view to determining whether their purpose or nature is to provide an opinion or service by an expert, or whether it is to provide medical treatment with a view to maintaining or restoring a person's health.

78. It may not be easy in individual cases to distinguish medical care within the meaning of the exemption at issue here — which is to say medical procedures having a therapeutic aim — from other medical activities. However, firstly, the need for the distinction is clear from the wording of Article 13A(1)(c) of the Directive, which states that it is not activities undertaken by physicians in general that benefit from the exemption but 'the provision of medical care'; and, secondly, the problem of where to draw the line in relation to the conditions attaching to tax exemptions commonly do give rise to difficulties.

79. Whether a supply by a doctor falls within the exemption or not is ultimately to be determined on the basis of the facts, or the factual context of the particular medical transaction.

80. In so doing it is necessary to separate the factual aspects of the medical supply under consideration from the legal criteria

applicable to determine whether the conditions for the exemption to apply are met, such as in particular the requirement that there be a therapeutic aim within the meaning of the case-law.

81. For example, one of the factual aspects of a medical procedure to which regard may be had in determining the purpose or nature of that procedure, but which does not constitute a legal condition for the exemption to apply *per se*, is the identity of the person who requests the medical procedure. Commissioning by a court, an insurer or an employer could suggest that a medical procedure is to be regarded as a service provided in an expert capacity and not a provision of medical care having a therapeutic aim, even if technically it is the same medical procedure that is involved.

82. The United Kingdom and the Commission are correct to argue that the identity of the person who commissions or causes a medical examination to be carried out is not material to the exemption in Article 13A(1)(c) of the Sixth Directive — both on the wording of the provision and according to the case-law. [31] But it is one of the factors that help to determine whether the procedure constitutes treatment having a therapeutic aim.

83. The same is true of the relationship a patient has with the doctor treating him. Under the Directive it is not necessary, in order to come within the exemption in Article 13A(1)(c), that there be a particular degree of confidential relationship between doctor and patient, nor indeed would such a factual requirement be practicable. The finding by the Court of Justice in Case 353/85 [32] that the provision of medical care for the purposes of Article 13A(1)(c) involves services 'provided outside hospitals and similar establishments and within the framework of a confidential relationship between the patient and the person providing the care, a relationship which is normally established in the consulting room of that person', rather describes medical care outside hospitals in general (Article 13A(1)(b) of the Sixth Directive). [33] That finding is therefore not to be understood as constituting a prerequisite for there to be provision of medical care.

84. Finally, this is an appropriate point at which to consider the premiss, on which the United Kingdom's submission is based, that the activities described in both these cases involve medical diagnosis in the widest sense, and that the exemption cannot depend on the person who requested the diagnosis, or the reason for making it.

31 — Cf the judgment in *D.* (cited in footnote 2), paragraph 22.

32 — Judgment cited in footnote 12, paragraph 33.

33 — See also my Opinion in Case C-45/01 of 10 December 2002 (cited in footnote 28), points 45 and 46.

85. Very broadly, the Court's case-law says that in order to assess a transaction in the context of the Community VAT system, the nature of the transaction must be considered overall; artificial distinctions are to be avoided, and regard must be had to the perspective of the average consumer. [34]

86. If the medical supplies in this case are considered in their overall factual context, perhaps it is rash to describe them as involving diagnosis. As I have said, and as the Commission argued, the same medical procedure may be classified differently depending on the factual context in which it is performed, so that whether assessing a person's state of health is to be regarded as diagnosis or as giving an expert opinion depends on that context.

87. Before I turn to the activities described in Cases C-212/01 and C-307/01 in the light of the foregoing, I should just like to observe that, like the Commission, I do not consider the issue of the deduction of VAT to raise any more serious problems as a result of various medical services being treated differently for tax purposes than are raised in other cases where goods or services are used for both taxable and non-taxable transactions. How to proceed in such circumstances is clear from Article 17(5) of the Sixth Directive, which states that the proportion of VAT that is deductible for such goods and services is to be determined by reference to all the transactions carried out by the taxable person. [35]

B — *Case C-212/01*

88. It should be observed at the outset that the second question referred in Case C-212/01 on the interpretation of the Court's judgment in the case of *D.* has no distinct meaning without the first question. I therefore propose to answer both questions together.

89. By its two questions, the Landesgericht Innsbruck is asking whether medical findings and expert opinions based thereon made by a doctor appointed by a court or pension insurance institution for the purposes of determining whether an applicant for a pension does or does not suffer from disability, incapacity to work, or invalidity, fall within the scope of Article 13A(1)(c) of the Sixth Directive.

34 — Cf the judgment in Case C-349/96 (cited in footnote 8), paragraph 29.

35 — See also my Opinion in Case C-16/00 *Cibo Participations* [2001] ECR I-6663, point 6.

90. The activity of the doctor in such a case consists in making an expert assessment of the degree of a person's disability, for the purposes of evaluating the basis of a claim for a disability pension in the context of court proceedings. The medical intervention has no therapeutic aim and it does not therefore fall within the exemption in Article 13A(1)(c).

C — *Case C-307/01*

1. Paragraphs (a) and (b) of the question referred for a preliminary ruling

91. By paragraphs (a) and (b) of the question, the national tribunal is asking whether medical activities of examining persons and taking bodily samples for the purposes of testing for viruses, infections and other diseases, carried out for or on the instructions of employers or insurers, fall within the exemption in Article 13A(1)(c).

92. It is not possible to give a catch-all response because, as I have said, the person who commissions or requests a medical examination is not *per se* relevant for the purposes of the exemption.

93. The fact that a medical examination is carried out at the instigation, or on the instructions, of an employer or insurer does not automatically mean that it does not have a therapeutic aim, which is the critical condition for the exemption to apply. The example cited by the Commission of (periodic) medical examinations and tests to which employees frequently have to submit as a duty owed to their employer under employment law seems to me to be illustrative in this connection. Such routine examinations fulfil a therapeutic goal, in so far as their purpose is to maintain the employee's health or to prevent the onset of disease. Similarly, it is conceivable that an insurer might require certain preventive tests to be performed on its insureds. Such examinations, too, would fall to be classified as medical treatment with the aim of preventing, diagnosing and, where possible, curing, regardless of the identity of the person requesting them. The same would be true of medicals in schools of the type alluded to at the hearing. The purpose of such medicals is not to obtain an expert opinion, even though they are carried out on the instructions of the school and not the pupils who undergo the examination, but to protect and, if possible, restore those pupils' health.

94. It must therefore be found that medical examinations and tests of the type described in paragraphs (a) and (b) of the question referred fall within the scope of the exemption in Article 13A(1)(c) only if they are carried out in the interests of the patient's health and not purely to obtain an expert opinion with a view to providing information to employers or insurers.

95. The kinds of examination described in the order for reference, involving assessment for employers or insurers of the physical and/or mental health of a potential employee or insured person in order to determine his medical suitability for a particular post or the risk he represents for an insurance scheme, are examples of activities by experts which have no therapeutic aim.

2. Paragraphs (c) to (h) of the question referred

96. By subparagraphs (c) to (h) of the question referred, the national tribunal is requesting guidance on how the preparation of various medical certificates and reports should be treated for tax purposes.

97. In my view, the tribunal makes an erroneous distinction in the way it puts its question between certificates and reports on the one hand, and the examinations performed in order to produce them on the other. The latter may be regarded as merely ancillary since they do not serve any purpose in themselves for the person requesting them; they are simply the means employed to produce the certificate or report. [36] Nor does it make any difference to the aim of the medical procedure — which is the crucial factor — whether the certificates or reports are issued on the basis of medical notes or examinations.

98. What is, rather, critical for the purposes of Article 13A(1)(c) of the Sixth Directive is whether the services are supplied for the purposes of assessing medical fitness, such as for travel, or of establishing particular grounds for a claim, whether in connection with a war pension, or personal injury or medical negligence litigation. These are medical interventions (of an expert nature) whose purpose is other than therapeutic and they are therefore excluded from the scope of Article 13A(1)(c) of the Sixth Directive.

99. It is true that certifying whether a person is medically fit may indeed have a 'prophylactic' function in the widest sense, in that the person examined may, for instance, refrain from undertaking a journey which his health could not withstand. Similarly, the award of a war pension or damages may also contribute to a person's health or its restoration in the broadest sense. But in the case of both these medical activities it is clearly the expert's opinion that is uppermost, any therapeutic implications being only very indirect, so that to my mind such medical services cannot be regarded as having any therapeutic aim.

36 — Cf the judgment in the *Card Protection Plan* case (cited in footnote 8), paragraph 30.

VI — Conclusion

100. In the light of all of the foregoing, I propose that the Court should reply to the questions referred for a preliminary ruling as follows.

A — *Case C-212/01*

Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that the exemption therein laid down does not cover activities undertaken by a doctor consisting in establishing as an expert appointed by a court or pension insurance institution whether an applicant for a pension is or is not suffering from disability, incapacity to work or invalidity, the purpose of which is the preparation of an expert opinion rather than therapeutic.

B — *Case C-307/01*

(1) Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that

— conducting medical examinations of individuals, and

— taking blood or other bodily samples to test for the presence of viruses, infections or other diseases,

for or on behalf of an employer or insurance company are not exempt from VAT if they do not have any therapeutic aim, such as the medical treatment of the individuals by means of prevention, diagnosis or treatment, but serve some other purpose, such as the compilation of health-related information by an expert for employers or insurance companies.

(2) The aim of medical activities such as

— certification of medical fitness such as, for example, fitness to travel,

— giving certificates as to a person's medical condition for purposes such as entitlement to a war pension,

— preparing medical reports following medical examinations, including conducting such medical examinations, or on the basis of medical notes without any medical examination being carried out, in connection with issues of liability and the quantification of damages for individuals contemplating personal injury litigation, and

— preparing medical reports on the basis of medical notes or following medical examinations, including conducting such examinations, in connection with medical negligence for individuals contemplating litigation

is the obtaining of an expert opinion, rather than therapeutic. They do not therefore fall within the scope of Article 13A(1)(c) of the Sixth Directive and are thus not exempted from VAT.