

JUDGMENT OF THE COURT (Fifth Chamber)

6 November 2003 \*

In Case C-45/01,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

**Christoph-Dornier-Stiftung für Klinische Psychologie**

and

**Finanzamt Gießen,**

on the interpretation of Article 13A(1)(b) and (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 (OJ 1977 L 145, p. 1),

\* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting as President of the Fifth Chamber, P. Jann  
and of A. Rosas (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,  
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Christoph-Dornier-Stiftung für Klinische Psychologie, by W. Küntzel,  
Rechtsanwalt,
- the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting  
as Agents,
- the Danish Government, by J. Molde, acting as Agent,
- the Commission of the European Communities, by E. Traversa and K. Gross,  
acting as Agents, assisted by A. Böhlke, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Christoph-Dornier-Stiftung für Klinische Psychologie, of the German Government and of the Commission at the hearing on 18 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 10 December 2002,

gives the following

## **Judgment**

- <sup>1</sup> By order of 14 December 2000, received at the Court on 2 February 2001, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 13A(1)(b) and (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 (OJ 1977 L 145, p. 1; ‘the Sixth Directive’).

- 2 The questions were raised in proceedings between Christoph-Dornier-Stiftung für Klinische Psychologie ('Dornier') and the Finanzamt (Tax Office) Gießen ('the Finanzamt') concerning the charging of value added tax ('VAT') at a reduced rate on psychotherapeutic treatment provided by Dornier in 1990 when, according to Dornier, those services should have been exempt from VAT.

## Legal framework

### *Community legislation*

- 3 Under Article 2(1) of the Sixth Directive, VAT is chargeable on 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.
- 4 Article 4(1) and (2) of the Sixth Directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of

tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.’

5 Article 13A(1)(b), (c) and (g) of the Sixth Directive states:

‘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:

...

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

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

...

- (g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned'.

6 Article 13A(2) of the Sixth Directive provides:

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

- they shall not systematically aim to make a profit, but any profits nevertheless arising shall not be distributed, but shall be assigned to the continuance or improvement of the services supplied,
- they shall be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned,
- they shall charge prices approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to value added tax,

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

(b) The supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (n) above if:

— it is not essential to the transactions exempted,

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

### *National legislation*

7 Paragraph 4(14) and (16) of the Umsatzsteuergesetz 1980 (Law on Turnover Tax; 'the UStG'), in the version in force at the date of the facts in the main proceedings, provides:

'The following transactions covered by Paragraph 1(1)(1) to 1(1)(3) are exempt:

...

14. activities arising from the practice of the profession of doctor, dentist, lay practitioner (heilpraktiker), physiotherapist, midwife or similar professional medical activity for the purposes of Paragraph 18(1)(1) of the Einkommensteuergesetz [Law on Income Tax] or from the practice of the profession of clinical chemist. Other supplies by associations whose members belong to the professions set out in the first sentence are also exempt vis-à-vis their members in so far as those supplies are directly used to carry out activities exempt under the first sentence.

...

16. activities closely linked with the operation of hospitals, diagnostic clinics and other bodies providing medical care, diagnoses or tests and of old people's homes, residential accommodation for the elderly and nursing homes, where:

(a) those bodies are run by legal persons governed by public law or

...

(c) in the case of diagnostic clinics and other establishments providing treatment by doctors, diagnoses or tests, the services are provided under the supervision of a doctor and in the previous calendar year at least 40% of the services were provided to the persons specified in number (15)(b)...’.

8 Paragraph 4(15)(b) of the UStG specifies the following persons:

‘insured persons, persons in receipt of social assistance or... persons entitled to maintenance or a pension.’

9 According to a judgment of 10 November 1999 of the Bundesverfassungsgericht (Federal Constitutional Court), Article 3(1) of the Grundgesetz (Basic Law) precludes the question whether medical activities are exempt from turnover tax from being decided solely on the basis of legal form. Accordingly, exemption from tax of the activities of a member of one of the professions listed in the first sentence of Paragraph 4(14) of the UStG is not limited to the person who actually practises the profession but can also be claimed by a partnership or a company.

### **Main proceedings and questions referred for a preliminary ruling**

10 Dornier is a charitable foundation governed by private law, with its head office at Marburg (Germany). According to the order for reference, its object is to develop the practice of clinical psychology. It also aims to improve methods of treatment through theoretical and practical research in clinical psychology. For those purposes, it maintains an out-patient facility in which patients are given psychotherapeutic treatment by qualified psychologists employed by the foundation.

11 In 1990, the qualified psychologists employed by the foundation were not doctors. However, they were licensed to practise under the Heilpraktikergesetz (Law on Lay Practitioners) and had received further education to qualify as psychotherapists.

- 12 More than 40% of the services Dornier provided in 1990 were for persons insured under the compulsory social insurance scheme, for persons in receipt of social assistance or for persons entitled to maintenance or a pension. In addition, the board members and principal employees were psychotherapists who were licensed as lay practitioners ('Heilpraktiker').
- 13 In 1990, the Finanzamt taxed the services supplied by Dornier at a reduced rate of VAT under Paragraph 12(2)(8) of the UStG. Disagreeing with Dornier, it took the view that those services were not exempt from tax under Paragraph 4(16)(c) of the UStG.
- 14 Dornier contested its tax assessment for 1990 before the Hessisches Finanzgericht (Finance Court, Hesse), Kassel (Germany). It argued that, if applied in accordance with the German Constitution and Community directives, the exemption in question covered not only 'services provided under the supervision of a doctor' but also those services provided by establishments offering psychotherapeutic care where they were managed not by doctors but by qualified psychologists holding a further paramedical qualification similar to that of a medical specialist in psychotherapy and licensed as lay practitioners. The refusal of tax exemption gave rise to a difference in treatment, without any objective reason, as compared with the taxation of comparable services provided under the supervision of a doctor.
- 15 The Hessisches Finanzgericht took the view that neither Article 13A(1)(b) of the Sixth Directive nor constitutional considerations required that Paragraph 4(16)(c) of the UStG be applied more broadly than its wording entailed. It accordingly rejected the claim, on the ground that Dornier had not provided the services specified in Paragraph 4(16)(c) of the UStG under the supervision of doctors.

- 16 Dornier appealed against this judgment to the Bundesfinanzhof. The latter stayed the proceedings and referred the following four questions to the Court for a preliminary ruling:

- ‘1. Does psychotherapeutic treatment, given in an out-patient facility provided by a foundation (charitable establishment) employing qualified psychologists who are licensed under the Heilpraktikergesetz but who are not registered as doctors, qualify as activities “closely related” to hospital and medical care within the meaning of Article 13A(1)(b) of Directive 77/388/EEC?
2. In order for there to be an “other duly recognised establishment of a similar nature” within the meaning of Article 13A(1)(b) of Directive 77/388/EEC, must there be a formal recognition procedure or can recognition also derive from other rules (e.g. rules concerning the assumption of costs by social security authorities) which apply equally to hospitals, centres for medical treatment and other establishments?

Is an exemption from tax unavailable to the extent that the social security authorities do not reimburse, or only partially reimburse, patients for the costs of psychotherapeutic treatment given by the aforementioned employees of the claimant?

3. Is the psychotherapeutic treatment provided by the claimant exempt from tax on the basis of the neutrality of value added tax, because the psychotherapists it employs could have provided the same treatment on a tax-exempt basis under Article 13A(1)(c) of Directive 77/388/EEC if they had provided it themselves as self-employed taxable persons?

4. Is the claimant entitled to rely on the tax exemption of its transactions involving psychotherapeutic treatment under Article 13A(1)(b) and (c) of Directive 77/388/EEC?’

### Questions referred for a preliminary ruling

- 17 The Court finds, as a preliminary point, that the third question referred, concerning the interpretation of Article 13A(1)(c) of the Sixth Directive, is substantively identical to a question on which the Court has already ruled. The answer to that question is pertinent to the examination of the first question, which concerns the interpretation of letter (b) of the same provision. Accordingly, it is appropriate to examine the third question first.

### *The third question*

- 18 By its third question, the national court asks the Court whether the psychotherapeutic treatment provided by Dornier may be exempted from VAT under Article 13A(1)(c) of the Sixth Directive, having regard, first, to the principle of neutrality inherent in the common system of VAT and, second, to the fact that the same treatment could have been provided on a tax-exempt basis by psychotherapists employed by Dornier if they had provided it not as employees but as self-employed taxable persons.
- 19 It is apparent from both the wording of the question and the observations submitted to the Court in this connection that it is common ground that if the psychotherapeutic treatment had been provided by self-employed psychothera-

pists, it would have been exempt from tax as provided for in Article 13A(1)(c) of the Sixth Directive. Accordingly, the third question essentially asks whether the legal form of the taxable person who provided the service in question, in this case a foundation governed by private law, prevents that exemption from applying.

- 20 The Court has held that the exemption envisaged in Article 13A(1)(c) of the Sixth Directive is not dependent on the legal form of the taxable person supplying the medical or paramedical services referred to in that provision (Case C-141/00 *Kügler* [2002] ECR I-6833).
- 21 The answer to the third question must therefore be that since the exemption envisaged in Article 13A(1)(c) of the Sixth Directive is not dependent on the legal form of the taxable person providing the medical or paramedical services referred to in that provision, psychotherapeutic treatment provided by a foundation governed by private law and given by psychotherapists employed by the foundation may benefit from that exemption.

### *The first question*

- 22 By its first question, the national court essentially asks whether the exemption from VAT provided for in Article 13A(1)(b) of the Sixth Directive applies to psychotherapeutic treatment given in the out-patient facility of a foundation governed by private law by qualified psychologists employed by the foundation who are licensed to carry out such treatment but are not doctors.

- 23 It follows from the answer to the third question that psychotherapeutic treatment given in conditions such as those indicated in the main proceedings may benefit from the exemption provided for in Article 13A(1)(c) of the Sixth Directive. Since, according to the information given in the order for reference, the treatment at issue in the main proceedings appears to have been given to the patients in the out-patient facility of a foundation governed by private law, it is not necessary to examine whether the same treatment also fulfils the conditions for benefiting from a tax exemption pursuant to Article 13A(1)(b).
- 24 The possibility cannot be totally excluded, however, that an interpretation of the terms used in Article 13A(1)(b) may be relevant for resolving the dispute pending before the national court. Accordingly, it is appropriate to rule on the interpretation of Article 13A(1)(b) of the Sixth Directive.
- 25 In accordance with the wording of its first question, the national court wishes to know whether such treatment is an activity ‘closely related’ to hospital and medical care.
- 26 In asking the Court whether psychotherapeutic treatment given in conditions such as those referred to above is an activity closely related to hospital and medical care within the meaning of Article 13A(1)(b) of the Sixth Directive, the national court appears not to envisage the possibility that such treatment may be ‘medical care’ within the meaning of that provision. Dornier and the Commission submit, however, that ‘medical care’ should be given a broad interpretation, which could thus apply to psychotherapeutic treatment given by persons who are not doctors. In those circumstances, in order to give an appropriate answer to the

first question, the course followed by the Advocate General in her Opinion must be adopted and consideration given not only to the term ‘activities closely related to hospital and medical care’, but also to the term ‘medical care’, both of which are found in Article 13A(1)(b) of the Sixth Directive.

- 27 It must be acknowledged that, even if psychotherapeutic treatment is not an activity closely related to hospital care or care by doctors, it may nevertheless be covered by the term ‘medical care’ within the meaning of the abovementioned provision, as Dornier and the Commission suggest.

Activities ‘closely related’ to hospital and medical care

— Observations submitted to the Court

- 28 The German Government submits that the psychotherapeutic treatment at issue in the main proceedings does not come within the ambit of activities ‘closely related’ to hospital or medical care within the meaning of Article 13A(1)(b) of the Sixth Directive. In its view, there must be a link between such activities and hospital or medical care and they must therefore either supplement or be a necessary precondition of that care. It states that Dornier’s activity is complete in itself and that such treatment is not linked to other types of care.
- 29 The Danish Government submits that the tax exemption under Article 13A(1)(b) of the Sixth Directive should apply only where the treatment, viewed in isolation,

must be regarded as hospital or medical care in the strict sense or where it is sufficiently closely related to the hospital or medical care.

- 30 According to the Danish Government, in the absence of a sufficiently direct link between the treatment given by a paramedical profession and medical care in the strict sense, there is a risk of the exemption provided for in Article 13A(1)(b) of the Sixth Directive extending to treatment covered by letter (c) of the same provision. It is for the Member States to choose which paramedical treatment to exempt, pursuant to the power granted by Article 13A(1)(c); this cannot be called into question by an interpretation of letter (b) of the same provision.
- 31 The Danish Government submits, in the event that the Court should find that Article 13A(1)(b) of the Sixth Directive is to be interpreted as meaning that the exemption provided for therein may also extend to treatment which could be exempted by the Member States under letter (c) of the same provision, that it is necessary to determine precisely the extent of such an overlap.
- 32 The Commission considers that psychotherapeutic treatment is not an activity ‘closely related’ to hospital or medical care within the meaning of Article 13A(1)(b) of the Sixth Directive. In paragraph 27 of Case C-76/99 *Commission v France* [2001] ECR I-249, the Court considered the term to equate to the relationship between an ancillary service and a principal service. According to the Commission, the services provided by psychotherapists are independent services which are not a means of better enjoying the principal service (Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30). Such treatment is linked to medical services only in so far as reimbursement of the related expenditure by health insurance schemes or social security authorities is subject to prior certification by a doctor of the need for the treatment. The Commission points out, however, that the Bundesfinanzhof has stated that no doctor is involved in the treatment in the strict sense.

## — Findings of the Court

- <sup>33</sup> As stated by the Court in paragraph 22 of *Commission v France*, cited above, Article 13A(1)(b) of the Sixth Directive does not include any definition of the concept of activities ‘closely related’ to hospital and medical care. None the less, it is apparent from the very terms of that provision that it does not envisage services which are unrelated to hospital care for the patients receiving those services or to any medical care which they might receive.
- <sup>34</sup> In this case, it is common ground that the psychotherapeutic treatment given in Dornier’s out-patient facility by qualified psychologists generally constitutes services provided to the patients as an end in themselves and not as a means of better enjoying other types of services. In so far as that treatment is not ancillary to hospital or medical care, it is not an activity ‘closely related’ to services exempted under Article 13A(1)(b) of the Sixth Directive.
- <sup>35</sup> Accordingly, the Court finds that psychotherapeutic treatment given in an out-patient facility of a foundation governed by private law by qualified psychologists who are not doctors is an activity ‘closely related’ to hospital or medical care within the meaning of Article 13A(1)(b) of the Sixth Directive only when such treatment is actually given as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service.

## The term of ‘medical care’

### — Observations submitted to the Court

- <sup>36</sup> Dornier submits that the psychotherapeutic treatment which is given in its out-patient facility by qualified psychologists is ‘medical care’ within the meaning of Article 13A(1)(b) of the Sixth Directive. It states that the care given by psychotherapists consists in diagnosing, treating and curing psychological illnesses or disorders. It is therefore medical care concerning the health of persons within the meaning of Case C-384/98 *D*. [2000] ECR I-6795, paragraphs 17 and 18.
- <sup>37</sup> Dornier submits that, according to the definition of ‘medical care’ given by the Court, it is necessary to ascertain and define the material content of the service provided, that is, the durable capacity to provide medical care and not the formal admission of the person providing the care as a doctor or as a person treated as a doctor from the point of view of professional regulations. It states that psychotherapists were not treated as doctors because of lacunae which still existed in 1990 in the applicable professional regulations.
- <sup>38</sup> According to Dornier, the conditions governing the application of the VAT exemption in Article 13A(1)(b) of the Sixth Directive do not require that the care be given by a specific group of persons, that is, persons authorised to practise medicine in accordance with the Federal Medical Regulations. It submits that, were that the case, it would have been necessary to choose a formulation such as ‘medical care given by doctors’. An examination of various language versions of the Sixth Directive confirms that the term ‘medical care’ refers to a substantive concept linked to an activity. Dornier infers from this that it cannot be a criterion for application of the exemption that the activity be carried out by a doctor, or

even under the supervision of a doctor. On the contrary, for the exemption to apply, it must be sufficient for care to be given by a member of a medical profession who is authorised to practise and whose qualification is comparable to a doctor's, as is that of the qualified psychologists in question in the main proceedings.

- 39 The Commission also submits that the term 'medical care' must be understood in the broad sense and that it is not limited to medical activities in the strict sense. According to the Commission, Article 13A(1)(b) and (c) both concern 'medical care concerning the health of persons' in accordance with the definition given by the Court in paragraphs 17 and 18 of *D.*, cited above. The care referred to in letters (b) and (c) differs less in its nature than in the form in which it is provided. Thus, the services referred to in Article 13A(1)(b) are services encompassing a whole range of medical care normally provided on a non-profit-making basis in establishments pursuing social purposes such as the protection of human health, whilst the care referred to in letter (c) of the same provision is care provided outside hospital establishments and within the framework of a confidential relationship between the patient and the person providing the care, which is normally provided in the consulting room of the latter. The Commission refers in this connection to Case 353/85 *Commission v United Kingdom* [1988] ECR 817, paragraphs 32 and 33.

- 40 The Commission adds that the fact that the term 'medical care' applies to the psychotherapeutic treatment at issue in the main proceedings is consistent with the purpose of the exemption provided for in Article 13A(1)(b) of the Sixth Directive because it 'is designed to ensure that the benefits flowing from [hospital and medical] care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT' (*Commission v France*, cited above, paragraph 23). Such treatment normally serves to treat an illness or any other health disorder and it should therefore be viewed as provision of care.

- 41 The German Government maintains that Article 13A(1)(b) of the Sixth Directive refers only to ‘ärztliche Heilbehandlungen’ [literally, care by a doctor] in the strict sense of the term. It states that, unlike Article 13A(1)(c), that provision does not use the generic term ‘heilbehandlung’ [‘care’] and does not draw a distinction between ‘medical’ and ‘paramedical’.

— Findings of the Court

- 42 According to the Court’s case-law, the exemptions envisaged in Article 13 of the Sixth Directive are to 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 (see in particular Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20; and *Kügler*, cited above, paragraph 28). However, the interpretation of the terms used in that provision must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT.
- 43 It is apparent from the case-law that the objective of reducing the cost of medical care and making that care more accessible to individuals is common to both the exemption provided for in Article 13A(1)(b) of the Sixth Directive and that in letter (c) of the same provision (see *Commission v France*, cited above, paragraph 23; and *Kügler*, cited above, paragraph 29).
- 44 It must also be borne in mind that the principle of fiscal neutrality precludes, *inter alia*, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned (*Kügler*, cited above, paragraph 30).

- 45 As is clear from the answer given by the Court to the third question, the exemption provided for in Article 13A(1)(c) of the Sixth Directive applies to psychotherapeutic treatment given by qualified psychotherapists when that treatment is given outside bodies governed by public law and other establishments contemplated by Article 13A(1)(b).
- 46 As regards the question of whether psychotherapeutic treatment given by qualified psychologists in a hospital environment is covered by the term 'medical care' in Article 13A(1)(b) of the Sixth Directive, it is clear, first, that only some language versions of the Directive, including the German and French versions, seem to draw a distinction between the nature of the care exempted under that provision and that of the care exempted under letter (c) of the same provision.
- 47 Next, as correctly pointed out by the Advocate General in points 44 to 46 of her Opinion, the criterion for drawing a clear distinction between the two tax exemptions provided for in Article 13A(1)(b) and (c) is less the nature of the service than the place where it is provided. The Court has held that, under Article 13A(1)(b), it is appropriate to exempt services encompassing a whole range of medical care in establishments pursuing social purposes such as the protection of human health, whereas letter (c) of the same provision exempts services provided outside hospitals and within the framework of a confidential relationship between the patient and the person providing the care (*Commission v United Kingdom*, cited above, paragraph 33). Whilst it is true that the Court in that case found that the exemption of supplies of goods effected in connection with the provision of medical care envisaged in Article 13A(1)(c) could not be justified under letter (b) of the same provision, that interpretation follows *inter alia* from the fact that the latter provision covers duly recognised establishments pursuing social purposes and provides expressly for exemption of activities which are closely linked to medical care; the same cannot be said of Article 13A(1)(c).

- 48 It should also be borne in mind that, given the objective of reducing health care costs, the term ‘medical care’ in Article 13A(1)(b) does not call for an especially narrow interpretation (see, to that effect, *Commission v France*, cited above, paragraph 23). However, the services covered by that term, like those covered by ‘provision of medical care’ in letter (c) of the same provision, must have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (*D.*, cited above, paragraph 18; and *Kügler*, cited above, paragraph 38). It is not disputed that the treatment provided by qualified psychologists in a hospital environment fulfils the condition of having a therapeutic purpose.
- 49 Lastly, it must be pointed out that that interpretation of the term ‘medical care’ in Article 13A(1)(b) is in keeping with the principle of fiscal neutrality because paramedical services, such as treatment given by qualified psychologists, are exempt from VAT regardless of where they are provided.
- 50 It follows from the foregoing considerations that the term ‘medical care’ in Article 13A(1)(b) of the Sixth Directive must be interpreted as covering all provision of medical care envisaged in letter (c) of the same provision, including services provided by persons who are not doctors but who provide paramedical services, such as psychotherapeutic treatment given by qualified psychologists.
- 51 Accordingly, the first question must be answered to the effect that psychotherapeutic treatment given in an out-patient facility of a foundation governed by private law by qualified psychologists who are not doctors is not an activity ‘closely related’ to hospital or medical care within the meaning of Article 13A(1)(b) of the Sixth Directive, except where such treatment is actually given as a service ancillary to the hospital or medical care received by the patients

in question and constituting the principal service. However, the term ‘medical care’ in that provision must be interpreted as covering all provision of medical care envisaged in letter (c) of the same provision, including services provided by persons who are not doctors but who give paramedical services, such as psychotherapeutic treatment given by qualified psychologists.

### *The second question*

- 52 By its second question, the national court asks, first, whether the term ‘other duly recognised establishments of a similar nature’ in Article 13A(1)(b) of the Sixth Directive presupposes a formal recognition procedure of an out-patient facility of a foundation governed by private law or whether recognition of such an establishment may also derive, for example, from the fact that the cost of treatment given there is assumed by the social security authorities in accordance with applicable rules, which apply equally to hospitals, centres for medical treatment and other establishments. Second, it asks whether the fact that the social security authorities do not reimburse, or only partially reimburse, patients for the cost of such treatment justifies the preclusion of the exemption.

### Observations submitted to the Court

- 53 Dornier maintains that its out-patient facility, which is a centre for psychotherapeutic care and diagnosis, is an establishment similar in nature to bodies governed by public law, hospitals and centres for medical treatment or diagnosis envisaged in Article 13A(1)(b) of the Sixth Directive. The question of whether the facility has been ‘duly recognised’ for the purposes of that provision must, in

Dornier's view, be answered by reference to national law. Dornier states that in Germany the law does not require such a facility to have an operating licence and no specific supervision of the establishment is prescribed. In the present case, only psychologists working there are, under the Heilpraktikergesetz, subject to supervision by the public health authorities of the city of Marburg.

- 54 Dornier adds that the costs of the services provided in its out-patient facility have been reimbursed to the patients by statutory and private health insurance schemes in the same manner as the costs incurred for equivalent services provided by doctors practising psychotherapy. The reason why Dornier's bills were reimbursed at a reduced rate is the 'lower point value' of psychotherapeutic care; the same reduction applies to services provided by doctors recognised by the health schemes. Dornier submits that generally its out-patient facility was recognised as a provider under the statutory health insurance scheme.
- 55 Dornier infers from the foregoing that its out-patient facility, which can operate without a licence and which provides psychotherapeutic treatment identical to that given by doctors, with a comparable rate of reimbursement, is an 'other duly recognised establishment of a similar nature' within the meaning of Article 13A(1)(b) of the Sixth Directive.
- 56 According to the German Government, there is no need to answer the second question, since the psychotherapeutic treatment at issue in the main proceedings is not 'hospital' or 'medical' care within the meaning of Article 13A(1)(b) of the Sixth Directive. It submits in the alternative, however, that Community law does not provide any indication as to the recognition procedure, but rather allows the Member States broad discretion as to which establishments in the public health sector may be recognised. That that was the intention of the Community

legislature is quite clear from the Council of the European Communities' *travaux préparatoires* for the Sixth Directive, which took place in 1974 and 1975. It is also expressed several times in the wording of Article 13A(1) of that directive.

57 The German Government submits that, strictly speaking, such recognition would require a legal act, but it adds that no further specification is given. Accordingly, it is not necessary that recognition be legislative in nature as part of a national law transposing the Sixth Directive. It could also result from circumstances extraneous to tax law, such as the reimbursement of costs incurred for treatment provided by the establishment, as referred to by the national court. The German Government states that it is necessary, however, that a non-fiscal criterion be envisaged in the national VAT rules. Otherwise such rules would not be sufficiently precise to constitute a transposition measure.

58 The German Government states that in Germany Paragraph 4(16)(c) of the UStG governs the conditions of recognition for VAT purposes. According to that provision, only those establishments which provide treatment under medical supervision and which, in the previous calendar year, provided at least 40% of their services to insured persons, persons in receipt of social assistance or persons entitled to maintenance or a pension may be regarded as 'other duly recognised establishments of a similar nature' for the purposes of Article 13A(1)(b) of the Sixth Directive. It is thus clear that, in Germany, the recognition of an establishment for reasons relating to the assumption of costs by the social security authorities does not necessarily lead to recognition for VAT purposes.

59 The German Government adds that it must be for the national legislation to determine whether the exemption is inapplicable in so far as the social security authorities do not reimburse, or only partially reimburse, patients for the costs of psychotherapeutic treatment given by qualified psychologists who are not doctors.

- 60 The Danish Government submits that the reference to ‘other duly recognised establishments of a similar nature’ in Article 13A(1)(b) of the Sixth Directive does not entail a formal recognition procedure. Recognition might also follow from other circumstances, such as the fact that the treatment in question is reimbursed under the public health insurance scheme.
- 61 The Commission observes that the Sixth Directive does not provide for any formal recognition procedure. It is thus for the national legislature to specify the form that recognition is to take, which may also follow from circumstances extraneous to tax law, provided they relate to activities which generate turnover. Conditions for reimbursement of costs incurred for treatment by health insurance schemes or other social security authorities are one example. It is for the national court to determine in each case whether those conditions are satisfied.
- 62 The Commission submits, however, that assumption of only part of the costs of the care in question may not give rise to partial recognition of establishments. It submits that the same treatment must be taxable or exempt, as the case may be, in its entirety. Rules which allow for partial recognition of establishments based on the rate of reimbursement of the costs incurred are neither clear nor foreseeable. Accordingly, such rules would hardly be conducive to ensuring proper and straightforward application of the tax exemption.
- 63 According to the Commission, the prices applied and thus the cost of care provided by the establishments in question are other factors to be taken into account in the recognition process. It points out that Article 13A(2)(a) of the Sixth Directive authorises the Member States to make the granting of the exemption provided for in Article 13A(1)(b) subject to certain conditions to be complied with by bodies other than those governed by public law, such as relatively low prices and the lack of systematic pursuit of profit. The Commission adds that all of the exemptions referred to in Article 13A are intended to reduce the costs of certain activities in the public interest.

## Findings of the Court

- <sup>64</sup> As regards the term ‘other duly recognised establishments of a similar nature’, Article 13A(1)(b) of the Sixth Directive does not specify the conditions and procedures for that recognition. It is thus, in principle, for the national law of each Member State to lay down the rules according to which such recognition may be granted to establishments which request it.
- <sup>65</sup> The adoption of national rules in this area is, moreover, provided for in Article 13A(2)(a) of the Sixth Directive, which states that ‘Member States may make the granting to bodies other than those governed by public law of each exemption provided for in (1)(b)... subject in each individual case to one or more of the... conditions’ referred to therein.
- <sup>66</sup> However, since Article 13A(2)(a) does not require the Member States to take such measures, the fact that a Member State has not exercised that option does not affect the possibility that an establishment may be recognised for the purposes of granting the exemptions referred to.
- <sup>67</sup> In addition, no provision of the Sixth Directive requires that recognition be granted in accordance with a formal procedure or that it be provided for expressly in national tax provisions.
- <sup>68</sup> According to the German Government, Paragraph 4(16)(c) of the UStG lays down the national rules relating to the recognition of an establishment for the purposes of granting the exemption provided for in Article 13A(1)(b) of the Sixth

Directive. It follows that a foundation governed by private law may be granted that exemption if it fulfils the conditions established under national law, including the condition requiring that the treatment be provided under medical supervision.

<sup>69</sup> It should be borne in mind in this context that, as regards Article 13A(1)(g) of the Sixth Directive, the Court has held that where a taxable person seeks the status of charitable organisation, it is for the national courts to examine whether the competent authorities have observed the limits on their discretion under that provision while applying Community principles, in particular the principle of equal treatment (*Kügler*, cited above, paragraph 56).

<sup>70</sup> It follows from the answer given by the Court to the first question that the condition requiring that the treatment be provided under medical supervision, in so far as it is intended to preclude the exemption from applying to treatment given under the sole responsibility of members of paramedical professions, goes beyond the limits of the discretion allowed to the Member States under Article 13A(1)(b) of the Sixth Directive. The term ‘medical care’ in that provision covers not only treatment provided directly by doctors or other health professionals under medical supervision, but also paramedical services given in hospitals under the sole responsibility of persons who are not doctors.

<sup>71</sup> It follows that, for the purposes of the exemption provided for in Article 13A(1)(b) of the Sixth Directive, a Member State may not validly make recognition of establishments subject to a condition requiring that paramedical services provided by those establishments be given under medical supervision.

72 In paragraphs 57 and 58 of *Kügler*, cited above, the Court added that, in order to determine which organisations should be recognised as charitable within the meaning of Article 13A(1)(g) of the Sixth Directive, the national authorities should, in accordance with Community law and subject to review by the national courts, take a number of factors into consideration. Those factors include the public interest of the activities of the taxable person in question, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies.

73 As correctly pointed out by the Advocate General in point 55 of her Opinion, those statements appear to apply equally to the interpretation of Article 13A(1)(b) of the Sixth Directive as regards recognition of the establishments referred to in that provision.

74 In the case in the main proceedings, it is therefore for the national court to determine, in the light of all of those factors, whether the refusal to recognise Dornier for the purposes of the exemption provided for in Article 13A(1)(b) of the Sixth Directive gives rise to an infringement of the principle of equal treatment as compared to other operators providing the same treatment in comparable situations.

75 It is in this light that it is appropriate to take account of the fact that the social security authorities do not reimburse, or only partially reimburse, patients for the costs of psychotherapeutic treatment. If Dornier's situation is comparable in this respect to that of other operators providing the same treatment, the mere fact that the cost of that treatment is not fully covered by the social security authorities does not justify a difference in the treatment of providers for VAT purposes.

- 76 Accordingly, the second question must be answered to the effect that the recognition of an establishment for the purposes of Article 13A(1)(b) of the Sixth Directive does not presuppose a formal recognition procedure; nor must such recognition necessarily derive from national tax law provisions. Where the national rules pertaining to recognition contain restrictions which exceed the limits of the discretion allowed to Member States under that provision, it is for the national court to determine, in the light of all the relevant facts, whether a taxable person must none the less be regarded as an ‘other duly recognised establishment of a similar nature’ within the meaning of that provision.

#### *The fourth question*

- 77 By its fourth question, the national court asks whether, in circumstances such as those in the main proceedings, the provisions of Article 13A(1)(b) and (c) of the Sixth Directive may be relied on by a taxable person before a national court in order to obtain an exemption for treatment provided by it.

- 78 It must be borne in mind that, in accordance with settled case-law (see, in particular, Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case C-193/91 *Mohsche* [1993] ECR I-2615, paragraph 17; Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 36; and *Kügler*, cited above, paragraph 51), wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

- 79 In addition, although Article 13A(1) of the Sixth Directive provides that the Member States are to apply the exemptions prescribed by that provision ‘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’, a Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in the Sixth Directive, on its failure to adopt the very provisions which are intended to facilitate the application of that exemption (*Kügler*, cited above, paragraph 52).
- 80 As regards the content of Article 13A(1)(b) and (c) of the Sixth Directive, the Court finds that, contrary to the assertions of the German Government, those provisions indicate in a sufficiently precise and unconditional manner the activities to which the exemption applies (see, by analogy, as regards Article 13A(1)(g) of the Sixth Directive, *Kügler*, cited above, paragraph 53).
- 81 The fact that those provisions confer discretion on the Member States to determine, first, which establishments are not ‘governed by public law’ but which may benefit from the exemption provided for in Article 13A(1)(b) and, second, for which paramedical professions the exemption provided for in letter (c) of the same provision may be granted, does not prevent individuals who, according to objective criteria, provide treatment in the public interest envisaged by those exemptions, from relying directly on the provisions of the Sixth Directive as against national provisions which do not comply with that directive.
- 82 In the present case, it follows from the answer given to the second question that the national rules pertaining to recognition of an establishment for the purposes of the exemption provided for in Article 13A(1)(b) of the Sixth Directive contain a restriction incompatible with the terms of that provision. The taxable person may therefore rely directly, in the national court, on Article 13A(1)(b) of the Sixth Directive to contest the application of a rule of national law requiring that the

treatment be provided under medical supervision. However, it also follows from the answer to the second question that, in order for it to obtain recognition as an 'other duly recognised establishment of a similar nature' and thus to benefit from the exemption provided for in Article 13A(1)(b) of the Sixth Directive, the national court must determine, in the light of all the relevant factors, in particular the circumstances of the case in the main proceedings, whether the taxable person satisfies the conditions of application of that exemption.

83 As far as the exemption provided for in Article 13A(1)(c) of the Sixth Directive is concerned, it follows from the answer given to the third question that that exemption applies to psychotherapeutic treatment provided by a foundation governed by private law and given by psychotherapists employed by the foundation. Consequently, that provision may be relied on by a taxable person as against national legislative provisions or administrative practices which make the exemption subject to the provider's having a specified legal form.

84 Accordingly, the fourth question must be answered to the effect that, in circumstances such as those in the main proceedings, Article 13A(1)(b) and (c) of the Sixth Directive may be relied on by a taxable person before a national court in order to contest the application of rules of national law which are incompatible with that provision.

## Costs

85 The costs incurred by the German and Danish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Bundesfinanzhof by order of 14 December 2000, hereby rules:

1. Psychotherapeutic treatment given in an out-patient facility of a foundation governed by private law by qualified psychologists who are not doctors is not an activity 'closely related' to hospital or medical care within the meaning of Article 13A(1)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, except where such treatment is actually given as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service. However, the term 'medical care' in that provision must be interpreted as covering all provision of medical care envisaged in letter (c) of the same provision, including services provided by persons who are not doctors but who give paramedical services, such as psychotherapeutic treatment given by qualified psychologists.
2. Recognition of an establishment for the purposes of Article 13A(1)(b) of the Sixth Directive 77/388 does not presuppose a formal recognition procedure;

nor must such recognition necessarily derive from national tax law provisions. Where the national rules pertaining to recognition contain restrictions which exceed the limits of the discretion allowed to Member States under that provision, it is for the national court to determine, in the light of all the relevant facts, whether a taxable person must none the less be regarded as an 'other duly recognised establishment of a similar nature' within the meaning of that provision.

3. Since the exemption envisaged in Article 13A(1)(c) of the Sixth Directive 77/388 is not dependent on the legal form of the taxable person providing the medical or paramedical services referred to in that provision, psychotherapeutic treatment provided by a foundation governed by private law and given by psychotherapists employed by the foundation may benefit from that exemption.
4. In circumstances such as those in the main proceedings, Article 13A(1)(b) and (c) of the Sixth Directive 77/388 may be relied on by a taxable person before a national court in order to contest the application of rules of national law which are incompatible with that provision.

Edward

Jann

Rosas

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass

V. Skouris

Registrar

President

