

Effectiveness of the current VAT treatment of charities: are the objects of the VAT exemptions in the public interest being achieved and if not, how can this be improved within the restrictions imposed by EU legislation?

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1 Introduction

Charities are not mentioned as such in the VAT Directive.² However, Chapter 2 of Title IX of the VAT Directive (articles 132-134) provides for ‘Exemptions for certain activities in the public interest’. Most³ of the activities mentioned in the exemptions included in article 132 are deemed charitable in many Member States, for example medical care, welfare and social security work, education, religion, sports and culture. I will not discuss these exemptions in detail (the full text of articles 132-134 is included in Annex 1), but I aim to draw some general conclusions regarding the effectiveness of the current value added tax (VAT) treatment of charities, taking into account the boundaries set by European legislation. The central question in this paper is whether the current treatment of charities for VAT purposes is effective and efficient, given the objects of the exemptions for certain activities in the public interest and how this effectiveness could be improved.

Before addressing the exemptions, it is important to appreciate that various charities are not within the realm of VAT at all. Problems those charities encounter may be similar to problems encountered by charities whose activities are exempt, but the reasons are completely different. Changes to the VAT regime will not provide a solution for those charities as their problems are caused by the basic structure of VAT and therefore cannot to be solved within the VAT framework. Having thus made the distinction between charities within and outside VAT in paragraph 2, I will discuss in paragraph 3 why exemptions for certain activities in the public interest are included in the VAT Directive at all and I will examine whether the vague wording of some exemptions gives Member States the opportunity to interpret these exemptions in whatever way they like. In paragraph 4, I will highlight some general rules regarding the exemptions which limit the freedom of Member States, by analysing the case law developed by the Court of Justice of the European Union (ECJ) over the years. These general rules stem from the objects of the exemptions and the basic VAT principles. In paragraph 5, I will establish the purpose of the exemptions as defined by the ECJ. Paragraph 6 examines whether these objects are achieved effectively and efficiently by the current exemptions. In paragraph 7, I will develop several alternatives to better achieve these objects and at the same time to mitigate the negative consequences of a VAT levy for charities which are not VAT taxable persons, as this would also improve the effectiveness of government policy regarding charities. In this paragraph I will also briefly pay attention to the study announced by the European Commission regarding exemptions in the public interest. Paragraph 8 concludes this paper.

2 Not all charities are within the scope of VAT

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² Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as amended by later directives.

³ Postal services and dental care, which are mentioned in articles 132(1)(a) and 132(1)(e) respectively, are probably not regarded as charitable in any Member State.

A VAT exemption can only apply if a charity qualifies as a taxable person. Without a taxable person there is no liability for VAT and therefore no need for an exemption. Article 9(1) VAT Directive defines a taxable person as 'any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity'. A charity which does not carry out economic activities is not a taxable person. In the *Hong Kong Trade Development Council* case⁴ the ECJ decided that a person providing services free of charge in all cases cannot be regarded a taxable person. Therefore, the numerous charities that only provide services and goods for free are outside the scope of VAT and its exemptions. Furthermore, in the *Tolsma* case⁵ the Court decided that there has to be a legal relationship between the provider of a service and the recipient, pursuant to which there is reciprocal performance: the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. A charity that only receives voluntary donations may, therefore, also fall outside the scope of VAT, as did Mr Tolsma, who played a barrel organ on the public highway. The ECJ did not regard the donations he received from passers-by as a consideration for a service, for two reasons:

- (1) there was no agreement between the parties, since the passers-by voluntarily made a donation, the amount of which they determined as they wished;
- (2) there was no necessary link between the musical service and the payments to which it gave rise.

Based on these criteria several charities, especially in the philanthropic sector, cannot be regarded as taxable persons. Even if such a charity engages in substantial financial transactions, it does not necessarily carry on economic activities. In an English case on the National Society for the Prevention of Cruelty to Children (LON/92/602X), the Tribunal concluded that to qualify as a business activity investment activities of a charity would have to go beyond the activities of an ordinary investor managing its assets, which will often not be the case. This case was not referred to the ECJ. However, it was confirmed when a few years later, in the *Wellcome Trust* case⁶ the ECJ decided that the concept of economic activities is to be interpreted as not including an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust.

Similarly, a charity that performs activities that would otherwise qualify as economic activities may still not be regarded a taxable person. This might be concluded from the *SPÖ Landesorganisation Kärnten* case.⁷ The SPÖ Landesorganisation Kärnten carried out public-relations activities, information provision, the staging of events, the supply of advertising material against invoice to other groups of the SPÖ and it organised the annual SPÖ ball. The income received by the Landesorganisation came predominantly from invoicing services to the regional and local groups and the sale of entrance tickets to the ball. However, only a small proportion of the expenses of the provincial organisation was invoiced to the groups for which it was responsible. Those groups contributed to the expenditure of the Landesorganisation according to their financial resources – without there being any predetermined rules to be complied with – resulting in the Landesorganisation itself being obliged to cover most of the costs of advertising. It was able to counterbalance the resulting losses with money from public funds, members' contributions, subscriptions paid by the members and donations. The Court observed that the advertising activities did not allow the generation of revenue on a continuing basis as the

⁴ ECJ, 1 April 1982, Case 89/81, *Staatssecretaris van Financiën v Hong-Kong Trade Development Council*.

⁵ ECJ, 3 March 1994, Case C-16/93, *R. J. Tolsma v Inspecteur der Omzetbelasting Leeuwarden*.

⁶ ECJ, 20 June 1996, Case C-155/94, *Wellcome Trust Ltd v Commissioners of Customs and Excise*.

⁷ ECJ, 6 October 2009, Case C-267/08, *SPÖ Landesorganisation Kärnten v Finanzamt Klagenfurt*.

subsidies, donations and subscriptions were used to cover the losses from advertising activities. The Court, therefore, held that by the advertising activities the SPÖ carried out a communication exercise which was in line with its political objectives and sought to spread its ideas as a political organisation and develop an informed political opinion with a view to participation in the exercise of political power. The Court observed that in carrying out that activity, the SPÖ does not participate in any market, for which reason the advertising activities were not regarded as an economic activity. Leaving aside that in some Member States, such as the Netherlands, political parties have charitable status, this might also be of importance for (other) charities. Various charities will pursue their objectives by communicating their ideas and by influencing public opinion. Furthermore, it seems that even organising a ball to raise funds by selling entrance tickets does not necessarily bring such charities within the realm of VAT. In such circumstances the exemption for fund-raising events of exempt organisations (article 132(1)(o)) is therefore not needed to avoid a levy of VAT.

Interestingly, the latter provision requires that exemption is not likely to distort competition. An echo of this requirement might be found in paragraph 24, where the Court states that the SPÖ does not participate in any market. I wonder, however, whether this is true of balls. In Austria many balls are organised during the season and as it is not possible to attend every ball, there must be some kind of competition between the various balls and, one would assume, a market for ball tickets. Furthermore, in 2009 it was not necessary to be a member of the SPÖ to buy tickets for the ball (non-members simply paid a higher price)⁸ although I do not know whether this was the case when the ECJ gave its decision. The Court does not mention whether the ball was open to everyone who had bought a ticket or whether it was members only. In any case, the SPÖ decision might result in fewer charities being considered taxable persons for VAT. This would limit the importance of the exemptions applicable to charities.

3 Political reasons made it difficult to limit the amount and scope of exemptions

The traditional purpose of taxation is to raise revenue to meet government expenditure. However, tax legislation is also used for other, auxiliary or subsidiary, functions, as a means of reaching certain policy goals. Such policy goals include the promotion of charitable activities. Tax incentives⁹ have been widely used for this purpose. Whether it is desirable or not to promote charitable causes (and if so, which causes are to be promoted) is a political question which will not be addressed in this paper. It will be taken as a given that governments of the Member States promote charitable causes.

Before the Sixth VAT Directive harmonised VAT exemptions for certain activities in the public interest, various Member States had included tax incentives, including exemptions, for charitable activities in their national legislation. It was therefore no surprise that the Member States wanted to continue using the harmonised VAT to further these charitable causes. As mentioned before, the definition of 'charitable causes' is highly political and may vary amongst Member States. This is reflected in the current exemptions for activities in the public interest. The wording of articles 132-134 of the current VAT Directive is practically the same as the wording of article

⁸ http://www.ballkalender.cc/kaernten/2009-01-10_Messearena_Klagenfurt_1185.php.

⁹ Other names for tax incentives are, for example, tax breaks or tax expenditures. A tax incentive is defined as a government expenditure constituted by a loss or deferral of tax income which results from a provision in the tax legislation insofar as this provision is not in accordance with the primary structure of the law.

13A of the Sixth VAT Directive,¹⁰ so the history of that Directive can still explain the current exemptions.

Under the Second Directive¹¹ Member States were more or less free to introduce exemptions, as article 10(3) stated that ‘Each Member State may, subject to the consultations mentioned in article 16, determine the other exemptions which it considers necessary’. However, in the Explanatory Memorandum to the Proposal for a Sixth Directive the European Commission observed that uniform rules regarding exemptions are necessary to ensure equality of treatment as between the various Member States and as regards collection of the Community’s own resources.¹² Given the political importance given by most Member States to the possibility of excluding certain activities from VAT, one can understand that drafting a harmonised list of exemptions was not an easy task. The Commission explained in the Explanatory Memorandum (p. 15) that the exemptions currently included in article 132 already existed in the majority of Member States, which was probably the only way to get all Member States to agree the list of exemptions. The political difficulties in formulating the exemptions can be illustrated by the discussions on article 13A(1)(n) of the Sixth VAT Directive (the wording of article 132(1)(n) of the VAT Directive does not significantly deviate from this article). Originally, the Proposal for a Sixth Directive provided for an exemption of:

‘the supply of services by theatres, cinema-clubs, concert-halls, museums, libraries, public parks, botanical or zoological gardens, educational exhibitions, and operations within the framework of activities in the public interest of a social, cultural or educational nature, by:
–bodies governed by public law; or
–non-profit-making organisations; or
–private charitable organisations.’

However, the Member States could not agree on a precise list of cultural activities, which resulted in the current indeterminate and rather vague provision exempting ‘certain’ cultural services and goods closely linked thereto, by bodies governed by public law or by other cultural bodies recognised by the Member State concerned. It should be mentioned that the exemption for ‘certain’ services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education of article 132(1)(m) is just as vague and indeterminate. However, this vague terminology does not mean that Member States can interpret these exemptions in whatever way they like. In paragraph 14 of the 1998 *Commission v Spain* case¹³ the Spanish Government argued that, unlike other exemptions, point (m) provides for the exemption of ‘certain’ supplies of services, which, according to the Spanish government, permits Member States to limit its scope, not only by expressly excluding certain services provided by sports establishments from the exemption, but also by applying ‘other criteria’, such as the amount of the consideration for the services in question. However, the Court observed that the application of the criterion of the amount of membership fees may lead to results contrary to article 13(A)(1)(m), as it may result in a non-profit-making body being excluded from the benefit of the exemption and in a profit-making body being able to benefit from it. Moreover, the Court held that there is nothing in that provision to the effect that a Member State may make the

¹⁰ 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 as amended by later directives.

¹¹ Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes OJ No 71, 14. 4. 1967, p. 1303/67.

¹² Proposal for a Sixth Council Directive on the harmonisation of Member States concerning turnover taxes. COM (73) 950 final, 20 June 1973. Bulletin of the European Communities, Supplement 11/73, p. 15.

¹³ ECJ, 7 May 1998, C-124/96, *Commission of the European Communities v Kingdom of Spain*.

exemption subject to any conditions other than those laid down in article 13(A)(2) (article 133 of the VAT Directive). For the same reason the ECJ rejected the claim of the UK in the *Canterbury Hockey Club* case that the Member States are free to limit the scope of the exemption to supplies of services which are provided to individuals, since article 13A(1)(m) of the Sixth Directive requires the exemption only of ‘certain services closely linked to sport’.¹⁴ In paragraph 19 of this judgment the Court observed that as regards sport and physical education, as activities in the public interest, the exemption is intended to encourage those types of activity but is not a general exemption of all supplies of services linked to them. The indeterminate wording of some of the exemptions, therefore, does not allow Member States to impose additional conditions.

In the Proposal for a Nineteenth Directive, the imprecise term ‘certain’ was replaced by a list of exempt services based on the corresponding lists applicable in a number of Member States, but this replacement never happened, also not when the current VAT Directive was introduced.

In general, because of political difficulties in arriving at definite provisions regarding these charitable exemptions, the wording of articles 132-134 seems to give substantial freedom to Member States. Member States have the discretion to impose or not impose certain requirements (article 133, please refer to paragraph 4.1 below) and not all exemptions are drafted in a conclusive way, giving Member States the opportunity to interpret these provisions in various ways. However, both the European Commission and the ECJ limit this freedom by referring to the basic principles underlying the exemptions.

4 General rules regarding exemptions for certain activities for the public benefit restricting the freedom of Member States to interpret these exemptions

In the previous paragraph it was stated that the wording of many charitable exemptions is rather vague. In several cases Member States interpreted these exemptions as meaning that they could keep the exemptions included in the national legislation before the harmonisation of VAT. Furthermore, Member States, the European Commission,¹⁵ tax authorities and taxpayers do not always agree on the interpretation of these exemptions and the range of discretion left to the Member States regarding these exemptions. Over the years, the ECJ has given guidance on how to interpret these provisions. In the next paragraph I will discuss some general observations of the ECJ regarding the interpretation of the exemptions. As mentioned before, I will not discuss each and every exemption in detail, but I aim to establish some general rules regarding these charitable exemptions.

¹⁴ ECJ, 16 October 2008, C-253/07, *Canterbury Hockey Club, Canterbury Ladies Hockey Club v The Commissioners for Her Majesty’s Revenue and Customs*, second question referred, please refer to paragraph 4.4 for a further discussion of this case.

¹⁵ Some recent examples of differences in opinion regarding the scope of the exemptions of article 132 can be found in the press releases of the European Commission of October 2009, January 2010 and June 2010 in which Austria, Finland, the Netherlands and Denmark were requested to change their tax legislation on certain exemptions for activities in the public interest. These changes both included restricting and extending the domestic exemptions. Press releases of 8 October 2009 (IP/09/1453, Austria and Finland, <http://europa.eu/rapid/pressReleasesAction.do?aged=0&guiLanguage=en&language=en&reference=IP/09/1453&format=HTML>), 29 October 2009 (IP/09/1644, the Netherlands, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1644&format=HTML&aged=0&language=en&guiLanguage=en>), 28 January 2010 (IP/10/90, Denmark, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/90&format=HTML&aged=0&language=en&guiLanguage=en>) and 24 June 2010 (IP/10/796, the Netherlands, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/796&format=HTML&aged=0&language=en&guiLanguage=en>).

4.1 (Ir)relevance of domestic charity legislation

Charities are not mentioned as such in the VAT Directive. This was different in the Proposal for a Sixth Directive.¹⁶ In article 14 of this proposal exemptions similar to the ones currently included in article 132(b) (medical services), 132(g) (welfare and social security), 132(h) (protection and education of children) and 132(n) (culture) only applied if supplied by bodies governed by public law, non-profit-making organisations or private charitable organisations. Article 14(2) provided for definitions of ‘non-profit-making organisations’ and ‘private charitable organisations’. ‘Non-profit-making organisation’ was defined as an organisation meeting the following requirements:

- it shall not have as its object the making of profits;
- it shall assign any profits made to the improvement and continuance of the services which it provides;
- it shall obtain no material advantages for persons other than the customers or users of the organisation; this provision shall be without prejudice to the employment by the organisation of wage or salary-earning staff.

‘Private charitable organisation’ was defined as an organisation whose activities are directed to the public good or to benevolent ends and which meets one of the following requirements:

- its prices shall be approved by the competent public authorities; or
- its profits shall be assigned to promoting the public interest or benevolent ends in accordance with rules to be laid down under national laws.

Apparently, the Member States could not agree on these definitions and in article 13A of the Sixth Directive (just as in article 132 of the VAT Directive) no definitions of ‘non-profit-making organisations’ and ‘private charitable organisations’ were included. Some of the requirements which were part of the definitions in the proposal were included in the conditions Member States may opt to impose on organisations regarding certain exemptions (currently article 133) and which will be discussed at the end of this paragraph.

However, the charities had not completely vanished. Articles 13A(1)(g) and (h) of the English language version of the Sixth VAT Directive provided for an exemption for the supply of goods and services closely linked to (g) welfare and social security work, including those supplied by old people’s homes and (h) the protection of children and young persons. In both cases, these activities had to be carried out by ‘bodies governed by public law or by other organisations recognised as charitable by the Member States concerned’. Other language versions did not refer to organisations recognised as charitable, but to organisations recognised as having a social character.¹⁷ In the English language version of articles 132(1)(g) and (h) of the VAT Directive the wording has been changed and refers to ‘organisations recognised by the Member State concerned as being devoted to social wellbeing’. This is more in line with the other language versions. As of the entry into force of the VAT Directive charitable organisations are, therefore, not explicitly mentioned any more.

Being recognised as ‘charitable’ has a very specific meaning in many Member States. Various Member States have included provisions in their tax legislation or charity legislation which

¹⁶ Proposal for a Sixth Council Directive on the harmonisation of Member States concerning turnover taxes. COM (73) 950 final, 20 June 1973. Bulletin of the European Communities, Supplement 11/73, p. 41-42.

¹⁷ For example, in the French version ‘organismes reconnus comme ayant un caractère social’ and in the German version ‘als Einrichtungen mit sozialem Charakter anerkannte Einrichtungen’.

determine the requirements for being recognised as such. For example, the Charities Act 2006 which applies in England and Wales provides for an extensive description of charitable purposes.¹⁸ In the *Kingscrest* case¹⁹ the ECJ had to answer the question whether the word ‘charitable’ in articles 13A(1)(g) and (h) Sixth VAT Directive had to be interpreted according to the domestic law of the Member State (in the *Kingscrest* case the UK). Before, the ECJ had already stated in more general terms that the subjection to, or exemption from, VAT of a specific transaction cannot depend on its classification in national law.²⁰ In paragraphs 22-24 of the *Kingscrest* case the ECJ observed that the exemptions and the conditions for those exemptions to apply, especially regarding the subject of the exemptions, have their own independent meaning in Community Law and must therefore be given a Community definition. In other case law, the Court elaborated further on this and observed that it is clear from the ninth and eleventh recitals in the preamble to the Sixth Directive that it is designed to harmonise the basis of assessment of VAT and that the exemptions from that tax constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another and which must be placed in the general context of the common system of VAT introduced by that directive.²¹

The fact that an organisation does not have a charitable status under domestic law does not, therefore, lead to the conclusion that such organisation is not recognised as charitable for purposes of the Sixth VAT Directive. The Court decided that whether a specific transaction is subject to or exempt from VAT cannot depend on its classification in national law. The word ‘charitable’ cannot therefore be defined according to the requirements in domestic law but has to be defined in the light of the objectives of the exemption. This means that ‘charitable’ and other expressions used in the VAT exemptions, should have the same meaning in all Member States.

This is different in the ECJ case law on provisions for charities in direct taxes. In both the *Stauffer*²² and *Persche*²³ cases the ECJ decided that regarding direct taxes Member States may apply their own definition and requirements to decide whether an organisation is charitable (as long as the requirement is not in breach of the Treaty on the Functioning of the European Union (TFEU), for example, being resident in the Member State, as this is a restriction on the free movement of capital). For direct tax purposes the meaning of ‘charitable’ therefore varies

¹⁸ This Act can be found on http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060050_en_1.

¹⁹ ECJ, 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*.

²⁰ For example, ECJ, 11 January 2001, C-76/99, *Commission of the European Communities v. the French Republic* paragraph 26.

²¹ For example, ECJ, 14 June 2007, Case C-434/05, *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën*, paragraph 15; ECJ, 16 October 2008, C-253/07, *Canterbury Hockey Club, Canterbury Ladies Hockey Club v The Commissioners for Her Majesty's Revenue and Customs*, paragraph 16; ECJ, 11 December 2008, C-407/07, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing v Staatssecretaris van Financiën*, paragraph 29.

²² ECJ, 14 September 2006, Case C-386/04, *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften*, especially paragraph 39 where the Court observed that Member States ‘are free to determine what the interests of the general public they wish to promote are by granting benefits to associations and foundations which pursue objects linked to such interests in a disinterested manner’.

²³ ECJ, 27 January 2009, Case C-318/07, *Hein Persche v Finanzamt Lüdenscheid*, paragraph 43: ‘At the outset, it is appropriate to point out that it is for each Member State to determine whether, in order to encourage certain activities recognised as being charitable, it will provide for tax advantages in favour of both public and private bodies which concern themselves with those activities and taxpayers who make them gifts’.

between the Member States. This different approach is explained by the fact that where there is no harmonisation of direct taxes with regard to charities, the VAT is a harmonised tax. The exemptions should therefore be interpreted in the same way in all Member States to ensure fiscal neutrality and not to distort conditions of competition or hinder the free movement of goods and services (as is laid down in preamble 4 and 7 of the VAT Directive).

As mentioned before, the VAT Directive does not refer to organisations recognised as charitable. However, article 132(1) does refer to organisations recognised by the Member States as establishments of a similar nature to hospitals (b), as being devoted to social wellbeing (h), as having similar objects to educational institutions (i) and as cultural bodies (n). Regarding the definition of organisations devoted to social wellbeing, the ECJ did acknowledge that Member States have the discretion to recognise certain organisations as being devoted to social wellbeing.²⁴ However, this discretion must be exercised in accordance with EU legislation and the VAT Directive. These organisations must, therefore, meet the dual requirement of (i) being themselves devoted to social wellbeing and (ii) being engaged in welfare or social security work. To decide whether organisations qualify for the exemption, the objectives pursued by the organisations viewed as a whole and whether they are engaged in welfare work on a permanent basis must be taken into account.²⁵ The ECJ will probably impose similar requirements on member states regarding the other organisations. Based on ECJ case law these expressions should, therefore, not – at least not exclusively - be interpreted according to domestic legislation if such legislation contains definitions of these organisations. Instead, these exemptions must also be defined in the light of their objectives, thus providing for an identical application in all Member States.

However, article 133 does provide for the possibility to include conditions in the domestic VAT legislation for several exemptions to apply. These requirements are similar to conditions various Member States impose on charities. Furthermore, the exemptions for which these conditions may be imposed will in many cases apply to charities under domestic legislation. Member States may impose these requirements on bodies other than those governed by public law regarding the exemptions provided for in points (b) (hospitals), (g) (welfare and social security work), (h) (protection of children), (i) (education), (l) (non-profit making organisations with members), (m) (sports) and (n) (culture) of article 132(1). Many of these activities are regarded as charitable in various Member States.

The requirements Member States may impose are as follows:

- (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;
- (b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;
- (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;
- (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

²⁴ ECJ, 17 June 2010, C-492/08, *European Commission v French Republic* paragraph 41.

²⁵ ECJ, 17 June 2010, C-492/08, *European Commission v French Republic* paragraph 44-45.

The Member States are not obliged to impose all conditions: they are free to decide not only whether or not to impose these conditions, but also which of the conditions they want to impose. Imposing these conditions enables Member States – at least partly – to reflect their domestic legislation regarding charities in the VAT exemptions.

4.2 Narrow interpretation of exemptions, interpretation of expressions not too restricted (based on objects)

Preamble 35 of the VAT Directive states that a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States. This statement was also made in the preamble to the Sixth Directive. In the Explanatory Memorandum to the Proposal for a Sixth Directive the European Commission stated that the list of exemptions had been drawn up having regard (i) to the exemptions already existing in the various Member States, and (ii) the need to keep the number of exemptions as small as possible. One reason for the latter was the concern to keep exceptions to the minimum in a general system of taxation of consumption. This basic principle can also be found in ECJ case law. In paragraph 12 of the *Gregg* case²⁶ the Court observed that, according to settled case law²⁷ of the Court, the terms used to describe the exemptions envisaged by article 13 of the Sixth Directive are to be interpreted strictly since these constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Furthermore, the Court pointed out many times that the aim of article 13A of the Sixth VAT Directive (article 132 VAT Directive) is to exempt from VAT certain activities which are in the public interest, and that this provision does not provide for an exemption for every activity performed in the public interest, but only for those which are listed and described in great detail.²⁸ This case law remains valid under the VAT Directive.

However, even though the Court is of the opinion that the exemptions are to be interpreted strictly, the Court also noted – as was mentioned in paragraph 4.1— that those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another.²⁹ Going from there, the Court observed that the Sixth Directive does not include any definition of various concepts used in the exemptions.³⁰ Furthermore, the Court noted that such concepts do not call for an especially

²⁶ ECJ, 7 September 1999, Case C-216/97, *Jennifer Gregg and Mervyn Gregg and Commissioners of Customs & Excise*.

²⁷ Some examples of the case law regarding the exemptions in the public interest are ECJ, 23 February 1988, 353/85, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (paragraphs 26 and 35); ECJ, 15 June 1989, 348/87, *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* (paragraph 13); and ECJ, 12 November 1998, C-149/97, *The Institute of the Motor Industry v Commissioners of Customs and Excise* (paragraph 17).

²⁸ See, for example, ECJ, 11 July 1985, 107/84, *Commission of the European Communities v Federal Republic of Germany*. (paragraph 17); ECJ, 15 June 1989, 348/87, *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* (paragraph 13); and ECJ, 12 November 1998, C-149/97, *The Institute of the Motor Industry v Commissioners of Customs and Excise* (paragraph 18), ECJ, 28 January 2010, C-473/08, *Ingenieurbüro Eulitz GbR Thomas and Marion Eulitz v Finanzamt Dresden I* (paragraph 26), ECJ 10, June 2010, C-262/03, *CopyGene A/S v Skatteministeriet* (paragraph 25).

²⁹ For example ECJ, 20 June 2002, C-287/00, *Commission of the European Communities v Federal Republic of Germany*, paragraph 44 and ECJ, 14 June 2007, Case C-434/05, *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën*, paragraph 15.

³⁰ For example, ECJ, 11 January 2001, C-76/99, *Commission of the European Communities v the French Republic*, paragraph 21-24 regarding activities 'closely related' to hospital and medical care; ECJ, 14 June 2007, Case C-434/05, *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland*

narrow or strict interpretation since the exemption of such activities is designed to ensure that the benefits flowing from these activities or access to the benefits from such activities are not hindered by the increased costs of providing it that would follow if such activities were subject to VAT.³¹

Nevertheless, this does not mean that there are no limits to the interpretation of the concepts used in the exemptions. In paragraph 42 of the *Dornier* case the Court observed that the interpretation of the terms 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.³² This led the Court to the conclusion in the *Horizon College* case that the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in article 13 should be construed in such a way as to deprive the exemptions of their intended effect.³³ This conclusion was followed in paragraph 30 of the *Stichting Intercollegiale Toetsing* case by the observation that it is not the purpose of the case law of the Court to impose an interpretation which would make the exemptions more or less inapplicable in practice.³⁴ In the *Canterbury Hockey Club* case the Court observed that the exemptions must be interpreted in the light of the context in which they are used and the scheme of the Sixth Directive, having particular regard to the underlying purpose of the exemption in question.³⁵

The importance of the objective of the exemption for its interpretation was also – in a less explicit way – expressed in the *Commission v Germany* case on research activities of universities where the Court held that although the undertaking of research projects for consideration may be regarded as of great assistance to university education, it is not essential to attain its objective, the teaching of students to enable them to pursue a professional activity, for which reason Germany was not allowed to exempt these activities.³⁶ In the *Kingscrest* case the ECJ combined these

(*Horizon College*) v *Staatssecretaris van Financiën*, paragraph 17 regarding the various forms of education covered by article 13A(1)(i) of the Sixth Directive (article 132(1)(i) VAT Directive). In the latter case the Court held that this provision does not cover the making available, for consideration, of a teacher to an educational establishment, in which that teacher temporarily carries out teaching duties under the responsibility of that establishment, even if the body which makes the teacher available is itself a body governed by public law that has an educational aim, or another organisation defined by the Member State concerned as having similar objects.

³¹ For example, ECJ, 11 January 2001, C-76/99, *Commission of the European Communities v the French Republic*, paragraphs 21-24 regarding activities ‘closely related’ to hospital and medical care; ECJ, 20 June 2002, C-287/00, *Commission of the European Communities v Federal Republic of Germany*, paragraph 47 regarding the supply of services closely related to university education; and ECJ 6 November 2003, Case C-45/01, *Christoph-Dornier-Stiftung für Klinische Psychologie and Finanzamt Gießen*, paragraph 48 regarding the term ‘medical care’.

³² ECJ, 6 November 2003, Case C-45/01, *Christoph-Dornier-Stiftung für Klinische Psychologie and Finanzamt Gießen*.

³³ ECJ, 14 June 2007, Case C-434/05, *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën*, paragraph 16.

³⁴ ECJ, 11 December 2008, C-407/07, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing v Staatssecretaris van Financiën*. In paragraph 37 of this case the Court defined the purpose of the predecessor of article 132(1)(f) as being to create an exemption from VAT in order to avoid an entity offering certain services being required to pay that tax when it has found it necessary to cooperate with other entities by means of a common structure set up to undertake activities essential to the provision of those services.

³⁵ ECJ, 16 October 2008, C-253/07, *Canterbury Hockey Club, Canterbury Ladies Hockey Club v The Commissioners for Her Majesty’s Revenue and Customs*, paragraph 17.

³⁶ ECJ, 20 June 2002, C-287/00, *Commission of the European Communities v Federal Republic of Germany*, paragraph 48, regarding the term ‘medical care’.

findings.³⁷ The Court observed that even though according to fixed case law the exemptions must be interpreted strictly, the interpretation of the terms used in those provisions must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality. The Court established the object of the exemptions which were under discussion: to reduce the cost of certain supplies of services in the general interest and to make them more accessible to the individuals who may benefit from them (paragraph 30). Furthermore, in paragraph 32 the Court observed that the expression ‘organisations recognised as charitable’ does not call for a particularly narrow construction. The requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect.³⁸

Therefore, even though the exemptions must be interpreted strictly, terms used in those exemptions must be interpreted according their objectives, to make sure the exemptions have their intended effect. This calls for an interpretation which is not too narrow, but which is restricted by the objective of the exemption.

4.3 Commercial nature of taxable person

In the charity or direct tax legislation of many Member States, only non-profit organisations qualify for charitable tax benefits. A similar requirement applies for several exemptions for activities in the public interest. The exemption included in articles 132(1)(l) (membership organisations) and (m) (sports) explicitly requires the taxable person to be a non-profit making organization. The exemption of article 132(1)(q) (public radio and television) requires the activities to be ‘other than those of a commercial nature’. In the *Kennemer Golf & Country Club* case, the ECJ decided that the requirement of being a non-profit organisation means that the categorisation of an organisation as such must be based on all the organisation’s activities, not just on the services referred to in the exemption.³⁹ The Court observed that all the exemptions listed in (currently) articles 132(1)(h) to (p) cover organisations acting in the public interest in a social, cultural, religious or sports setting or in a similar setting. The Court noted that the purpose of the exemptions is therefore to provide more favourable treatment, in the matter of VAT, for certain organisations whose activities are directed towards non-commercial purposes. If only services provided for these purposes should be taken into consideration, commercial undertakings, normally acting with a view to profit, could, in principle, seek exemption from VAT when, exceptionally, they provide services to which the qualifying adjective ‘non-profit-making’ could be attached. Such a result could not, in the view of the Court, be consonant with the wording and aim of the provision.

Another question, which was also addressed in the *Kennemer Golf & Country Club* case, was whether an organisation may be categorised as ‘non-profit-making’ even if it systematically seeks to achieve surpluses which it then uses for the purposes of the provision of its services.⁴⁰ The ECJ observed that it is clear from the wording of the exemption that the organisation must not have the aim, unlike a ‘commercial’ undertaking, of achieving profits for its members. It is the aim of

³⁷ ECJ, 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*, paragraph 31.

³⁸ ECJ, 28 January 2010, C-473/08, *Ingenieurbüro Eulitz GbR Thomas und Marion Eulitz v Finanzamt Dresden I* (paragraph 27), ECJ 10, June 2010, C-262/03, *CopyGene A/S v Skatteministeriet* (paragraph 26).

³⁹ ECJ, 21 March 2002, C-174/00, *Kennemer Golf & Country Club v Inspecteur Belastingdienst Particulieren/Ondernemingen Haarlem* (first question, paragraphs 16-22).

⁴⁰ ECJ, 21 March 2002, C-174/00, *Kennemer Golf & Country Club v Inspecteur Belastingdienst Particulieren/Ondernemingen Haarlem* (third question, paragraphs 24-35).

the organisation which is the test of eligibility for the VAT exemption; the fact that an organisation subsequently achieves profits, even if it seeks to make them or makes them systematically, does not affect the categorisation of the organisation as long as those profits are not distributed to its members as profits. To the ECJ it is clear that (currently) article 132(1)(m) does not prohibit the organisations from finishing their accounting year with a positive balance as such organisations would otherwise be unable to create reserves to pay for the maintenance of, and future improvements to, their facilities. This point of view may very well differ from requirements in national legislation regarding direct tax incentives for charities (as, for example, is the case in the Netherlands).

The ‘non-profit-making’ requirement is not restricted to the organisations mentioned above. Regarding the exemptions in articles 132(b) (hospitals), (g) (welfare and social security work), (h) (protection of children), (i) (education), (l) (non-profit-making organisations with members), (m) (sports) and (n) (culture), article 133(a) allows Member States to impose the condition on bodies other than those governed by public law that these must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied. Regarding the exemptions of articles 132(1)(l) and (m) this optional condition seems to be superfluous, as the exemption itself requires the taxable person to be a non-profit making organisation. The Court was also of this opinion given its observation that the condition concerning the absence of systematic profit-seeking essentially replicates the criterion of non-profit-making organisation as contained, particularly, in article 13A(1)(m) of the Sixth VAT Directive (article 132(1)(m) VAT Directive).⁴¹

The question arose whether the Member States may require in general that in order to qualify for the exemptions in the public benefit, the activities and/or the taxable persons must not (primarily) be commercial. In the *Hoffmann* case the ECJ had to answer the question whether the heading ‘Exemptions for certain activities in the public interest’, by itself, entails restrictions on the possibilities of exemption if the services in question are provided primarily for commercial purposes.⁴² In paragraph 37 of its judgment the Court observed that this heading does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision. The Court noted that the activities which are to be exempted, as well as the conditions to which the activities eligible for exemption may be made subject by the Member States, are specifically defined by the content of (currently) article 132. Furthermore, the Court observed that the commercial nature of an activity does not preclude it from being, in the context of article 13A of the Sixth Directive (article 132 VAT Directive), an activity in the public interest as (currently) article 133 authorises, but does not oblige, the Member States to restrict exemption to bodies other than public-law bodies which do not have a systematic profit-making aim. The heading does not therefore, of itself, entail restrictions on the possibilities of exemption provided for by that provision.

In the *Kingscrest* case the ECJ observed that in the light of the objective of the exemption, to reduce the cost of certain supplies of services in the general interest and to make them more accessible to the individuals who may benefit from them, the commercial nature of an activity does not preclude it from being an activity in the general interest (paragraph 30).⁴³ Furthermore, the Court noted that the term ‘organisation’ is in principle sufficiently broad to include private

⁴¹ ECJ, 21 March 2002, C-174/00, *Kennemer Golf & Country Club v Inspecteur Belastingdienst Particulieren/ Ondernemingen Haarlem*, paragraph 33 and ECJ 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*, paragraph 39.

⁴² ECJ, 3 April 2003, Case C-144/00, *Matthias Hoffmann*, second question (paragraph 31 et seq).

⁴³ ECJ, 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*, paragraphs 30-31.

profit-making entities.⁴⁴ When the Community legislature intends to restrict the grant of the exemptions to certain non-profit-making or non-commercial entities, it says so expressly, as is clear from subparagraphs (l), (m) and (q) (paragraph 37 of the *Kingscrest* case). Moreover, the Court observed that in order not to deprive the predecessor of article 133(a) of all purpose, it must necessarily be accepted that, where the Community legislature has not expressly made entitlement to the exemptions subject to the absence of a profit-making aim, the pursuit of such an aim cannot preclude entitlement to those exemptions.⁴⁵ Furthermore, the principle of fiscal neutrality precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes. That principle would not be observed if, where the national legislature has not made the exemption subject to the condition of article 133(a), the activities were treated differently for VAT purposes depending on whether the entities which provide them are profit-making or not.⁴⁶ Again, in the *Commission v. France* case, the ECJ observed that the pursuit of a profit-making aim, whilst it may be a relevant criterion to be taken into account in determining whether an organisation is charitable, by no means precludes it altogether from being charitable.⁴⁷

This leads to the conclusion that the public benefit exemptions also apply to profit making organisations, unless the VAT Directive or the national legislation – making use of article 133(a) – explicitly requires the organisation to be a non-profit-making organization.

4.4 Legal personality not necessary to qualify as ‘body’ or ‘organisation’

Several exemptions included in article 132 and article 133 refer to ‘organisations’ or ‘bodies’. This leads to the question whether legal personality is required to qualify for such exemptions. In the *Bulthuis-Griffioen* case the ECJ came to the conclusion that exemptions applicable to ‘bodies’ and ‘organisations’ do not apply to natural persons.⁴⁸ To come to this conclusion the Court referred to the settled case law, mentioned in paragraph 4.2, that the exemptions have their own independent meaning in Community law. It noted that this must also be true of the specific conditions laid down for those exemptions to apply and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption. Furthermore, the ECJ referred to the fact that the exemptions 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 and held that as some exemptions expressly refer to the concept of ‘body’ or ‘organisation’ and others do not, in the former case the exemption may be claimed only by legal persons, whereas in the latter case it may also be claimed by natural persons including traders.

However, in the *Gregg* case the ECJ reconsidered this decision.⁴⁹ The Court observed that notwithstanding the *Bulthuis-Griffioen* case it cannot be inferred, from the fact that different categories of economic operators are mentioned, that the exemptions are confined to legal persons where it refers expressly to activities undertaken by ‘establishments’ or ‘organisations’, whilst in

⁴⁴ ECJ, 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*, paragraph 35.

⁴⁵ ECJ, 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*, paragraph 40.

⁴⁶ ECJ, 26 May 2005, Case C-498/03, *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*, paragraphs 41-42.

⁴⁷ ECJ, 17 June 2010, C-492/08, *European Commission v French Republic* paragraph 37.

⁴⁸ ECJ, 11 August 1995, C-453/93, *W. Bulthuis-Griffioen v Inspecteur der Omzetbelasting*.

⁴⁹ ECJ, 7 September 1999, Case C-216/97, *Jennifer Gregg and Mervyn Gregg and Commissioners of Customs & Excise* paragraphs 13-21.

other cases an exemption may also be claimed by natural persons. According to the Court this is not contrary to the obligation to strictly interpret the specific conditions concerning the status or identity of the economic operator performing the services as the Court found the terms ‘establishment’ and ‘organisation’ in principle sufficiently broad to include natural persons as well. The Court added that that none of the language versions include the clear and unambiguous term ‘legal person’. The Court inferred that, in employing those terms, the Community legislature did not intend to confine the exemptions referred to in that provision to the activities carried on by legal persons, but meant to extend the scope of those exemptions to activities carried on by individuals. Even though the terms ‘establishment’ and ‘organisation’ suggest the existence of an individualised entity performing a particular function, the Court held that those conditions are not only satisfied by legal persons but also by one or more natural persons running a business. The Court found this in particular consistent with the principle of fiscal neutrality which precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. This principle would be frustrated if the possibility of relying on the benefit of the exemption was dependent on the legal form in which the taxable person carried on his activity. Therefore, terms used in the exemptions such as ‘bodies’ and ‘organisations’ do not exclude natural persons running a business. This judgement was confirmed in – amongst others – the *Kügler*,⁵⁰ *Dornier*,⁵¹ *Hoffmann*⁵² and –recently - *Commission v France*⁵³ cases. Interestingly, the Court did not reverse its similar case law of 1987 and 1991⁵⁴ regarding the term ‘bodies governed by public law’ (article 4(5) Sixth VAT Directive, article 13 VAT Directive) in an Order of 21 May 2008.⁵⁵ The Court is still of the opinion that an activity carried on by a private individual is not exempted from VAT merely because it consists in carrying out acts falling within the prerogatives of the public authority. Apparently, according to the ECJ this does not frustrate the principle of fiscal neutrality.

In the *Canterbury Hockey Club* case the Court had to answer a reversed question, that is whether ‘persons taking part in sport or physical education’ in the predecessor of article 132(1)(m) only referred to natural persons.⁵⁶ The Court observed that the term ‘persons’ is, on its own, wide enough to include not only natural persons, but also unincorporated associations and corporate persons, but that in normal linguistic usage only natural persons take part in sport even if this is done in groups of persons. However, the Court noted that it is not intended to restrict the benefit of the exemption to certain types of sport but that the exemption covers sport in general, which also includes sports necessarily practised by individuals in groups of persons or practised within organisational and administrative structures put in place by unincorporated associations or corporate persons, such as sports clubs. Restricting the exemption to services directly supplied to natural persons would exclude a large number of supplies of services essential to sport, irrespective of the question whether those services were directly linked to persons taking part in sport and who was the true beneficiary of those services. The ECJ held that this would run

⁵⁰ ECJ, 10 september 2002, C-141/00, *Ambulanter Pflegedienst Kügler GmbH and Finanzamt für Körperschaften I in Berlin*.

⁵¹ ECJ, 6 November 2003, Case C-45/01, *Christoph-Dornier-Stiftung für Klinische Psychologie and Finanzamt Gießen*.

⁵² ECJ, 3 April 2003, Case C-144/00, *Matthias Hoffmann*.

⁵³ ECJ, 17 June 2010, C-492/08, *European Commission v French Republic*.

⁵⁴ ECJ, 26 March 1987, 235/85, *Commission of the European Communities v Kingdom of the Netherlands*, paragraph 21 and ECJ, 25 July 1991, C-202/90, *Ayuntamiento de Sevilla v Recaudadores de Tributos de La zone primera y segunda*, paragraph 19.

⁵⁵ ECJ, 21 May 2008, C-456/07, *Karol Mihal v Daňový úrad Košice V* (in French and Slovak only), paragraph 17.

⁵⁶ ECJ, 16 October 2008, C-253/07, *Canterbury Hockey Club, Canterbury Ladies Hockey Club v The Commissioners for Her Majesty's Revenue and Customs*, paragraphs 24-35.

counter to the purpose of the exemption which is to extend the benefit of that exemption to services supplied to individuals taking part in sport. Furthermore, it would not be consistent with the principle of fiscal neutrality if the applicability of the exemption depended on the organisational structure particular to the sporting activity practised. The Court referred to the *Gregg* case mentioned above in observing that the principle of fiscal neutrality precludes, in particular, economic operators who effect the same transactions being treated differently in respect of the levying of VAT. Therefore, to determine whether supplies of services are exempt under article 132(1)(m), the identity of the material recipients of those services and the legal form under which they benefit from them are irrelevant: the term 'persons taking part in sport' includes corporate persons and unincorporated associations.

5 The object of the exemptions according to ECJ case law

From the case law mentioned in the previous paragraphs it can be derived that the object of the exemptions for the public benefit is to encourage the activities listed in article 132. This article is designed to ensure that the benefits flowing from the activities included in this article, or access to the benefits from such activities, are not hindered by the increased costs of providing them that would follow if such activities were subject to VAT. Therefore, the basic idea is that these exemptions reduce the cost of certain supplies of services and goods in the general interest and to make them more accessible to the individuals who may benefit from them.

A precondition is, however, the principle of fiscal neutrality. Preamble 7 to the VAT Directive states:

The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.

In this respect the ECJ held that the exemptions must be interpreted strictly since these constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Furthermore, the concepts and terms used in articles 132-134 should be interpreted in the same way in each and every Member State. The exemptions are independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another and which must be placed in the general context of the common system of VAT.

Furthermore, because of the principle of neutrality, similar supplies of services and goods, which are thus in competition with each other, must not be treated differently for VAT purposes. Economic operators carrying on the same activities must not be treated differently as far as the levying of VAT is concerned. Therefore, regarding the applicability of the exemptions in the public interest, no distinction must be made as to whether or not the persons providing or receiving the services or goods included in article 132 have legal personality and – except for the exemptions which, based on the VAT Directive or inclusion of the conditions of article 133 in the domestic legislation, only apply to non-profit-making organisations – whether these are profit-making or not.

6 Is the object of the exemptions for the public benefit currently met?

It is clear from ECJ case law that the main object of the exemptions for certain activities for the public benefit is to reduce the costs of these activities within the boundaries of the principle of fiscal neutrality. This works well if the supplier of the exempted service or goods is at the end of

the distribution chain and does not suffer much from the fact that he cannot deduct VAT which was charged to him. As a taxable person to whose activities the exemptions of article 132 apply cannot deduct the VAT charged to him, the tax applied at an earlier stage of the distribution chain will be included in the price of his goods and services, thus raising this price. In spring 2008 the European Foundation Centre (EFC) launched a survey of the VAT treatment of public-benefit foundations. The survey, in which 35 charities took part, indicates that the amount lost on VAT by these respondents comes to €40 million a year.⁵⁷ According to the UK Charity Tax Group, irrecoverable VAT costs UK charities between £400 and £500 million a year.⁵⁸

This drawback of the current exemption system was recognised by the European Commission in the Explanatory Memorandum to the Proposal for a Sixth Directive. One of the reasons to keep the exemptions to a minimum was:

‘to avoid the inconveniences which such exemptions cause, mainly by reason of the fact that, (...), taxes paid on inputs will not be deductible’⁵⁹

That the European Commission is still aware of this negative effect of the non-deductibility of input VAT is illustrated in a speech by László Kovács, former Commissioner for Taxes and Customs, at the International Philanthropy Conference on 15 September 2005 in Brussels in which he stated:

‘The main concern which Charities have with the VAT system is that they are unable to obtain a refund of the input VAT which they are charged by their various suppliers because they carry out a number of non-business and exempt operations. The result is that their costs are increased by this non-recoverable amount of VAT.’⁶⁰

This is an adverse effect not in line with the object of the exemptions for the public benefit, which is to reduce the costs of the exempted supplies. Under certain circumstances this might even infringe the principle of fiscal neutrality. For example, if an exemption only applies to non-profit-making organisations, then profit-making organisations can deduct the VAT charged to them and thus, under certain circumstances, charge a lower price for their supplies than the exempt taxpayers. Furthermore, the fact that input VAT is not deductible will be a disincentive for organisations to outsource activities such as catering and cleaning, even though –without taking into account the input VAT – outsourcing would be more efficient. In this respect the exemptions have the effect of distorting economic decisions and competition, thereby creating inefficiency.⁶¹

The exemptions seem to work well for entrepreneurs at the end of the distribution chain who have to invest a relatively low amount of money or do not outsource a lot of activities and therefore do not suffer much from the fact that they have to include the VAT charged to them in their prices.

⁵⁷ <http://www.efc.be/EUAdvocacy/EU%20Communiquus%20%20Briefings/befc0907.pdf>.

⁵⁸ <http://www.ctrg.org.uk/campaigns/VAT/>.

⁵⁹ Proposal for a Sixth Council Directive on the harmonisation of Member States concerning turnover taxes. COM (73) 950 final, 20 June 1973. Bulletin of the European Communities, Supplement 11/73, p. 15.

⁶⁰ http://ec.europa.eu/commission_barroso/kovacs/speeches/philanthropy_conference.pdf.

⁶¹ S. Cnossen ‘Is the VAT’s Sixth Directive Becoming an Anachronism?’ *European Taxation*, December 2003, p. 436, R. de la Feria, ‘The EU VAT treatment of public sector bodies: slowly moving in the wrong direction’ *Intertax* 37(3) 2009, p. 148–165 and P. Gendron *How should the U.S. treat government entities, nonprofit organizations, and other tax-exempt bodies under a VAT?*, p. 13, <http://www.americantaxpolicyinstitute.org/pdf/VAT/Gendron.pdf>. Paper for the February 2009 conference *Structuring a Federal VAT: Design & Coordination Issues*, organized by Charles McLure of the Hoover Institution, Stanford University, and Reuven Avi-Yonah, University of Michigan Law School.

This is reflected in the case law regarding taxpayers who wanted their supplies to be exempt: for example the Canterbury Hockey Clubs, the Horizon College which made some of its teachers available to other educational establishments, Mr Hoffman who organised the world tour of three great solo singers and the Zoological Society of London⁶² which owned and operated two zoos.

However, several cases concern taxpayers who did not want their supplies to be exempt. These are often taxpayers which have to make substantial investments, for example in real estate or equipment (such as hospitals) and/or which have outsourced many of their activities, for which reason the exemption leaves them with a large amount of non-deductible VAT. Examples of such taxpayers are Jennifer and Mervyn Gregg who ran a nursing home and the Kingscrest partnership which operated residential care homes. Furthermore, the adverse effects of the exemptions are reflected in case law regarding hospitals and universities which try to find ways to deduct VAT charged to them, for example the University of Huddersfield which for the most part supplied VAT exempt education services. This university wanted to refurbish two mills and sought a way in which to save tax or to defer its liability to it since the input VAT on the refurbishment costs would largely be irrecoverable in normal circumstances.⁶³ From an economic point of view, resources invested by charities in (advice regarding) schemes to avoid non-deductible VAT, and by tax authorities in combating these schemes, are not applied in an optimal way: such resources would be much better spent on the charitable objects of the organisations and on other, more productive, government activities.

The problems caused by the non-deductibility of input VAT on real estate was the reason why the Netherlands abolished the exemption of entry fees to museums as of 1 January 1996 (an exemption which had applied in the Netherlands since 27 December 1956) and replaced it with a reduced rate.⁶⁴

7 Alternatives to the exemptions

Given the problems caused by the non-deductibility of input VAT one could question whether an exemption from VAT is the most effective and efficient way to promote the activities included in article 132 VAT Directive and to reduce the costs of these activities. In this paragraph I will discuss several possible solutions.

7.1 Replacement of current exemptions with zero rate or exemptions with deduction of input tax

A simple solution would seem to replace the current exemptions with a zero rate or to abolish the rule that input VAT regarding exempt activities is not deductible. This would basically make the supplies of article 132 VAT Directive free of any VAT and would therefore achieve the object of reducing the costs of such supplies. In the UK the Charity Tax Group campaigned for the replacement of exemptions with reduced rate or zero-rated supplies.⁶⁵

However, this solution would give rise to several problems. First of all it would be a breach of the basic principle of the common system of VAT which entails the application to goods and services

⁶² ECJ 21 March 2002, Case C-267/00, *Commissioners of Customs and Excise and Zoological Society of London*.

⁶³ ECJ, 21 February 2006, Case C-223/03, *University of Huddersfield Higher Education Corporation v Commissioners of Customs & Excise*.

⁶⁴ Act of 18 December 1995, *Staatsblad* 660.

⁶⁵ <http://www.ctrg.org.uk/campaigns/priorities>.

of a general tax on consumption exactly proportional to the price of the goods and services (article 1(2) VAT Directive). Second, it would put charities which are not regarded as taxable persons in a worse position compared to charities which are regarded as taxable persons but benefit from the zero percent rate or the exemption-with-deduction. For example, a museum which does not charge entry fees is not regarded a taxable person and is therefore not able to deduct input VAT. This is an extra burden for this museum for which it has to find additional funding. On the other hand, a museum which charges entrance fees is regarded as a taxable person and would be able to deduct the input VAT if a zero rate or an exemptions-with-deduction system were introduced. Charities would therefore have an incentive to charge fees even though the object of the exemption (and probably the domestic policy regarding such charities) is to reduce the costs of charities' activities, not to increase them. A solution for this problem proposed by the European Charities Committee on VAT (ECCVAT) was to introduce a reduced rate on supplies to charities.⁶⁶ This would lessen the burden of irrecoverable input VAT for out-of-scope-charities. The ECCVAT observed that this had already been proposed by the European Commission to the Council of Ministers, but that it was narrowly rejected by three Member states.

Another, more general, problem regarding VAT incentives is that it is very difficult to target these at specific goods and services based on qualitative criteria. In the context of VAT such subjective criteria cannot be used, as this would not be in line with the principle of VAT that similar goods must be treated similarly in order not to distort competition. For this reason objective criteria are applied within VAT. This can make a VAT incentive rather inefficient when pursuing certain policy objects regarding the public interest.⁶⁷

Furthermore, the zero percent rate or exemption-with-deduction system would burden the treasuries of the Member States. If taxpayers who currently cannot reclaim VAT because of the exemptions for the public benefit suddenly got the right to reclaim VAT, this could cause major deficits, not only regarding future VAT which these taxpayers can reclaim, but also because of retrospective claims for refunds of VAT. For this reason the Netherlands, when replacing the VAT exemption for entrance fees for museums with the reduced rate, concluded an agreement with the Dutch museums that they would not reclaim VAT incurred in past years regarding real estate.

In his speech of 15 September 2005 Commissioner Kovács commented that it would be very unlikely that the Member States would unanimously agree on a zero rate or exemptions with deduction of input tax.⁶⁸ This will probably not be different now.

7.2 Replacement of exemptions with reduced rates

Instead of a zero rate or an exemption with deduction of input tax, the problem of non-deductibility of input tax could also be solved by a replacement of the current exemptions with reduced rates. A reduced rate on supplies of a taxable person does not restrict his possibility to deduct the input VAT. Regarding certain activities which seem to be addressed by article 132 VAT Directive, Member States already have the possibility to apply the reduced rate instead of an

⁶⁶ European Charities Committee on VAT *Options to alleviate the burden of irrecoverable VAT on charities*, p. 2.

⁶⁷ For a further discussion on this topic, especially in relation to cultural goods and services I refer to S.J.C. Hemels, 'Influence of different purposes of value added tax and personal income tax on an effective and efficient use of tax incentives' in M. Lang, P. Melz and E. Kristoffersson (ed.) *Value Added Tax and Direct Taxation. Similarities and Differences*, IBFD 2009, pp. 35-57.

⁶⁸ http://ec.europa.eu/commission_barroso/kovacs/speeches/philanthropy_conference.pdf, pp. 2-3.

exemption. Annex III to the VAT Directive allows them to apply the reduced rates referred to in article 98 of that Directive to: (6) supply, including on loan by libraries, of books (...), newspapers and periodicals (...); (7) admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas, exhibitions and similar cultural events and facilities; (8) reception of radio and television broadcasting services; (13) admission to sporting events; and (14) use of sporting facilities.

However, replacing the obligatory exemptions for certain activities in the public interest with the possibility to apply the reduced rate would also not fully achieve the objective of the current exemptions, to reduce the costs of the activities mentioned in article 132. The reduced rate will undeniably increase the costs of these supplies. This is especially the case for taxpayers who do not suffer much from being currently unable to deduct VAT. The prices of their supplies are raised by the amount of the reduced rate, whereas the possibility to deduct input VAT will not have a big mitigating effect on the costs of their supplies. To solve this problem, the ECCVAT advocated the introduction of an option for charities to be taxed at a reduced rate. Another solution of the ECCVAT was to introduce a super reduced rate, e.g. below the current minimum of 5%.⁶⁹ Currently, as a temporary measure, Member States which before 1 January 1991 charged rates below 5% are allowed to keep them at this level. France, for example, applies a super-reduced rate of 2.1% to tickets for the first 140 performances of theatre productions. However, Member states are not allowed to apply these super reduced-rates to other, new areas.⁷⁰ It is questionable whether all Member States would agree on introducing new super-reduced rates or optional taxation.

Furthermore, to a lesser degree, the problems (except for the incompatibility with article 1(2) of the VAT Directive) mentioned in paragraph 7.1 would also arise if, as happened in the Netherlands regarding museums, the exemptions were replaced by reduced rates: an adverse position for charities which do not charge for their activities, inefficiencies because of the difficulty of targeting VAT incentives and budgetary problems.

A practical problem is that, as discussions in past years have shown, it is not likely that Member States will agree on the introduction of new supplies which qualify for reduced rates.

7.3 Solution outside the realm of VAT: direct subsidies

The problems caused by the fact that exempt charities cannot deduct input VAT which, contrary to the objectives of the exemptions, raises instead of decreases the prices of their supplies, are difficult to solve within the VAT. In my view more effective solutions can be found outside the VAT system. The problem that exemptions can increase costs if substantial investments have been made for which the input VAT cannot be reclaimed, can also be addressed by granting direct subsidies to charities suffering from this problem. Obviously, direct subsidies will also have budgetary implications, but these are probably less than solutions within the VAT system.

⁶⁹ European Charities Committee on VAT *Options to alleviate the burden of irrecoverable VAT on charities*, p. 1.

⁷⁰ For this reason the European Commission referred France to the ECJ. Before 1 January 2007, the super-reduced rate only applied if no refreshments were served during the theatre performance. However, since 2007, the rate also applies to tickets for performances during which drinks are served. The Commission is of the opinion that this broadens the scope of this super-reduced rate and infringes the rules of the VAT Directive. Press release of 24 June 2010, IP/10/793, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/793&format=HTML&aged=0&language=en&guiLanguage=en>.

The advantage of direct subsidies is that governments can better target them than VAT incentives and therefore better allocate scarce government funds (less spill-over effects). Regarding direct subsidies Member States are allowed to apply their domestic charity legislation, thus enabling them to better target government funds to organisations which are domestically deemed charitable instead of according to the VAT Directive rules. For example, commercial organisations may be excluded from direct subsidies under domestic law and requirements may be imposed regarding the legal form of the charity. Neutrality is not a basic principle of direct subsidies. Rather the opposite: direct subsidies for charities make, by definition, a distinction between juridical subjects, not based on criteria of competition, but by criteria more related to government policy regarding such charities. Strict, qualitative criteria can be established to decide whether a charity qualifies for a direct subsidy or not. Furthermore, a direct subsidy can also be granted to charities which are not VAT taxable persons (and would therefore not benefit from the solutions discussed in paragraphs 7.1 and 7.2) but meet the criteria for the direct subsidy.

This solution has already been applied by several Member States. For example, when the UK government in 1998 made a commitment to restore free public access to the principal collections on display in the main national museums and galleries, this immediately brought attention to a major obstacle to free access: the inability to recover VAT as the free admittance would not be an economic activity within the realm of VAT. To compensate for this disadvantage of free access, a special VAT refund scheme was introduced in 2001 for museums and galleries which meet strict criteria and which are named in an order made by HM Treasury.⁷¹ These museums can reclaim VAT incurred in relation to free rights of admission. The scheme does not form part of the general VAT system governed by EU legislation, but certain rules in UK VAT legislation apply to it.

Another example of mitigating adverse effects of VAT through a direct subsidy can be found in Denmark and Sweden. These countries combine a high VAT rate for books and periodicals (25%) with specific subsidy arrangements, for example, universities get a refund of the VAT they have paid for books and periodicals (irrespective whether these are electronic publications which, being a service rather than goods, may not be taxed at the reduced rate of Annex III section 6, or other publications which may be taxed at the reduced rate). This enables governments to compensate specific taxpayers instead of giving a tax incentive to all taxpayers, even though they might not need this or might not qualify under direct subsidy conditions.

Norway (not a Member State, but a country with wide tax exemptions for the public benefit) compensated non-profit organisations for the increased burden of non-deductible VAT after the VAT reform of 2001 through the budget of the Ministry of Social Services, for which subjective criteria, reflecting policy priorities of stimulating certain types of projects, were used regarding refunds for the year 2003 and after.⁷²

In Ireland, the Irish Charities Tax Reform Group campaigned to ‘abolish VAT on giving’ to reduce the ‘human cost’ caused by the non-deductibility of input tax through the introduction of a VAT refund mechanism, pointing out that the Danish government already had introduced such a scheme for charities.⁷³ In its Finance Bill published on 7 November 2006, the Danish

⁷¹ Article 33A VAT Act 1994 and Notice 998 VAT refund scheme for national museums and galleries (http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageImport_ShowContent&id=HMCE_CL_000178&propertyType=document#P7_84).

⁷² For a discussion of this refund system I refer to O. Gjems-Onstad, ‘Refund of Input VAT to Norwegian NPOs’, *VAT Monitor* July/August 2004, pp. 244-246.

⁷³<http://www.vatcampaign.com/>.

Government made provision for a VAT compensation scheme for charities. The details of its operation were published in June 2007. Danish charities are compensated for VAT in direct proportion to the amount of their fund-raised income in excess of that raised in the threshold year of 2004.⁷⁴ The UK Charity Tax Group, besides campaigning for the replacement of exemptions with reduced rate or zero-rated supplies, also called on the UK Government to compensate charities for all the irrecoverable VAT they pay.⁷⁵ In the Netherlands and other Member States such refund schemes already exist for local governments.⁷⁶

Member States have to keep in mind that they are not completely free to introduce such direct subsidies. Not only is it important that such schemes do not form a breach of the VAT Directive; furthermore, these must not infringe the state aid rules of articles 107-109 of the TFEU⁷⁷ (before the entry into force of the Treaty of Lisbon articles 87-89 EC Treaty). Article 107 TFEU prohibits Member States from granting aid through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. However, several forms of such aid are allowed, for example aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned (article 107(2)(b) TFEU) and aid granted to any one undertaking not exceeding €200,000 over any period of three fiscal years (*de minimis* Regulation⁷⁸). Often, direct subsidies to charities will probably not exceed this *de minimis* amount. Furthermore, aid to promote culture and heritage conservation may be considered to be compatible where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest (article 107(2)(d) TFEU). Notification and approval of the European Commission is necessary before Member States can introduce such aid.

It is important to note that in his speech of 2005 Commissioner Kovács stated that:

‘The Commission has always considered that any scheme designed to relieve the VAT burden for charitable activities can be regarded as compatible with EU legislation if it is clearly separated from the VAT system itself (since under this system VAT can only be refunded if it is connected with taxable supplies) and does not affect the own resources of the Community. The essential difference is that, under such a scheme, the tax is collected in the first place and then the Government chooses to allocate it back to the bodies from which it has been collected. This is a subtle but important accounting distinction. I have to underline that the decision to set up such a refund mechanism is strictly a national budgetary issue over which the Commission has no say or influence.’⁷⁹

⁷⁴ For information on the Danish refund scheme I refer to <http://www.charitytaxreform.com/files/Danish%20Vat%20Compensation%20Scheme%20Summary%20-%20Feb%202007.pdf>.

⁷⁵ <http://www.ctrg.org.uk/campaigns/VAT/>.

⁷⁶ Wet van 27 juni 2002, *Staatsblad* 2002, 621 (Wet op het BTW-compensatiefonds). For a critical discussion of these schemes I refer to M. Aujean, P. Jenkins and S. Poddar ‘A new approach to public sector bodies’ *International VAT Monitor* Vol. 10 No. 4, July/August 1999, p. 144-149, R. de la Feria, ‘The EU VAT treatment of public sector bodies: slowly moving in the wrong direction’ *Intertax* 37(3) 2009, p. 148-165 and M. Aujeans contribution to this book.

⁷⁷ Treaty on the Functioning of the European Union, the consolidated version can be found in the Official Journal C 115 , 09/05/2008 P. 0001 – 0388 and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

⁷⁸ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of articles 87 and 88 of the Treaty to *de minimis* aid.

⁷⁹ http://ec.europa.eu/commission_barroso/kovacs/speeches/philanthropy_conference.pdf, pp. 3-4. In February 2003 his predecessor, Commissioner Bolkenstein, had already written the Irish Charities Tax Reform Group: ‘(...), the question of the Commission's attitude to a possible scheme whereby the Irish

This makes this solution also feasible from a practical point of view. As long as Member States remain within the boundaries mentioned above, direct subsidies offer many ways to mitigate negative effects of VAT exemptions in a more effective and efficient way than would be possible through a solution within the VAT system.

7.4 Study of the European Commission on the VAT position of charities

In April 2009, the President of the European Commission, Barroso stated in a letter to the European Foundation Centre that the European Commission would launch ‘a detailed study later this year to assess the possibility of a legislative update regarding the relevant rules of the VAT Directive.’⁸⁰ The European Commission services for taxation (DG TAXUD) intend to review the VAT taxation of public bodies and public-interest activities in 2010. An open invitation to tender for a study on the VAT rules applied to the public sector and exemptions in the public interest has been published.⁸¹ Following this study, the EC will launch a consultation for all stakeholders at the end of 2010 and a policy proposal is envisaged for 2011. The European Commission foresaw three types of options as to how the situation for public benefit organisations could be changed:

1. fundamental changes to current VAT rules, and in particular to widen the scope to cover most activities (as in Australia and New Zealand), and to restrict exemptions provided for in article 132;
2. the introduction of the option for taxable persons to be either exempt or taxed, as was tested for financial services;
3. a solution outside the VAT system. Member States could either extend the public regimes to non-profit organisations or organise national monetary transfers, i.e. national refund schemes such as in Denmark.

It will be interesting to see what comes out of this study and whether Member States will be able to agree on legislative proposals resulting from this study.⁸² For the short term, implementation of a refund scheme in domestic legislation seems to be the most feasible option to mitigate the negative effects of the non-refundable input tax.

8 Conclusion

Government would give a subsidy to Irish charities of an amount equivalent to the non-deductible VAT that they had incurred was raised. In particular, the delegation was concerned to know whether any such scheme would be at odds with the provisions of Community VAT law as contained in the 6th VAT Directive. I wish to confirm to you that in the Commission’s view, the granting of government subsidies - irrespective of the beneficiaries - is in itself not contrary to European Union VAT law. In this regard, it has also to be noted that, provided that the State Aid rules are observed Community law in general does not prescribe how Member States should spend their revenue.’ (<http://www.charitytaxreform.com/node/8>). The Commissioners office has confirmed this in 2008 to the Danish umbrella organisation of charities, isobro: <http://www.charitytaxreform.com/files/Danish%20Vat%20Compensation%20Scheme%20Summary%20-%20Feb%202007.pdf>.

⁸⁰ <http://www.efc.be/EUAdvocacy/EU%20Communiquis%20%20Briefings/befc0958.pdf>.

⁸¹ http://ec.europa.eu/taxation_customs/resources/documents/common/tenders_grants/tenders/AO-2009-03/Tech_specs_en.pdf.

⁸² In 2006 Amand was not very positive on the outcome of such discussions. He noted that the negotiating partners/stakeholders have a common interest: both the European Commission and the Member States derive revenue from VAT. C. Amand, ‘VAT for Public Entities and Charities – Should the Sixth Directive Be Renegotiated?’ *International VAT Monitor* November/December 2006, pp. 433-443, p. 442.

The impossibility of deducting input VAT means that the main object of the charitable exemptions, to reduce the costs of these activities, is not always achieved. Furthermore, the fact that VAT exemptions must adhere to the basic VAT principle of fiscal neutrality, obliging Member States to interpret the terms and concepts in the exemptions in the same way, if necessary in conflict with domestic charity legislation, may make these exemptions less effective from a public policy point of view. In my view it would be best to mitigate the negative VAT effects by direct subsidies and not within the VAT system. The advantage of direct subsidies is that these can be targeted better than VAT measures because direct subsidies allow for strict, qualitative criteria, which may vary between Member States and which can better reflect domestic charity legislation. Such solution is therefore, in my opinion, more effective than a change within the VAT system, also because the charities which are not deemed VAT taxable persons, but may encounter the same VAT problems as exempt charities, would not be helped by a solution within the VAT system. Obviously, when implementing direct subsidies Member States are also restricted by EU legislation, in particular the freedoms and state aid prohibition in the TFEU. However, these restrictions leave more freedom to Member States to reflect domestic policy regarding charities and, in the view of the European Commission, do not seem to hinder the introduction of VAT refund schemes.

Annex 1

Chapter 2 Exemptions for certain activities in the public interest

Article 132

1. Member States shall exempt the following transactions:

- (a) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto;
 - (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
 - (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;
 - (d) the supply of human organs, blood and milk;
 - (e) the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians;
 - (f) the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition;
 - (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 bodies recognised by the Member State concerned as being devoted to social wellbeing;
 - (h) the supply of services and of goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social wellbeing;
 - (i) the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;
 - (j) tuition given privately by teachers and covering school or university education;
 - (k) the supply of staff by religious or philosophical institutions for the purpose of the activities referred to in points (b), (g), (h) and (i) and with a view to spiritual welfare;
 - (l) the supply of services, and the supply of goods closely linked thereto, to their members in their common interest in return for a subscription fixed in accordance with their rules by non-profit-making organisations with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature, provided that this exemption is not likely to cause distortion of competition;
 - (m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education;
 - (n) the supply of certain cultural services, and the supply of goods closely linked thereto, by bodies governed by public law or by other cultural bodies recognised by the Member State concerned;
 - (o) the supply of services and goods, by organisations whose activities are exempt pursuant to points (b), (g), (h), (i), (l), (m) and (n), in connection with fund-raising events organised exclusively for their own benefit, provided that exemption is not likely to cause distortion of competition;
 - (p) the supply of transport services for sick or injured persons in vehicles specially designed for the purpose, by duly authorised bodies;
 - (q) the activities, other than those of a commercial nature, carried out by public radio and television bodies.
2. For the purposes of point (o) of paragraph 1, Member States may introduce any restrictions necessary, in particular as regards the number of events or the amount of receipts which give entitlement to exemption.

Article 133

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

- (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;
- (b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;
- (c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;
- (d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

Member States which, pursuant to Annex E of Directive 77/388/EEC, on 1 January 1989 applied VAT to the transactions referred to in Article 132(1)(m) and (n) may also apply the conditions provided for in point (d) of the first paragraph when the said supply of goods or services by bodies governed by public law is granted exemption.

Article 134

The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i) and (n) of Article 132(1), in the following cases:

- (a) where the supply is not essential to the transactions exempted;
- (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.