Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 1 December 2022 [1]

Case C-620/21

MOMTRADE RUSE OOD
v
Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

(Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Reference for a preliminary ruling – VAT Directive – Article 132(1)(g) – Exemption for the supply of services closely linked to welfare and social security work – Body recognised as being devoted to social wellbeing – Member State concerned which recognises the body as being devoted to social wellbeing)

I. Introduction

1. Demographic change and globalisation do not stop even for EU VAT law. This can be seen from the present case. An undertaking established in Bulgaria posts its employees throughout the European Union, including to private individuals established in Germany and Austria who, for reasons of age or health, need home help as well as care. In principle, the place of supply of these services to private individuals is the place where the supplier is established, in this case Bulgaria. Accordingly, Bulgarian law is applicable in respect of the correct levying of VAT and thus also the exemption for those services which are carried out in Germany or Austria.

2. The exemption at issue covers services closely linked to welfare and social security work supplied by a body 'recognised by the Member State concerned as being devoted to social wellbeing'. The crucial question is which State is the 'Member State concerned'. Is it the State in whose territory the services subject to relief are supplied (country of destination) because its social welfare systems generally pay for the supply? Or is it the State which would actually be entitled to the tax revenue if the supply were not exempt? In the case of supplies to non-taxable persons like those at issue, this would be the country of origin, while in the case of supplies to taxable persons (such as a hospital in another country), this would be the country of destination.

3. Both solutions create practical problems. If the Member State which is the country of destination takes the decision on recognition, it may be difficult for the Member State which is the country of origin to review that decision, even though its tax revenue could be indirectly

[1] Original language: German.

affected. If the Member State which is the country of origin is competent for such recognition, that Member State could establish an ideal location for cross-border welfare services by adopting a very liberal recognition practice. This could lead to distortions of competition with undertakings established in the country of destination, which a harmonised system of VAT is in fact intended to prevent.

4. Because there can be only one solution, however, the Court must decide in this case whether the exemption of transactions of certain bodies to be recognised by the 'Member State concerned' always applies to the State which is the place of supply for VAT purposes (in this case Bulgaria) or to the country of destination (in this case Germany or Austria).

II. Legal framework

A. European Union law

5. The legal framework is formed by Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). [2]

6. Article 45 of the VAT Directive concerns the place of supply of services to a non-taxable person and states:

'The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.'

7. Article 132(1)(g) of the VAT Directive governs exemption:

'1. Member States shall exempt the following transactions:

(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;'

8. Point (c) of the first paragraph of Article 133 of the VAT Directive permits Member States to make the granting of the abovementioned exemption subject to a condition:

'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:

(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.'

[2] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the version applicable in the years at issue (2014 to 2015), as last amended in that respect by Council Directive 2013/61/EU of 17 December 2013 (OJ 2013 L 353, p. 5).

9. Article 134(a) of the VAT Directive provides:

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

(a) where the supply is not essential to the transactions exempted'.

B. Bulgarian law

10. The VAT Directive was transposed by the Zakon za danaka varhu dobavenata stoynost (Law on value added tax; 'the ZDDS').

11. Under Article 21 of the ZDDS, the place of supply of services provided to a non-taxable person is deemed to be the place where the supplier has established his independent business.

12. Article 40 of the ZDDS provides that the supply of social services in accordance with the Zakon za sotsialnoto podpomagane (Law on social assistance; 'the ZSP') is exempt.

13. Article 16 of the ZSP stipulates that social services are based on targeted social work to help people with their day-to-day activities or social integration and are provided at the person's choice and request based on a personal needs assessment.

14. Under Article 18 of the ZSP, social services, including those supplied by Bulgarian legal entities, may be provided only following registration with the Agentsia za sozialno podpomagane (Social Assistance Agency, Bulgaria).

15. According to the legal definition in Article 1, point 6, of the Supplementary provisions of the ZSP, 'social services' means activities to support people and increase their opportunities to lead an independent life; point 7 states that 'social services in the community' are provided within a family or family related environment.

16. Article 40 of the Pravilnik za prilagane na ZSP (ZSP Implementing Regulations; 'the PPZSP') states that persons wishing to avail themselves of social services must submit a written request to the managing body in the place where they are currently residing if the provider of the social services is a legal entity. As references, they must enclose a copy of an identity document, a copy of their personal medical file, if available, and a medical report, if available. The managing body conducts an assessment of the person's need for social services and records the results in a standard-format report.

17. According to Article 40d of the PPZSP, the social services provider must prepare a personal plan based on the needs assessment in which it formulates objectives and sets out the activities required to meet those needs, including day-to-day needs and healthcare, education, rehabilitation and other needs.

18. Article 40e of the PPZSP requires social services providers to keep a client register containing data on the recipient and the service provided.

III. Facts and reference for a preliminary ruling

19. Momtrade Ruse OOD ('Momtrade') is a limited liability company which mainly provides outpatient social services. Since 24 June 2014, it has been registered voluntarily as a taxable person under the ZDDS. In addition, it is registered with the Social Assistance Agency of the Bulgarian Ministry of Labour and Social Policy[3] as a provider of social services in the form of personal carers, social assistants and home help for elderly people.

20. A tax audit was conducted for Momtrade for the period from 24 June 2014 to 31 December 2015. The audit covered the provision of services to various private individuals of German and/or Austrian nationality who were probably resident in Germany or Austria.

21. Based on contracts concluded with those private individuals, Momtrade posted care and home help workers to the clients' homes. The various duties are detailed in a questionnaire attached to the contract. These questionnaires were prepared by a placement agency registered in Germany or Austria, which referred clients to Momtrade under a placement agreement.

22. Aside from home help, the listed duties include caring for elderly people with health problems who are unable to take care of themselves. Each contract states both the client's name and the name of the placement agency. The payments made to Momtrade by the private individuals are not disputed.

23. The German tax authorities initiated an exchange of information. It was established further to that exchange that the place of supply of those services was in Bulgaria. Consequently, these transactions were not taxable in Germany, but were subject to tax in Bulgaria under the Bulgarian ZDDS.

24. Based on the documents produced by Momtrade, the revenue authorities in Bulgaria found that there was no agreement on the provision of 'social services', as clients' personal needs were not indicated. They held that German and Austrian law were relevant, in addition to the ZSP, because the service was in fact provided in another Member State, and that, in order for Momtrade to be exempt under Article 40, point 1, of the ZDDS, proof must be provided confirming that under the law of the other Member State the services provided in its territory were services devoted to social wellbeing.

25. By tax audit notice of 4 October 2018, Momtrade was in any case denied exemption for the services. It brought proceedings against that notice. The court of first instance in the case, the Administrativen sad Ruse (Administrative Court, Ruse, Bulgaria), held that Article 40, point 1, of the ZDDS corresponds to Article 132(1)(g) of the VAT Directive. In order for the exemption provided for in Article 40, point 1, of the ZDDS to apply, the person audited must prove that the service is devoted to social wellbeing both under Bulgarian law and under the law of the Member State in whose territory the services are provided. The court held that this had not been proven in accordance with the Bulgarian rules, which required a social assessment of the person's needs, which had not been carried out or documented in this case.

26. Momtrade had simply produced the contracts and associated questionnaires and had failed to produce the social service requests, social assessments, proposals, personal plans and list of clients required under Bulgarian law.

[3] Ministerstvo na truda i sotsialnata politika

27. Furthermore, the services provided in connection with the care of elderly persons are not social services within the meaning of Article 40(1) of the ZDDS as they simply provide help in connection with household management. The workers are not required to perform duties relating to the state of health of those persons. Nor had they received any training that might suggest that they were able to provide medical care.

28. The court of first instance therefore largely upheld the tax debts assessed in the tax audit notice. Momtrade appealed against that decision. The question arising for the Cassation Chamber, which has jurisdiction to hear the case, is the criteria by which it must assess whether the activities are devoted to social wellbeing.

29. The Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) has therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can Article 132(1)(g) of the VAT Directive be interpreted as meaning that it allows a commercial company registered as a social service provider in one Member State (in this case, Bulgaria) to rely on that provision in order to obtain a tax exemption for the social services which it provides in the territory of other Member States to private individuals who are nationals of those States? Is the answer to that question affected by the fact that the recipients of the services were referred to the provider by commercial companies registered in the Member States in which the services are provided?

(2) If Question 1 is answered in the affirmative, by what criteria and law (Bulgarian and/or Austrian and German law) is it necessary to assess, for the purposes of the interpretation and application of the aforesaid provision of EU law, whether the company audited is an "organisation recognised as being devoted to social wellbeing" and whether it has been proven that the services are "closely linked to welfare and social security work"?

(3) Based on that interpretation, does the fact that a commercial company is registered as a provider of social services, as defined by national law, suffice in order for that company to be classed as an organisation "recognised by the Member State concerned as being devoted to social wellbeing"?'

30. In the proceedings before the Court, the tax authorities of the Republic of Bulgaria and the European Commission submitted written observations. In accordance with Article 76(2) of the Rules of Procedure, the Court did not consider it necessary to hold a hearing.

IV. Legal assessment

31. As the answers to questions 1 and 3 are relatively straightforward in the light of the VAT Directive and the Court's case-law, I will examine those questions first (see section A. and B.). I will then turn to question 2, which has two parts that are to be considered separately. First, the referring court asks how to interpret the concept of 'services … closely linked to welfare and social security work' and how such services are to be proven. The key factor is the existence of an intrinsically exempt supply of services (see section C.) by old people's homes, by bodies governed by public law or by other recognised bodies. Second, it must be clarified how to interpret the

concept of 'Member State concerned', which recognises such 'other bodies' as being devoted to social wellbeing such that they fall within the scope *ratione personae* of the exemption (see section D.).

A. Direct applicability of Article 132(1)(g) of the VAT Directive (question 1)

32. The first question seeks clarification as to whether Momtrade may rely directly upon Article 132(1)(g) of the VAT Directive. According to the Court's case-law,[4] wherever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive. This requires that those provisions define rights which individuals are able to assert against the State.

33. In this connection, the Court has already ruled with regard to Article 132(1)(g) of the VAT Directive that it (or its predecessor provision, Article 13(A)(1)(g) of the Sixth Directive, the content of which is identical) indicates in a sufficiently precise and unconditional manner the activities to which the exemption applies.[5]

34. The concept of 'bodies recognised by the Member State concerned as being devoted to social wellbeing' does, however, grant the Member States a discretion to recognise certain organisations as being devoted to social wellbeing.[6] To the extent that the Member States observe the limits of the discretion that is accorded to them by Article 132(1)(g) of the VAT Directive, individuals cannot rely on that provision in order to acquire the status of body devoted to social wellbeing in respect of the Member State concerned.[7]

35. Where, however, a person seeks the status of body devoted to social wellbeing, it is for the national courts to examine whether the competent authorities have observed the limits of discretion while applying EU law principles, in particular the principle of equal treatment.[8] Thus, despite the discretion which is accorded, Article 132(1)(g) of the VAT Directive may be relied upon by an individual.[9]

36. With regard to the first question asked by the referring court, it must be made clear that this is true irrespective of whether the place of supply is determined on the basis of the destination principle or the origin principle and irrespective of whether a placement agency arranged that service.

4 Judgments of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 25); of 26 September 2000, *IGI* (C-134/99, EU:C:2000:503, paragraph 36); and of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 51).

5 Judgment of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 53). The judgment of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 47), refers to autonomous concepts of EU law which must be given an EU definition.

6 Judgment of 17 June 2010, *Commission* v *France* (C-492/08, EU:C:2010:348, paragraph 41 on point 15 of Annex III.

7 Judgment of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 55).

8 Judgments of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 56), and of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 45).

9 Judgments of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 61), and of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 32).

B. The requirements for effective recognition (question 3)

37. The third question asks whether the fact that a commercial company is registered as a provider of social services suffices for there to be an effectively recognised body for the purposes of Article 132(1)(g) of the VAT Directive.

38. It will be for the national authorities to determine which bodies should be recognised as being devoted to social wellbeing within the meaning of Article 132(1)(g) of the VAT Directive. [10] Article 132(1)(g) of the VAT Directive does not specify the conditions or the procedures for recognising bodies other than those governed by public law as being devoted to social wellbeing. Consequently, it is in principle for the national law of each Member State to lay down the rules in accordance with which that recognition may be granted to such bodies. [11]

39. In that regard, however, it is clear from the case-law of the Court that, when considering whether to recognise bodies other than those governed by public law as being devoted to social wellbeing, it is for the national authorities, in accordance with EU law and subject to review by the national courts, to take various factors into account.

40. These may include the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions; the public interest nature of the activities of the taxable person concerned; the fact that other taxable persons carrying on the same activities already enjoy similar recognition; and the fact that the costs of the supplies in question may be largely met by health insurance schemes or other social security bodies. [12] Account may also be taken of the objectives pursued by a body viewed as a whole and whether it is engaged in welfare work on a permanent basis. [13]

41. It also follows that the Member States do not have latitude to classify private profit-making bodies (like Momtrade in this case) as being devoted to social wellbeing merely because they provide, inter alia, services related to social wellbeing. [14] Consequently, the mere fact that a commercial company is registered as a provider of social services with a State agency does not suffice in itself in order to be able to infer that a correct discretionary decision was made in recognition as a body devoted to social wellbeing. The situation may be different if a substantive examination of the abovementioned factors were connected with that registration, which is a matter to be reviewed by the referring court.

[10] Judgment of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 57).

[11] Judgments of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 26); of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraphs 32 and 34); of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 43); and of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 69).

[12] Judgments of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 31 and the case-law cited); of 12 March 2015, *'go fair' Zeitarbeit* (C-594/13, EU:C:2015:164, paragraph 20); of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 35); of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 44); and of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 70).

[13] Judgment of 17 June 2010, *Commission* v *France* (C-492/08, EU:C:2010:348, paragraph 45).

[14] Judgments of 17 June 2010, *Commission* v *France* (C-492/08, EU:C:2010:348, paragraphs 42 and 44); of 28 July 2016, *Conseil des ministres* (C-543/14, EU:C:2016:605, paragraphs 61 and 63) and of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 72).

C. Assessment of services closely linked to welfare and social security work (question 2 – second part)

42. The second part of the second question concerns the assessment of an exempt supply of services, both as regards criteria and as regards applicable law and necessary proof. It is clear from the wording of Article 132(1)(g) of the VAT Directive that the exemption laid down in that provision applies only to the supply of services and of goods 'closely linked to welfare and social security work'. The existence of an exempt supply of services thus follows solely from EU law.

43. According to the Court's case-law, the terms used to specify the exemptions in Article 132 of the VAT Directive are to be interpreted strictly, as they are a departure from the general principle that VAT is to be paid on each supply of services made for consideration by a taxable person. [15] However, they also should not be interpreted too narrowly, [16] as the interpretation of those terms must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT and be consistent with the objectives underlying the exemptions. Accordingly, in the view of the Court, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 must be construed in such a way as to deprive the exemptions of their intended effects. [17]

44. The Court thus requires a teleological interpretation of the rules on exemption which takes account of the objectives of the exemption and the principle of neutrality. The interpretation of Article 132(1)(g) of the VAT Directive must also encompass Article 134(a), which requires that the supply of services concerned be essential to the transactions relating to welfare and social security work. [18]

45. In this regard, the Court has ruled that the provision of general care and domestic help by an out-patient care service to persons in a state of physical or economic dependence is in principle closely linked to welfare and social security work within the meaning of that provision. [19] Similarly, the supply of services provided to persons in a state of mental dependence and intended to protect them in civil matters must also be regarded as such where those persons risk damaging their own financial or other interests. [20] The concept does not, however, cover the supply of workers because it is not, in itself, a supply of services of general interest carried out in the social sector. It is irrelevant in that regard that the staff members concerned are care workers or that they are supplied to recognised care establishments. [21]

[15] Judgments of 7 September 1999, *Gregg* (C-216/97, EU:C:1999:390, paragraph 12); of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 22); of 12 March 2015, *'go fair' Zeitarbeit* (C-594/13, EU:C:2015:164, paragraph 17); of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 28); and of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 57).

[16] Judgment of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 32, mentions 'not … particularly narrow').

[17] Judgments of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 22); of 12 March 2015, *'go fair' Zeitarbeit* (C-594/13, EU:C:2015:164, paragraph 17); of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 28); and of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 57).

[18] Judgments of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 31), and of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 59). See also, apparently to that effect, judgment of 9 February 2006, *Stichting Kinderopvang Enschede* (C-415/04, EU:C:2006:95, paragraph 25).

[19] Judgments of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 23), and of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 62). See, to that effect, judgment of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 44).

[20] Judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 63).

[21] Judgment of 12 March 2015, *'go fair' Zeitarbeit* (C-594/13, EU:C:2015:164, paragraph 28).

46. The Member State on which the directive confers the power of taxation must clarify whether the supply in question is exempt. In VAT law, this is done through the place of supply of services. In the case of supplies to taxable persons, under Article 44 of the VAT Directive this is in principle the place where the recipient of the supply has established his business (destination principle). In the case of services to a non-taxable person, under Article 45 of the VAT Directive this is the place where the supplier has established his business (origin principle). Under certain specific place-of-supply rules (such as Article 54 of the VAT Directive), the right of taxation is based on the place where the activities are actually carried out (place-of-activity principle).

47. The present case concerns the supply of services to non-taxable persons, which means that the State having the right of taxation under Article 45 of the VAT Directive is Bulgaria. Therefore, the Bulgarian law on VAT, if it correctly transposed the VAT Directive, determines whether an exempt service was supplied. It is irrelevant in this regard whether the German or the Austrian law on VAT would also classify the supply of services in question as an exempt welfare supply. In a harmonised field of law such as VAT law, the assessment should nevertheless ideally be the same.

48. It is for the referring court to assess whether the relevant rules of the ZDDS correctly transpose the VAT Directive. If this is not the case, taxable persons may – as stated above (point 32 et seq.) – rely directly upon the VAT Directive. In both cases, the taxable person has a duty to assist in the assessment of whether the supply of services concerned is also an exempt supply of services. This may include providing proof. The VAT Directive does not, on the other hand, specify what proof this is or how it is to be provided.

49. In the absence of such EU legislation, it falls within the competence of the Member States to arrange the requirements for proof (principle of procedural autonomy). As the Court has already ruled, they have freedom in this regard [22] and may lay down the rules themselves. However, the procedures must not be less favourable than those governing similar domestic actions (principle of equivalence) nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). [23]

50. A breach of the principle of equivalence is not apparent here. Nor is a breach of the principle of effectiveness evident. It is clear that certain proof is suitable, necessary and generally also appropriate in reviewing whether there exists an exempt supply of services, a fortiori where the services are provided outside the area under the supervision of the Bulgarian tax authorities (in this case in Germany or Austria). This does not appear, in principle, to make it in practice impossible to invoke the exemption. Ultimately, however, this assessment must be made by the referring court.

[22] See, with regard to the absence of rules on interest in VAT law, judgments of 12 May 2011, *Enel Maritsa Iztok 3* (C-107/10, EU:C:2011:298, paragraph 29); of 28 July 2011, *Commission* v *Hungary* (C-274/10, EU:C:2011:530, paragraph 39); of 24 October 2013, *Rafinăria Steaua Română* (C-431/12, EU:C:2013:686, paragraph 20 – autonomy); and of 23 April 2020, *Sole-Mizo and Dalmandi Mezőgazdasági* (C-13/18 and C-126/18, EU:C:2020:292, paragraph 37).

[23] Judgments of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraph 24); of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32, paragraph 17); of 24 October 2013, *Rafinăria Steaua Română* (C-431/12, EU:C:2013:686, paragraph 20); of 4 March 2020, *Telecom Italia* (C-34/19, EU:C:2020:148, paragraph 58); of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 54); and of 16 July 2020, *UR* (VAT liability of lawyers) (C-424/19, EU:C:2020:581, paragraph 25).

D. The 'Member State concerned' which recognises the bodies (question 2 – first part)

1. Explanation of the problem

51. It is therefore Bulgaria that decides on the existence of a supply of services closely linked to welfare. Nevertheless, Article 132(1)(g) of the VAT Directive further requires that this service is supplied by a specific taxable person. Exempt services of this nature may be supplied only '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'.

52. Because only the last alternative is a possibility in the present case, the key factor is whether Momtrade is such a recognised body. Momtrade has possibly been recognised as such a body by Bulgaria, although the mere fact that a commercial company is registered as a provider of social services with a State agency does not suffice in itself (see above point 40 et seq.). It is evident that at the place of activity and in the countries of destination, Germany and Austria, Momtrade has not been recognised as such a body. If it is assumed that Bulgaria has effectively recognised Momtrade as such a body, it must be clarified, in order to answer the first part of the second question, which 'Member State concerned' is to make this decision on recognition.

53. The VAT Directive refers only to the 'Member State concerned'. At first glance, the 'Member State concerned' is also the Member State which is place of supply for VAT purposes. Ultimately, as the Commission, for example, asserts in its observations, that State must levy tax.

54. The place-of-supply rules were, however, amended for the supply of services with effect from 1 January 2010.[24] The purpose of that amendment was to take account of the character of VAT as a tax on consumption[25] with regard to the right of taxation of the respective Member State. Accordingly, the State where consumption takes place is intended, in principle, to have the right of taxation (destination principle). If this leads to enforcement problems – for example in the supply of services to non-taxable persons, see Article 45 of the VAT Directive – the origin principle applies. However, I do not think that this purpose of the origin principle – avoiding deficiencies in enforcement – is readily transferrable to the purpose of recognition of other bodies in accordance with Article 132(1)(g) of the VAT Directive.

55. The simplest solution might be to have regard to the country of origin in this regard too. This is supported by the fact that the place of supply to non-taxable persons is normally the country of origin, which also has the right of taxation. It would then be Bulgaria that is competent for recognition in the present case. On the other hand, in this solution a Member State which imposes very strict requirements (qualitatively for example) on recognition would make the cross-border supply of services closely linked to welfare more difficult for undertakings established in its territory. Conversely, it would be a locational advantage for such undertakings to become established in the State which imposes the least stringent requirements on recognition. In both cases distortions of competition in the country of destination – where the service is received and consumed – would be inevitable.

[24] Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services (OJ 2008 L 44, p. 11).

[25] See recital 3 of Directive 2008/8/EC.

56. VAT law has been harmonised specifically because it has a particular, intrinsic internal market dimension and such distortions of competition are to be avoided. The VAT Directive is therefore founded on the legal basis for competence under Article 113 TFEU and, unlike with other taxes (in particular, taxes on income), does not have to meet the special conditions laid down in Article 115 TFEU.

57. It thus appears doubtful whether the 'Member State concerned' really means the State which is the place of supply for VAT purposes, a fortiori since the place of supply depends on the status of the recipient of the supply. If the same service were supplied in the same (foreign) Member State to a non-taxable person (for example care services to a private individual) and to a taxable person (for example care services as a secondary provider to an old people's home), this would require two recognitions, as the place of supply is in the country of destination in one case (foreign) and in the country of origin (domestic) in the other.

2. Wording

58. The concept of body 'recognised by the Member State concerned' is used in just a few provisions governing exemption, while other rules on exemption mention only 'recognised establishments' (see, for example, Article 132(1)(b) of the VAT Directive).

59. This comparison of wording in itself suggests that 'Member State concerned' would appear to mean something other than the State which has the right of taxation. The interpretation that the Member State concerned always means the State which is also permitted to tax the transaction makes the overall wording superfluous, as without that wording it is in any case always the Member State in which the place of supply for VAT purposes is located and which therefore has the right of taxation that examines the conditions for the chargeable event and may exercise discretion to that effect.

60. The wording therefore indicates that 'Member State concerned' does not always mean the Member State which is permitted to tax the transaction.

3. Analysis of drafting history

61. It is also supported by the drafting history of the provision. In the predecessor legislation to the VAT Directive, the exemption under Article 132(1)(g) of the VAT Directive was governed by Article 13 of the Sixth Directive. According to the heading at the time, that article covered only 'exemptions within the territory of the country'.

62. According to recital 3 of the VAT Directive, with the adoption of the VAT Directive only the structure and the wording were recast, which would not make material changes in the existing legislation. Material changes which were nevertheless made are listed exhaustively in the provisions governing transposition and entry into force. There is nothing in this respect for Article 132(1)(g) of the VAT Directive.

63. Having regard to the Sixth Directive, it can therefore be assumed that an exemption *within the territory of the country* meant principally supplies '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' normally established within the territory of the country, which carry out their

supplies within the territory of that country. The Member State concerned which is required to effect recognition would then be the State in which the supply was carried out. This would be consistent with the country of destination principle.

4. Teleological interpretation

64. A teleological interpretation also militates against using the place-of-supply rules to determine the 'Member State concerned' which decides on recognition. As was stated above, the place-of-supply rules are intended to assign the tax base for cross-border supplies of goods and services to one of the Member States under consideration. To that end, different principles can be applied which take greater or lesser account of the nature of VAT as a tax on consumption (destination principle, place-of-activity principle) and the principle of effective tax administration (origin principle).

65. The objective of the VAT exemption in Article 132(1)(g) of the VAT Directive and the link with State recognition by the 'Member State concerned' are different, in my view, as it is not a matter of implementing the nature of VAT as a tax on consumption or effective tax administration but, specifically, of financing the Member States' social welfare systems.

66. The objective of that exemption is to reduce the cost of those services and thus to make them more accessible to the individuals who may benefit from them.[26] Since those costs are largely borne by the Member States' social welfare systems, the exemption thus also serves to finance the Member States' social welfare systems.

67. For this reason, the Court has repeatedly ruled that the Member State does not go beyond the limits of its discretion in the recognition of other bodies by requiring that the costs relating to the out-patient services concerned must have been borne wholly or partly by the statutory social security or social welfare authorities.[27]

68. If, on the one hand, the recognition of another body lies within the discretion of the Member State and, on the other, the exemption is intended to reduce the costs of medical care which are borne largely by the respective social welfare systems, the place of supply for VAT purposes cannot be crucial as it would be hard to imagine, in the case of cross-border supplies of services, that it should lie within the discretion of the country of origin (in this case Bulgaria) whether or not the social welfare systems in the countries of destination (in this case the German or Austrian systems) are to bear the VAT burden.

69. This would also explain why the EU legislature explicitly had in view recognition by the Member State concerned. The Member State concerned is, from a teleological point of view, the State whose social welfare systems are affected by the service and which is therefore intended to be able to decide whether to recognise the supplier as being devoted to social wellbeing.

[26] Judgments of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 30); of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 41); and of 8 October 2020, *Finanzamt D* (C-657/19, EU:C:2020:811, paragraph 29).

[27] Judgment of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 37); see also, to that effect, judgment of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 53), and of 21 January 2016, *Les Jardins de Jouvence* (C-335/14, EU:C:2016:36, paragraph 39). Similarly, in connection with exempt medical care, judgment of 5 March 2020, *Idealmed III* (C-211/18, EU:C:2020:168, paragraphs 30 and 31), and of 7 April 2022, *I* (VAT exemption for hospital services) (C-228/20, EU:C:2022:275, paragraph 61).

70. This interpretation is supported, lastly, by the wording of point (c) of the first paragraph of Article 133 of the VAT Directive. Under that provision, the Member State may make the granting to 'other bodies' of the exemption subject to the condition that those bodies must charge prices which are approved by the public authorities. This can only mean the authorities in the country of destination. If the competent authorities of the country of destination are responsible for approving prices in their territory, it becomes apparent that the 'Member State concerned' which decides on recognition must be the Member State which is the country of destination.

5. Consideration of the principle of neutrality

71. Furthermore, the interpretation under which the Member State competent for recognition in Article 132(1)(g) of the VAT Directive is the State whose social welfare systems generally pay for the services and not the State where the place of supply of the service is located under the VAT Directive is consistent with the principle of neutrality.

72. The principle of neutrality precludes economic operators who effect the same transactions being treated differently in respect of the levying of VAT.[28] Competing undertakings must in principle be treated equally for VAT purposes.

73. Competition between old people's homes, bodies governed by public law and other bodies recognised by the Member State concerned normally takes place where the services are supplied and paid for. Momtrade competes primarily with bodies which supply similar services in Germany or Austria. That competition could be significantly distorted if Member States were able, through their own recognition practice in the country of origin, to influence the costs of the activity in the country of destination.

74. This distortion of competition would occur wherever the recognition practice in the Member States is different. The discretion accorded to Member States in this regard (see above point 38 et seq.) virtually precludes a uniform practice. The Member State which imposes the strictest recognition requirements would prejudice undertakings which have established their business in its territory in respect of the supply of services under Article 45 of the VAT Directive. The Member State which imposes the least stringent recognition requirements would favour undertakings which have established their business in its territory in respect of the supply of services under Article 45 of the VAT Directive.

75. Accordingly, as the Bulgarian tax authorities have asserted, Bulgaria issues a decision on recognition which is valid only for the supply of services within the territory of Bulgaria. In the present case, Germany and Austria would therefore have to decide whether Momtrade should be recognised as being devoted to social wellbeing.

76. Momtrade would have to submit that decision to the Bulgarian tax authorities. It would have to be recognised in Bulgaria in accordance with the principle of mutual trust.[29] The Bulgarian tax authorities would then merely review whether there also exists an exempt supply of services

[28] See judgments of 11 June 1998, *Fischer* (C-283/95, EU:C:1998:276, paragraph 22); of 7 September 1999, *Gregg* (C-216/97, EU:C:1999:390, paragraph 20); and of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571, paragraph 30).

[29] See, with regard to this principle in the context of cooperation in criminal justice: judgment of 12 May 2021, *Federal Republic of Germany* (Red Notice, Interpol) (C-505/19, EU:C:2021:376, paragraph 80 and the case-law cited). See also judgment of 28 September 2006, *van Straaten* (C-150/05, EU:C:2006:614, paragraph 43).

closely linked to welfare and social security work within the meaning of Article 132(1)(g) of the VAT Directive. If that is not the case, the supply of services is subject to tax; if it is the case, the supply of services is exempt. Any disputes as to whether an error of assessment was made in the decision on recognition would have to be resolved in the State whose social welfare systems would generally have to bear the costs, that is to say, in the country of destination.

77. However, this interpretation means that the amount of VAT revenue in Bulgaria is influenced indirectly by the decision on recognition taken by another Member State (in this case Germany and Austria). This is nevertheless justified, in my view, by the particular objective of Article 132(1)(g) of the VAT Directive (reduction of costs of the respective social welfare systems – see point 65 et seq.) and the principle of competitive neutrality.

V. Conclusion

78. I therefore propose that the Court answer the questions referred for a preliminary ruling by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) as follows:

(1) Article 132(1)(g) of Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') may, despite the discretion accorded to Member States therein, be relied upon directly by an individual vis-à-vis the Member State of taxation. This is true irrespective of whether the place of supply is determined on the basis of the destination principle or the origin principle and irrespective of whether a placement agency arranged that service.

(2) Article 132(1)(g) of the VAT Directive is to be interpreted as meaning that the Member State concerned which takes the decision on recognition of other bodies is the State in which the services are actually carried out and whose social welfare systems generally pay for those services. In the case of cross-border supplies of services, this can also be a Member State on which the directive by means of the place of supply rules does not confer the corresponding power of taxation.

    On the other hand, the Member State on which the directive on the place of supply confers the power of taxation must assess, solely on the basis of its own law (if it correctly transposes Article 132(1)(g) of the VAT Directive), whether the supply concerned is a supply of services closely linked to welfare and social security work and is adequately proven.

(3) The mere fact that a commercial company is registered as a provider of social services with a State agency does not suffice in itself in order to be able to infer that a correct discretionary decision was made in recognition of it as a body devoted to social wellbeing.