Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 4 September 2014[1]

Joined Cases C-144/13, C-154/13 and C-160/13

VDP Dental Laboratory NV
v
Staatssecretaris van Financiën,
Staatssecretaris van Financiën
v
X BV
and
Staatssecretaris van Financiën
v
Nobel Biocare Nederland BV
(Requests for a preliminary ruling

from the Hoge Raad der Nederlanden (Kingdom of the Netherlands))

(Tax law — Value added tax — Tax exemption in the case of intra-Community acquisitions of goods — Article 140(a) and (b) of Directive 2006/112/EC — Tax exemption in the case of the importation of goods — Article 143(a) of Directive 2006/112/EC — Applicability of tax exemptions in the case of supplies of dental prostheses exempt under Article 132(1)(e) of Directive 2006/112/EC — Deduction of input tax — Article 17(2)(a), in the version of Article 28f(1), of Sixth Directive 77/388/EEC — Direct effect — Right to deduct input tax in the case of transactions benefiting from a national exemption contrary to EU law)

I – **Introduction**

1. The Court is called on yet again[2] to consider the question of value added tax in relation to dental prostheses. This is a special case inasmuch as, while the supply of dental prostheses is exempt from VAT in certain situations, there are still some Member States which tax all supplies of dental prostheses on the basis of a transitional arrangement.

2. The effects of these peculiarities on the deduction of input tax and the conditions of competition between suppliers of dental prostheses in different Member States have already been examined by the Court in the judgment in *Eurodental*.[3] The present requests for a preliminary ruling are also concerned with the aforementioned conditions of competition, although this time against the background of the tax exemptions for intra-Community acquisitions and imports from third countries. The issue of whether these are applicable to dental prostheses has yet to be settled.

1 — Original language: German.

2 — See, previously, *Eurodental* (C-240/05, EU:C:2006:763) and *VDP Dental Laboratory* (C-401/05, EU:C:2006:792).

3 — *Eurodental* (C-240/05, EU:C:2006:763).

3. In addition, following on from its first judgment in *VDP Dental Laboratory*,[4] the Court will once again have to address the consequences for the right to deduct input tax of an exemption granted in breach of European Union (EU) law. The recent judgment in *MDDP*[5] should have left no questions unanswered in this regard, however.

II – **Legal framework**

A – *EU law*

4. The main proceedings concern the collection of value added tax for the years 2006 and 2008. Consequently, regard must be had in the present cases both to 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,[6] in the version applicable for 2006 ('the Sixth Directive'), and to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax,[7] which came into force on 1 January 2007, in the version applicable for 2008 ('the VAT Directive'). In what follows, therefore, the rules are reproduced either in the version of the VAT Directive or in the version of the Sixth Directive, depending on the tax period in relation to which their interpretation is called for.

1. Taxable events

5. In accordance with Article 2(1) of the VAT Directive, the following transactions are subject to VAT:

'(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, … where the vendor is a taxable person acting as such …;

…

(c) …

(d) the importation of goods'.

6. Article 14(1) of the VAT Directive defines the 'supply of goods' as 'the transfer of the right to dispose of tangible property as owner'.

7. The 'intra-Community acquisition of goods' is defined in the first paragraph of Article 20 of the VAT Directive as 'the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began'.

4 — *VDP Dental Laboratory* (C-401/05, EU:2006:792).

5 — *MDDP* (C-319/12, EU:C:2013:778).

6 — OJ 1977 L 145, p. 1.

7 — OJ 2006 L 347, p. 1.

8. In accordance with the first paragraph of Article 30 of the VAT Directive, 'importation of goods' means 'the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the Treaty'.

2. Tax exemption for dental prostheses

9. Under Article 132(1)(e) of the VAT Directive, Member States are to exempt the following transactions from VAT:

'the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians'.

10. However, Chapter 1 of Title XIII of the VAT Directive, under the heading 'Derogations applying until the adoption of definitive arrangements', contains a derogation from that tax exemption in its Section 1 ('Derogations for States which were members of the Community on January 1978'). In that section, Article 370 provides:

'Member States which, at 1 January 1978, taxed the transactions listed in Annex X, Part A, may continue to tax those transactions'.

11. Point 1 of Annex X, Part A, refers to 'the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians'.

3. Exemptions for intra-Community acquisitions and on importation

12. Furthermore, in accordance with Article 140 of the VAT Directive, Member States are to exempt:

'(a) the intra-Community acquisition of goods the supply of which by taxable persons would in all circumstances be exempt within their respective territory;

(b) the intra-Community acquisition of goods the importation of which would in all circumstances be exempt under points (a), (b) and (c) and (e) to (l) of Article 143;

…'

13. In the case of imports from third countries, in accordance with Article 143(a) of the VAT Directive, Member States are to exempt:

'the final importation of goods of which the supply by a taxable person would in all circumstances be exempt within their respective territory'.

4. Exemptions for intra-Community supplies of goods and on exportation

14. In the case of a cross-border supply within the EU that amounts to an intra-Community acquisition, Article 138(1) of the VAT Directive provides for the following exemption:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began'.

15. Article 146 of the VAT Directive makes similar provision in the case of exports:

‘1. Member States shall exempt the following transactions:

(a) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;

(b) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory …

…’

5. Right to deduct input tax

16. For the purposes of the 2006 tax period, the right of a taxable person to deduct input tax on goods or services acquired by him (‘input transactions’) is governed by Article 17(1) and (2), in the version of Article 28f(1), of the Sixth Directive as follows:

‘1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person:

(b) value added tax due or paid in respect of imported goods within the territory of the country;

(c) …

(d) value added tax due pursuant to Article 28a(1)(a).

3. Member States shall also grant every taxable person the right to the deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

…

(b) transactions which are exempt pursuant to Article … 15 … or 28c(A) and (C);

…’

17. Article 28a(1)(a) of the Sixth Directive sets out the chargeable event of intra-Community acquisition that corresponds to that provided for in Article 2(1)(b)(i) of the VAT Directive.[8] Article 15 of the Sixth Directive governed the exemptions on exportation that are now provided for in Article 146 of the VAT Directive.[9] Article 28c(A) of the Sixth Directive contained the exemption for intra-Community supplies that is now to be found in Article 138 of the VAT Directive.[10]

8 — See point 5 above.

9 — See point 15 above.

10 — See point 14 above.

18. The provisions concerning the deduction of input tax contained in Article 17(1) to (3), in the version of Article 28f(1), of the Sixth Directive have their counterpart in Articles 167 and 168 of the VAT Directive.

B – *National law*

19. Netherlands law contained provisions corresponding in principle to the aforementioned provisions of EU law.

20. However, in 2006, the tax exemption for dental prostheses provided for in Article 132(1)(e) of the VAT Directive was still transposed, in Article 11(1)(g)(1) of the Netherlands Law on Turnover Tax (Wet op de omzetbelasting 1968), in a manner, contrary to EU law,[11] such that the supplier of dental prostheses did not have to be either a dentist or a dental technician.

III – **Main proceedings**

21. All three sets of main proceedings concern Netherlands taxable persons who arrange for dental prostheses to be manufactured in other countries in order subsequently either to sell them on as intermediaries or to use them themselves in the course of their activities as dentists. The issue in all three cases is whether purchases of dental prostheses from other countries are exempt from value added tax.

A – *Case C-144/13 (VDP Dental Laboratory)*

22. Case C-144/13 concerns the Netherlands company VDP Dental Laboratory NV ('VDP'). On receipt of orders from dentists, it arranged for dental prostheses to be manufactured by dental laboratories located in other countries both within and outside the EU. The dispute in the main proceedings concerns VDP's liability to VAT in the Netherlands in the first quarter of 2006 and the third quarter of 2008.

23. According to the information supplied by the referring court, in 2006 VDP was not yet to be regarded as a dental technician within the meaning of Article 132(1)(e) of the VAT Directive. Relying on Article 11(1)(g) of the Netherlands Law on Turnover Tax, VDP none the less treated its supplies of dental prostheses as exempt. At the same time, notwithstanding that exemption, it claimed entitlement to deduct the tax on its input transactions, relying at this stage on EU law. However, the Netherlands tax administration refused to allow VDP to deduct the input tax.

24. According to the account given by the referring court, VDP is now a dental technician within the meaning of the exemption provided for in Article 132(1)(e) of the VAT Directive, and has been since 2008. VDP treated its supplies of dental prostheses as exempt and, moreover, did not claim input tax deduction. In addition, however, it does not wish to pay tax on the dental prostheses which it obtains from abroad in so far as these constitute intra-Community acquisitions or imports from third countries. VDP takes the view that it is entitled to benefit from the exemptions provided for in Article 140(a) and Article 143(a) of the VAT Directive.

11 — See *VDP Dental Laboratory* (C-401/05, EU:C:2006:792).

B – *Case C-154/13 (X)*

25. The dispute in the main proceedings in Case C-154/13 concerns X's liability to VAT in the Netherlands for the first three quarters of 2008. During that period, X operated a dental practice. It carried out transactions which, in accordance with Article 132(1)(e) of the VAT Directive, were exempt from VAT and it was therefore not entitled to deduct input tax.

26. For the purposes of its business, X acquired dental prostheses from a dental technician established in Germany. X takes the view that it does not have to pay VAT on that intra-Community acquisition because of the exemption provided for in Article 140 of the VAT Directive. The Netherlands tax administration, however, considers that exemption to be inapplicable, inter alia because in Germany, unlike in the Netherlands, the supply of dental prostheses is not exempt from VAT, pursuant to Article 370, in conjunction with Annex X, Part (A)(1), of the VAT Directive.

C – *Case C-160/13 (Nobel Biocare Nederland)*

27. The third case has its origin in a dispute concerning the VAT liability of the Netherlands company Nobel Biocare Nederland BV ('Nobel') for December 2008. During that period, Nobel supplied dental prostheses to dental laboratories in the Netherlands. Nobel arranged for those prostheses to be manufactured by its parent company in Sweden.

28. The Netherlands tax administration applied VAT to the dental prostheses which Nobel obtained from Sweden as intra-Community acquisitions. Nobel, however, takes the view that the tax exemption provided for in Article 140(a) of the VAT Directive is applicable in this regard.

IV – **Procedure before the Court of Justice**

29. On 21, 27 and 28 March 2013, the Hoge Raad der Nederlanden, before which the actions in the main proceedings are pending, referred to the Court of Justice under Article 267 TFEU three requests for a preliminary ruling on a total of five questions. The questions referred concern two different areas.

30. First, in Case C-144/13 (*VDP Dental Laboratory*), the referring court raises a question concerning the right to deduct input tax for the 2006 tax period:

Should Article 17(1) and (2) of the Sixth Directive be interpreted to mean that if a national statutory provision, contrary to the Directive, provides for an exemption (in respect of which the right to deduct is excluded), the taxable person is entitled to the right to deduct in reliance on Article 17(1) and (2) of the Sixth Directive?

31. Secondly, all three cases raise the following question concerning the exemption for intra-Community acquisitions:

Must Article 140(a) and (b) of the VAT Directive be interpreted as meaning that the exemption from VAT contained in that provision does not apply to the intra-Community acquisition of dental prostheses? If the answer to that question is no, is the application of the exemption then subject to the condition that the dental prostheses are supplied from abroad by a dentist and/or dental technician to a dentist or dental technician?

32. In Case C-144/13 (*VDP Dental Laboratory*), that question is extended to the interpretation of Article 143(a) of the VAT Directive, which concerns exemptions for imports from third countries.

33. Furthermore, in Case C-154/13 (*X*), that question is supplemented as follows:

If the exemption from VAT (whether or not under the conditions described in the first question) for which Article 140(a) and (b) of the VAT Directive provides applies to the intra-Community acquisition of dental prostheses, does the exemption therefore apply in Member States, such as the Netherlands, which have complied with the exemption provided for in Article 132 of the VAT Directive, to the intra-Community acquisition of dental prostheses originating from a Member State which has taken advantage of the derogating and transitional arrangements for which Article 370 of the VAT Directive provides?

34. Following the joinder of the cases for the purposes of the procedure and the judgment, written observations were submitted by VDP, Nobel, the Republic of Estonia, the Kingdom of the Netherlands and the European Commission. Nobel, the Kingdom of the Netherlands and the Commission took part in the hearing on 19 May 2014.

V – **Legal assessment**

A – *The right to deduct input tax*

35. As is clear from the grounds of the request for a preliminary ruling in Case C-144/13, by its question on the right to deduct input tax the referring court wishes in essence to ascertain whether a taxable person can rely on Article 17, in the version of Article 28f(1), of the Sixth Directive in order to exercise a right to deduct input tax even in a situation where he has not paid tax on his transactions because national law, contrary to the provisions of EU law, has provided for a tax exemption.

36. In so far as it concerns the interpretation of the VAT Directive, that question had already been the subject of Case C-319/12 (*MDDP*), the judgment in which was not delivered until after the present requests for a preliminary ruling had been received.

37. In *MDDP*, the Court of Justice held that Article 168 of the VAT Directive does not permit a taxable person both to benefit from an exemption which is provided for in national law but is incompatible with the VAT Directive and to exercise the right to deduct input tax.[12] In such a situation, therefore, the only choice open to a taxable person is either to avail himself of the national tax exemption, thus ruling out the right to deduct input tax, or to subject his transactions to VAT in accordance with EU law, thus rendering himself eligible to deduct input tax.

38. Since none of the parties to the present proceedings has put forward any arguments that have not already been addressed in the context of *MDDP*,[13] there is no reason to call into question the findings of the judgment in *MDDP*.

39. Moreover, the foregoing is not precluded by the fact that the Commission submitted at the hearing that the facts of the present case concerning VDP differ from those in *MDDP* because VDP has to exercise its right to deduct input tax retrospectively. The Commission is right to point out that this would present VDP with the problem of retrospectively obtaining from its customers a price increased by the value of the VAT, since, in order to exercise its right to deduct input tax, VDP would have to

12 — Judgment in *MDDP* (C-319/12, EU:C:2013:778, paragraph 45).

13 — See, in this connection, my Opinion in *MDDP* (C-319/12, EU:C:2013:421, points 37 to 51).

pay tax on transactions which it had originally treated as exempt. However, I have already pointed out in connection with *MDDP* that, in certain circumstances, a taxable person is able to seek compensation from the Member State concerned if he can no longer pass on to his customers the VAT collected retrospectively. [14]

40. The answer to the first question referred for a preliminary ruling must therefore be that Article 17, in the version of Article 28f(1), of the Sixth Directive does not confer a right to deduct input tax on a taxable person who has not paid tax on his transactions because, contrary to the provisions of EU law, national law has provided for an exemption.

B – *The exemptions provided for in Article 140(a) and (b) and Article 143(a) of the VAT Directive*

41. With regard to the exemptions for intra-Community acquisitions of goods provided for in Article 140(a) and (b) and for imports of goods from third countries under Article 143(a) of the VAT Directive, the referring court wishes to ascertain whether, and if so under what conditions, those exemptions apply to dental prostheses. After all, both provisions make the exemption dependent on whether the goods would also be exempt if the goods were supplied in national territory.

42. Article 132(1)(e) of the VAT Directive exempts supplies of dental prostheses in national territory. However, that exemption applies only on condition that the supplies are effected by a dentist or dental technician. That said, Article 140(a) and (b) and Article 143(a) respectively of the VAT Directive require, as a condition for the exemption of intra-Community acquisitions or of imports of goods from third countries, that the supplies be exempt 'in all circumstances' in national territory. The Kingdom of the Netherlands therefore takes the view — unlike the other parties to the proceedings — that Article 140(a) and (b) and Article 143(a) of the VAT Directive are not applicable to dental prostheses.

43. I am of the opinion that the answer to this question calls for a distinction to be drawn. As I shall show, it is true that the exemption provided for in Article 143(a) of the VAT Directive is not applicable to imports of dental prostheses from third countries (see 1 below). The same applies for Article 140(b) of the VAT Directive (see 2 below). A different stance is called for, however, with respect to the exemption provided for in Article 140(a), which, subject to the conditions laid down in Article 132(1)(e) of the VAT Directive, also applies to intra-Community acquisitions of dental prostheses (see 3 below). Moreover, the position is no different where, in accordance with the transitional arrangements under Article 370, in conjunction with Annex X, Part (A)(1), the Member State of origin of the goods does not apply the exemption provided for in Article 132(1)(e) of the VAT Directive (see 4 below).

1. Exemption from tax for the importation of goods under Article 143(a) of the VAT Directive

44. Under Article 143(a) of the VAT Directive, Member States are to exempt from VAT the final importation of goods 'of which the supply by a taxable person would in all circumstances be exempt within their respective territory'.

45. The phrase 'within their respective territory' refers to the relevant Member State of importation. This is clear from a comparison of that provision with provisions such as Article 88, Article 207 or Article 214(1)(a) of the VAT Directive, which contain the same phrase. As VDP has therefore rightly pointed out, the supply of the goods must be exempt from tax in the Member State of destination, that is to say, the Member State into which the goods are imported.

14 — See my Opinion in *MDDP* (C-319/12, EU:C:2013:421, point 72).

46. By the phrase 'in all circumstances', the wording of Article 143(a) of the VAT Directive indicates that the supply of the imported goods must always, that is to say, independently of any further conditions, be exempt from tax. If, however, an exemption for the supply of goods is subject to further conditions, such as, in the present case, that contained in Article 132(1)(e) of the VAT Directive, concerning the characteristics of the supplier, then the supply of certain goods would *not* be exempt 'in all circumstances'.

47. The drafting history of Article 143(a) of the VAT Directive confirms that interpretation of the wording in question. In the Sixth Directive, the provision corresponding to Article 143(a) of the VAT Directive was Article 14(1)(a). According to that provision, the importation of goods 'of which the supply by a taxable person would in all circumstances be exempted within the country' was exempt. Article 14(1)(a) of the Sixth Directive is in turn based on Article 15(1) of the Commission's proposal.[15] Unlike Article 14(1)(a) of the Sixth Directive as later adopted by the Council, Article 15(1) of the Commission's proposal still referred explicitly to individual domestic exemptions. With one exception,[16] that reference covered only exemptions that were dependent solely on the subject-matter of the supply and were to apply independently of any further conditions. There was no reference to any exemption for supplies of dental prostheses by dentists and dental technicians.[17]

48. Against that background, the fact that the exemption provided for in Article 14(1)(a) of the Sixth Directive was ultimately worded differently can best be explained by the fact that the only exemption referred to in Article 15(1) of the Commission's proposal as being subject to conditions other than the mere object of the supply was not included in the directive as adopted. It therefore made sense to use the phrase 'in all circumstances' to summarise what was now a reference exclusively to exemptions that were to apply independently of any further conditions.

49. A schematic interpretation leads to the same conclusion. After all, point (k) of Article 143 contains an exemption for 'the importation of gold by central banks'. The 'supply of gold to central banks' is exempt under Article 152 of the VAT Directive. This is therefore an exemption which exempts the supply of gold not in every case but only where gold is supplied to a particular consignee, namely a central bank. If, however, the exemption provided for in Article 143(a) of the VAT Directive were understood as being applicable to all exemptions for the supply of goods where the corresponding conditions are satisfied, then the importation of gold by central banks would necessarily be exempt simply by virtue of that provision, in conjunction with Article 152 of the VAT Directive. Article 143(k) of the VAT Directive, which makes specific provision for such imports, would thus be superfluous.

50. The purpose of the exemption provided for in Article 143(a) of the VAT Directive also does not support any arguments that would militate in favour of an extensive understanding of its scope.

51. After having stated in the proposal for a Sixth Directive that that exemption required 'no special explanation',[18] the Commission has argued in the present proceedings that its purpose lies in the equal treatment of cross-border and domestic transactions. This sounds plausible at first. However, once the effects of input tax deduction in the supply chain are also taken into account, equal treatment can ultimately no longer be said to obtain.

15 — Proposal for a Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: Uniform basis of assessment of 20 June 1973, COM(73) 950 final.

16 — See Article 14(B)(c) of the proposal for a Sixth Directive (cited in footnote 15), which exempted from tax supplies to 'organisations responsible for constructing, installing and maintaining cemeteries, graves and monuments commemorating war dead'; see now in this regard Annex X Part (B)(6) to the VAT Directive.

17 — Article 14(A)(1)(e) of the proposal for a Sixth Directive (cited in footnote 15).

18 — Proposal for a Sixth Directive (cited in footnote 15), p. 16.

52. If input tax deduction in the supply chain is left out of account, an extensive application of the exemption provided for in Article 143(a) of the VAT Directive means that there is no VAT charge on the acquisition of goods irrespective of whether they are acquired in national territory or from a third country. This is achieved by extending the exemption for domestic supplies to imports from third countries.

53. If input tax deduction by the supplier is taken into account, a different picture emerges. After all, the consequence of the exemption applicable to domestic supplies of goods is that the supplier also has no right to deduct input tax, as provided for in Article 168 of the VAT Directive,[19] in respect of the supplies obtained for the purpose of manufacturing those goods. The non-deductible VAT on those inputs thus operates ultimately as a charge on the exempt supply of the goods inasmuch as it increases the cost of their manufacture.

54. The situation is usually different, however, in the case of goods imported from third countries. In this case the supplier established in the third country is in principle entitled to deduct input tax. It is, after all, international fiscal practice for goods that are exported to be relieved of any value added tax. In the case of exports from the EU, this is achieved by the exemption for exports provided for in accordance with Article 146 and, at the same time, the right to deduct input tax provided for in Article 169(b) of the VAT Directive.[20]

55. If, therefore, it is the norm for a right on the part of the supplier to deduct input tax to obtain in the case of cross-border transactions but not in the case of domestic transactions, then it is also the norm for the exemption provided for in Article 143(a) of the VAT Directive to give rise to a competitive advantage for goods from third countries. The Kingdom of the Netherlands was therefore right to point out that, in the present case, suppliers from third countries, unlike domestic suppliers, would be able to supply dental prostheses without any VAT charge at all if Article 143(a) of the VAT Directive were also applicable to imports of dental prostheses from third countries.

56. Such distortions of competition can be prevented only if the third country likewise confers no right to deduct input tax in respect of the export in question. Since this will, however, not normally be the case, that competitive advantage for third-country suppliers can only be remedied, albeit imperfectly, by taxing imports of goods. This is because taxing imports means that VAT is also charged on goods originating in third countries. What is more, that charge is final, unless the purchaser is entitled to deduct input tax in accordance with Article 168(e) of the VAT Directive.[21] Such is the case in particular where the purchaser is a consumer or resells the goods tax-free in national territory. It is the latter of those situations with which the three sets of main proceedings are concerned. None of the taxable persons is entitled to deduct input tax on the purchase of dental prostheses since they resell the prostheses tax-free in accordance with Article 132(1)(e) of the VAT Directive.

57. However, that VAT charge on goods from third countries will normally be higher than the charge to be borne by domestically supplied goods. While, in the latter case, the charge depends on the value of the inputs,[22] the charge arising from the taxation of goods on importation is determined by the value of the finished article.[23] Consequently, a refusal to apply the exemption on importation provided for in Article 143(a) of the VAT Directive usually has the effect of creating a competitive disadvantage for dental prostheses from third countries.

19 — Or Article 17(2), in the version of Article 28f(1), of the Sixth Directive.

20 — Or Article 17(3)(b), in the version of Article 28f(1), of the Sixth Directive.

21 — Or Article 17(2)(b), in the version of Article 28f(1), of the Sixth Directive.

22 — See Article 73 of the VAT Directive.

23 — See Article 85 of the VAT Directive in conjunction with Article 29 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

58. Thus, neither the exemption nor the taxation of imports from third countries of goods the supply of which is exempt in the Member State of destination offers a solution that is neutral from the point of view of competition. Neither route is capable of creating equal conditions of competition as between domestic goods and goods from third countries. A solution that is neutral from the point of view of competition lies outside the regulatory ambit of the VAT Directive, since it would presuppose an influence over the right of a supplier in a third country to deduct input tax. [24]

59. Against that background, it is important to recall the settled case-law to the effect that the exemptions provided for in the Sixth Directive must be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person. [25] That principle also applies to the exemptions on importation. Moreover, a strict interpretation would not render the exemption provided for in Article 143(a) of the VAT Directive ineffective in the present context, [26] since, as we have seen, when the effects of input tax deduction by the supplier are taken into account, the objective of equal treatment cannot be achieved any more successfully by a broad interpretation of that provision.

60. Finally, the considerable practical difficulties also militate against a broad interpretation. Both the Kingdom of the Netherlands and the Commission have rightly drawn attention to those difficulties. For example, if the exemption provided for in Article 143(a) of the VAT Directive were interpreted broadly in the present context, it would routinely have to be demonstrated at the time when goods cross the border that the third-country vendor is a dentist or dental technician. Such difficulties are avoided if the exemption provided for in Article 143(a) of the VAT Directive applies only where supplies of imported goods always, that is to say, by virtue of the characteristics of the goods themselves alone, benefit from an exemption. After all, the characteristics of the goods are normally easily verifiable at the time when they cross the border.

61. In conclusion, Article 143(a) of the VAT Directive exempts from tax only imports of third-country goods the supply of which is always, that is to say, independently of any further conditions, exempt from tax in the Member State of destination. The answer to the question concerning Article 143(a) of the VAT Directive must therefore be that that exemption is not applicable to imports of dental prostheses.

2. Exemption for intra-Community acquisitions under Article 140(b) of the VAT Directive

62. The next issue to be examined is the exemption for intra-Community acquisitions of goods provided for in Article 140(b) of the VAT Directive. That provision is linked to the exemption for imported goods provided for in Article 143(a) of the VAT Directive, just discussed. After all, Article 140(b) of the VAT Directive exempts, inter alia, 'the intra-Community acquisition of goods the importation of which would in all circumstances be exempt under [point] (a) … of Article 143'.

63. Since the exemption referred to is not applicable to imports of dental prostheses, [27] the intra-Community acquisition of dental prostheses is not exempt under Article 140(b) of the VAT Directive either.

24 — See points 55 and 56 above.

25 — See, inter alia, *Velker International Oil Company* (C-185/89, EU:C:1990:262, paragraph 19) and *Granton Advertising* (C-461/12, EU:C:2014:1745, paragraph 25).

26 — On this requirement, see, inter alia, *Dornier* (C-45/01, EU:C:2003:595, paragraph 42) and *Klinikum Dortmund* (C-366/12, EU:C:2014:143, paragraph 27).

27 — See points 44 to 61 above.

3. Exemption for intra-Community acquisitions under Article 140(a) of the VAT Directive

64. The intra-Community acquisition of dental prostheses might, however, be exempt from tax under the conditions laid down in Article 140(a) of the VAT Directive. That exemption concerns the intra-Community acquisition of goods the supply of which by taxable persons is exempt 'in all circumstances' in the Member State of destination.

65. Although the wording of Article 140(a) of the VAT Directive is recognisably modelled on the exemption for imports of goods from third countries provided for in Article 143(a) of the VAT Directive, the two provisions cannot be interpreted in the same way. Rather, the intra-Community acquisition of dental prostheses is exempt if the supply is effected by a dentist or a dental technician.[28] There are two reasons for my view, which differs from the interpretation of Article 143(a) of the VAT Directive and is shared by VDP, Nobel, the Republic of Estonia and the Commission.

66. First, an identical interpretation of the two provisions would rob the exemption for intra-Community acquisitions provided for in Article 140(a) of the VAT Directive of any independent content. For, in those circumstances, the prescriptive content of that provision would extend no further than the exemption provided for in Article 140(b) of the VAT Directive, in so far as the latter itself refers to the exemption provided for in Article 143(a) of the VAT Directive.

67. Secondly, an interpretation differing from that of Article 143(a) of the VAT Directive is required by Articles 90 EC and 93 EC (now Articles 110 TFEU and 113 TFEU). This is because an EU legislative act such as the VAT Directive must be interpreted in conformity with primary law as a whole.[29]

68. Under Article 90 EC (now Article 110 TFEU), Member States are not to impose on the products of other Member States any internal taxation in excess of that imposed on similar domestic products. That provision is intended to ensure the free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States.[30]

69. That guarantee of equal conditions of competition is also the *ratio legis* of Article 93 EC (now Article 113 TFEU), on the basis of which the VAT Directive was adopted. According to that article, the harmonisation of Member States' turnover taxes serves to ensure the establishment and the functioning of the internal market and in particular to avoid distortions of competition.

70. It follows from those two Treaty provisions that Article 140(a) of the VAT Directive is to be interpreted so far as is possible in such a way as to prevent distortions of competition between Member States. In this regard, intra-Community competition differs from competition with third countries in two respects.

71. On the one hand, tax exemptions within the EU are in principle subject to the unform rules of the VAT Directive. An exemption must therefore, in principle, be applied in the same way both in the Member State of origin and in the Member State of destination.

72. On the other hand, cross-border supplies of goods that would be exempt from tax if they were effected within national territory do not confer a right to deduct input tax either. After all, the Court held in *Eurodental* that the transactions exempted under Article 13 of the Sixth Directive do not give rise to the right to deduct input VAT even where those transactions are of an intra-Community

28 — See my Opinion in *VDP Dental Laboratory* (C-401/05, EU:C:2006:537, point 44).

29 — See *Sturgeon and Others* (C-402/07, EU:C:2009:716, paragraph 48); *Chatzi* (C-149/10, EU:C:2010:534, paragraph 43); and *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 40).

30 — *Stadtgemeinde Frohnleiten and Gemeindebetriebe Frohnleiten* (C-221/06, EU:C:2007:657, paragraph 30) concerning Article 90 EC.

nature.[31] Consequently, an intra-community supply that is exempt under Article 138 of the VAT Directive does not — as would otherwise be the case under Article 169(b) of the VAT Directive[32] — give rise to the right to deduct input tax where such a supply is the subject of a special exemption, including that provided for in the present Article 132 of the VAT Directive.

73. This effectively serves to ensure that value added tax is in principle neutral from the point of view of competition in the trade in dental prostheses in the European Union. This is because the conditions governing the deduction of input tax by the supplier are the same in the case of both domestic and intra-Community transactions. If the exemptions are applied uniformly throughout the European Union, there will be no right on the supplier's part to deduct input tax in either case. It is for this reason that dental prostheses obtained both in national territory and from another Member State are subject in the same circumstances to non-deductible input tax incurred in the course of manufacturing.[33] Accordingly, unlike in the case of imports from third countries,[34] an exemption for intra-Community acquisitions of goods in circumstances where the domestic supply of those goods would also be exempt is actually conducive to the equal treatment of domestic and cross-border transactions.

74. In the light of the foregoing, it is not surprising that, in *Eurodental*, the Court pointed out *en passant* that the exemption provided for in Article 140(a) of the VAT Directive is also applicable to dental prostheses[35] and the Advisory Committee on Value Added Tax had previously expressed itself along similar lines.[36]

75. That exemption is subject to the condition that the supplier must be a dentist or dental technician in the Member State of origin because this is the only way of ensuring equal treatment for national and intra-Community supplies. It is true that this also gives rise to a number of practical difficulties when it comes to verifying that the conditions for exemption have actually been satisfied. However, a check will be more easily carried out within the EU than at the time of importation from a third country.[37] The reasons for this are, first of all, that the EU operates a system of administrative cooperation in matters of taxation,[38] and, secondly, that the check does not have to be carried out at the border but can take place as a stage of the normal taxation procedure.

76. Unlike Article 143(a), therefore, Article 140(a) of the VAT Directive must be interpreted as meaning that it is applicable to the intra-Community acquisition of dental prostheses where the supplier is a dentist or dental technician within the meaning of Article 132(1)(e) of the VAT Directive.

31 — *Eurodental* (C-240/05, EU:C:2006:763, paragraph 37).

32 — Or Article 17(3)(b), in the version of Article 28f(1), of the Sixth Directive.

33 — The only remaining differences stem from the fact that the input tax charge may vary depending on where the inputs have come from, on account of the different rates of tax applied by the Member States. In accordance with Articles 96 to 105 of the VAT Directive, tax rates are only partially harmonised.

34 — See points 53 to 55 above.

35 — See *Eurodental* (C-240/05, EU:C:2006:763, paragraph 40) concerning the predecessor provision of Article 28cB(a) of the Sixth Directive.

36 — See the guidelines resulting from the 56th meeting of 13 to 14 October 1998 of the VAT Advisory Committee established pursuant to Article 29 of the Sixth Directive relating to the predecessor provision of Article 28cB(a) of the Sixth Directive.

37 — See point 60 above.

38 — See Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (recast) (OJ 2010 L 268, p. 1).

4. Impact of the derogation provided for in Article 370 of the VAT Directive

77. It remains to be clarified, finally, whether Article 140(a) of the VAT Directive is also applicable in the case where the dental prostheses are supplied from a Member State which, on the basis of Article 370, in conjunction with Annex X, Part A(1), of the VAT Directive, does not apply the exemption provided for in Article 132(1)(e) of the VAT Directive but always taxes supplies of dental prostheses.

78. In this regard, the Kingdom of the Netherlands takes the view that the exemption cannot in any event be applicable in such a case if distortions of competition are to be avoided.

79. Such a derogation cannot be based on the wording of the exemption provided for in Article 140(a) of the VAT Directive. As we have seen, this refers only to the existence of an exemption in the Member State of destination, but not in the Member State of origin. [39]

80. However, a Member State which, in accordance with Article 370, in conjunction with Annex X, Part A(1), of the VAT Directive, taxes supplies of dental prostheses in all circumstances is effectively in the same competitive situation as a third country. Since the supplier in such a Member State benefits not from the exemption provided for in Article 132(1)(e) of the VAT Directive but only from the exemption for intra-Community supplies provided for in Article 138 of the VAT Directive, he can, when making supplies to another Member State, deduct the full amount of tax that he has paid on his inputs, in accordance with Article 169(b) of the VAT Directive. [40] Dental prostheses from such a Member State can therefore be supplied without any VAT charge at all. As in the case of a supply from a third country, [41] this gives rise to a competitive advantage for taxable persons who are established in such a Member State.

81. It is with a view in particular to offsetting that competitive advantage that I have proposed a strict interpretation of the exemption for imports from third countries in the context of the examination of Article 143(a) of the VAT Directive. [42] I do not, however, consider it appropriate to transpose that strict interpretation to the exemption for intra-Community acquisitions provided for in Article 140(a) of the VAT Directive in the case where the Member State of origin, availing itself of the derogation under Article 370 of the VAT Directive, does not apply an exemption for supplies of dental prostheses.

82. First of all, the consequence of doing so would ultimately be to place the Member State of origin at a competitive disadvantage. As I have already demonstrated in relation to third countries, [43] if intra-Community acquisitions were taxable, dental prostheses from such a Member State would as a rule carry a higher VAT charge than prostheses from another Member State which are subject only to non-deductible input tax. For Member States (unlike third countries), however, such discrimination against imported goods is problematic from the point of view of the prohibition laid down in this regard in Article 90 EC (now Article 110 TFEU). [44]

39 — See point 45 above.

40 — Or Article 17(3)(b), in the version of Article 28f(1), of the Sixth Directive.

41 — See point 55 above.

42 — See point 56 above.

43 — See point 57 above.

44 — See point 68 above.

83. Secondly, the Court has already held in *Eurodental*, in the context of the distortions of competition resulting from the different rules governing the right to deduct input tax,[45] that that situation is the consequence of an as yet incomplete harmonisation of value added taxation.[46] The distortions of competition of which the Kingdom of the Netherlands rightly complains are therefore the consequence of the derogation under Article 370 of the VAT Directive and not of an excessively broad interpretation of the exemption provided for in Article 140(a) of the VAT Directive.

84. If, therefore, the cause of the problem lies in the derogation provided for in Article 370 of the VAT Directive, then this is also the only place to find a solution. In this connection, I would raise the question whether that provision satisfies the requirements of primary law, in particular the principle of equal treatment. I have in mind both the general principle of equality enshrined in Article 20 of the Charter of Fundamental Rights, applicable to taxable persons, and the particular principle of equality laid down in Article 4(2) TEU, applicable between the Member States. After all, Article 370 of the VAT Directive does not fall into the traditional category of a provision subject to a process of only gradual harmonisation that gives all Member States the scope to apply different national rules. On the contrary, that provision allows only very specific Member States[47] to derogate from the VAT Directive's provisions on exemptions, which are, however, binding on the other Member States.[48] Such differences in the treatment of Member States and the consequential differences in the treatment of the taxable persons established in them may be justified for a transitional period with a view to the attainment of an objective of harmonisation.[49] In the present case, however, no time-limit is prescribed for the derogation provided for in Article 370 of the VAT Directive. Consequently, the different powers exercised by the Member States in relation to the application of the exemption provided for in Article 132(1)(e) of the VAT Directive have been in place since the Sixth Directive first came into force, in other words for more than 36 years.[50]

85. However, the question of the compatibility of Article 370 of the VAT Directive with Article 20 of the Charter of Fundamental Rights and Article 4(2) TEU goes beyond the subject-matter of the present requests for a preliminary ruling. It could be examined before the Court only as part of a differently structured set of proceedings. None the less, in the light of the distortions of competition pointed out by the Kingdom of the Netherlands, it is incumbent on the EU legislature to satisfy the requirements of Article 113 TFEU by formulating the VAT Directive accordingly.

86. So far as the present question is concerned, it remains to be stated in conclusion that Article 140(a) of the VAT Directive is also applicable where the dental prostheses are supplied from a Member State which, availing itself of Article 370, in conjunction with Annex X, Part A(1), of the VAT Directive, does not apply the exemption provided for in Article 132(1)(e) of the VAT Directive.

45 — See point 72 above

46 — Judgment in *Eurodental* (C-240/05, EU:C:2006:763, paragraphs 48 to 53).

47 — On the strict conditions applicable to reliance on the derogations provided for in the VAT Directive by Member States which acceded to the European Union at a later stage, see *Commission* v *Poland* (C-49/09, EU:C:2010:644, paragraph 42) in relation to Article 115 of the VAT Directive.

48 — This fact is overlooked in *Jetair and BTW-eenheid BTWE Travel4you* (C-599/12, EU:C:2014:144, paragraphs 44 to 51) which concerned Article 370 of the VAT Directive in another context.

49 — On the different treatment of economic operators, see *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 69); see also, to the same effect, *Eurodental* (C-240/05, EU:C:2006:763, paragraph 52).

50 — See Article 28(3)(a) and (4), in conjunction with Annex E(2), of the Sixth Directive.

VI – **Conclusion**

87. In the light of all of the foregoing, I propose that the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden should be answered as follows:

(1) Article 17, in the version of Article 28f(1), of the Sixth Directive does not confer a right to deduct input tax on a taxable person who has not paid tax on his transactions because, contrary to the provisions of EU law, national law has provided for an exemption.

(2) The tax exemption provided for in Article 140(a) of the VAT Directive is applicable to intra-Community acquisitions of dental prostheses where the supplier is a dentist or dental technician in accordance with Article 132(1)(e) of the VAT Directive. This holds true irrespective of whether the Member State of origin avails itself of the derogating rule in Article 370, in conjunction with Annex X, Part A(1), of the VAT Directive.

(3) The importation of dental prostheses is under no circumstances exempt from tax under Article 143(a) of the VAT Directive.

(4) The intra-Community acquisition of dental prostheses is under no circumstances exempt from tax under Article 140(b), in conjunction with Article 143(a), of the VAT Directive.