Case C-657/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

4 September 2019

Referring court:

Bundesfinanzhof (Germany)

Date of the decision to refer:

10 April 2019

Defendant at first instance and appellant in the appeal on a point of law:

D Tax Office

Applicant at first instance and respondent in the appeal on a point of law:

E

Subject-matter of the main proceedings

VAT, preparation of expert reports for Health Insurance and Care and Support Insurance Funds

Subject-matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. In circumstances such as those in the main proceedings, does the preparation by a taxable person of expert reports on the care and support needs of patients for the Medizinischer Dienst der Krankenversicherung (Health Insurance Medical Service) fall within the scope of Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (Directive 2006/112/EC)?

2. If Question 1 is answered in the affirmative:

(a) In order for an undertaking to be recognised as a body devoted to social wellbeing within the meaning of Article 132(1)(g) of Directive 2006/112/EC, is it sufficient if, as a subcontractor, it supplies services to a body recognised under national law as a body devoted to social wellbeing within the meaning of Article 132(1)(g) of Directive 2006/112/EC?

(b) If Question 2(a) is answered in the negative: In circumstances such as those in the main proceedings, is it sufficient that the expense incurred by the recognised body within the meaning of Article 132(1)(g) of Directive 2006/112/EC is borne entirely by the Health Insurance and Care and Support Insurance Funds in order for a subcontractor of that recognised body also to be regarded as a recognised body?

(c) If Questions 2(a) and 2(b) are answered in the negative: In order for a taxable person to be recognised as a body devoted to social wellbeing, may a Member State subject such recognition to the condition that the taxable person has actually entered into a contract with a social security or social welfare authority, or is it sufficient if a contract with that taxable person could be entered into under national law?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), in particular Articles 132 and 134

Provisions of national law cited

Umsatzsteuergesetz (Law on turnover tax, ‘the UStG’), in particular Paragraph 4

Sozialgesetzbuch (Social Insurance Code) — Volume XI - Social care insurance system (‘SGB XI’), in particular Paragraphs 18, 53a and 53b

Richtlinien des Spitzenverbandes Bund der Pflegekassen zur Begutachtung von Pflegebedürftigkeit (Guidelines of the Central Association of Care and Support Insurance Funds on the assessment of care and support needs, ‘the Assessment Guidelines’), in particular Section B 1

Richtlinien des Spitzenverbandes Bund der Pflegekassen zur Zusammenarbeit der Pflegekassen mit anderen unabhängigen Gutachtern (Guidelines of the Central Association of Care and Support Insurance Funds on cooperation between Care and Support Insurance Funds and other independent experts, ‘the Independent Expert Guidelines’), in particular point 2

Brief summary of the facts and procedure

1 Every federal state has a working group known as the Medizinischer Dienst der Krankenversicherung (Health Insurance Medical Service, 'the MDK'), which is responsible for, among other things, preparing expert reports on the care and support needs of insured persons on behalf of the Care and Support Insurance Funds set up within the Health Insurance Funds. The assessments are carried out by the doctors, trained care workers and other specialists who the MDK employs to perform its ongoing workload. The MDK can call upon doctors, trained care workers and other suitable specialists as external contractors to assist it in handling peaks in claims and to provide it with expert opinions on specific questions. The MDK bears responsibility for the assessments, even in cases where it calls upon external experts. There are detailed provisions governing the requirements imposed on the qualifications of the experts.

2 The respondent is a trained nurse with basic medical training and a diploma in nursing, as well as further training in quality management in the care and support sector. Her company also engaged in a taxable teaching activity in relation to care and support.

3 The respondent prepared expert reports on patients' care and support needs for MDK Niedersachsen (the MDK for Lower Saxony, 'the MDK NS') as an external expert from 2012 to 2014. The MDK NS paid her for those services on a monthly basis, without applying VAT. The applicant declared the turnover from her expert report work as non-taxable income, but fully exercised her right to deduct VAT from all input services.

4 The appellant Tax Office ('the Tax Office') took the view that the expert report work was not exempt from VAT under either national law or EU law. It increased the turnover declared so far by the net amounts invoiced to the MDK NS and set the VAT for 2012 and 2013 and the advance payments for the first to third quarters of 2014 by tax assessments of 3 February 2015.

5 The respondent brought an action in respect of those assessments before the appropriate finance court. That court upheld most of the action and, in its reasoning, stated, in essence, that the preparation of expert reports on care and support was exempt from tax as a service 'closely linked to welfare and social security work', referring expressly to EU law. It held that, by virtue of the possibility for independent experts to be commissioned to prepare expert reports on persons insured under social security schemes, a possibility laid down in statute from November 2012, the respondent was also recognised by the State as a body devoted to social wellbeing on account of its contract with the MDK NS.

6 In the appeal on a point of law (*Revision*) brought before the referring court, the Tax Office submits that there has been an infringement of substantive law. It submits, in essence, that the national tax relief legislation did not make provision for the expert report services in question to be exempt from tax. Since those rules

were in conformity with EU law, it was not possible to rely directly on EU law. Moreover, it had not been established that the Care and Support Insurance Fund had intended to bear the cost of the respondent's expert report work.

Brief summary of the basis for the reference

7 The outcome of the dispute turns on a decision of the Court of Justice on the interpretation of Directive 2006/112.

Assessment of the dispute under national law

8 Under national law, the services in question are subject to tax, as the conditions for tax exemption pursuant to Paragraph 4 of the UStG have not been satisfied.

9 Tax-exempt 'provision of medical care' pursuant to Paragraph 4(14) of the UStG does not apply here, as the expert report work of the MDK and therefore also that of the respondent serves only as a basis for determining the extent to which the insured person is entitled to reimbursement of the cost pursuant to the Gesetz über die Pflegeversicherung (Law on care and support insurance). The MDK performs such assessments for social security purposes, not therapeutic purposes.

10 Nor do the respondent's services constitute care or support services within the meaning of Paragraph 4(16) of the UStG.

11 Finally, pursuant to both Paragraph 4(15) of the UStG and Paragraph 4(15a) of the UStG, only the transactions of the bodies referred to in those provisions (for example, bodies of social security authorities or the MDK) are exempt from tax. The respondent, which is not part of the MDK, does not satisfy this condition.

12 In that regard, it should be noted that points 15 and 15a of Paragraph 4 of the UStG exempt only welfare and social security services from tax, but do not, however, exempt services closely linked to those services, as provided for in Article 132(1)(g) of Directive 2006/112. The respondent may therefore be able to rely directly on the tax exemption of its services pursuant to the latter provision, even if the national court considers this to be questionable.

First question referred

13 The first question seeks clarification as to whether the respondent's expert report work falls within the scope of the term 'the supply of services closely linked to welfare and social security work' within the meaning of Article 132(1)(g) of Directive 2006/112.

14 According to the case-law of the Court of Justice, the exemptions provided for in Article 132 of Directive 2006/112 do not cover every activity performed in the public interest, but only those listed in that provision and described in great detail (cf., for instance, judgment of 14 March 2019, *A & G Fahrschul-Akademie*,

C-449/17, EU:C:2019:202, paragraph 17). Consequently, not every person pursuing an activity in the public interest can be regarded as a body recognised by the Member State (judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:605, paragraph 60 et seq.).

15 The terms used to specify the tax exemptions referred to in Article 132 of Directive 2006/112 are to be interpreted strictly, since they constitute exceptions to the general principle, arising from Article 2 of Directive 2006/112, that VAT is to be levied on all services supplied for consideration by a taxable person. However, that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 of Directive 2006/112 should be construed in such a way as to deprive the exemptions of their intended effects (judgments of 4 May 2017, *Brockenhurst College*, C-699/15, EU:C:2017:344, paragraph 23, and of 14 March 2019, *A & G Fahrschul-Akademie*, C-449/17, EU:C:2019:202, paragraph 19).

16 In the present case, the service provided by the Care and Support Insurance Fund in question constitutes an exempt welfare and social security service. The Care and Support Insurance Fund is a recognised service provider pursuant to Article 132(1)(g) of Directive 2006/112.

17 However, the respondent's expert report services are not welfare and social security services, as the expert report work serves merely as a decision-making aid for the issuing of entitlement to assistance decisions by the Health Insurance Fund. The fact that the services of the MDK (even insofar as it uses third parties for this purpose) are provided on the basis of SGB XI and are in the public interest is not sufficient in that regard.

18 However, it is questionable whether the expert report work constitutes a service 'closely linked' to welfare and social security work within the meaning of Article 132(1)(g) of Directive 2006/112/EC.

19 According to the case-law of the Court of Justice, a service closely linked to an exempted transaction can be exempt from tax if the main transaction is itself an exempted transaction and both the main transaction and the service which is closely related to it are provided by one of the bodies referred to in Article 132(1)(g) of Directive 2006/112/EC (judgments of 9 February 2006, *Kinderopvang Enschede*, C-415/04, EU:C:2006:95, paragraphs 21 and 22, and of 14 June 2007, *Horizon College*, C-434/05, EU:C:2007:343, paragraphs 34 and 36).

20 However, according to the case-law of the national court, services cannot be closely linked to welfare if they are provided not to the person in need of care, but rather to an undertaking that requires its services in order to provide its own tax-exempt output service for the respective patients or persons in need of care. This applies, for example, to the provision of staff or general management and administrative services.

21 This is not precluded by the fact that, according to the case-law of the referring court, a transaction may be exempt from tax pursuant to Article 132(1)(c) of Directive 2006/112/EC even if services are not provided to patients or Health Insurance Funds. The reason for this is that the tax exemption under Article 132(1)(c) of Directive 2006/112/EC is not dependent on the identity of the recipient of the service, as the identity-related condition of tax exemption relates to the service provider, who must be in the medical or paramedical profession. It is questionable whether this consideration may be applied to Article 132(1)(g) of Directive 2006/112/EC.

22 In the judgment of 20 November 2003, *Unterpertinger* (C-212/01, EU:C:2003:625), the Court of Justice did not take the exemption under Article 132(1)(g) of Directive 2006/112/EC into consideration in relation to a comparable set of facts.

23 If the transaction were nevertheless to be 'closely linked', the respondent's service would be 'essential' to the activity of the Care and Support Insurance Fund within the meaning of Article 134(a) of Directive 2006/112, to the effect that it would not be excluded from the tax exemption. That is because, in order to make a comprehensive assessment of care and support needs, in particular disability and the need for assistance, the ability to call upon care and support specialists and other suitable specialists, who are either employed by the MDK or commissioned by it in individual cases, is essential. The respondent's activity is also not performed in direct competition with those of commercial enterprises subject to VAT (Article 134(b) of Directive 2006/112).

Second question referred

24 The second question relates to the term 'body devoted to social wellbeing' within the meaning of Article 132(1)(g) of Directive 2006/112. According to the case-law of the Court of Justice, that term is, in principle, sufficiently broad to include natural persons and private profit-making entities (cf., for instance, judgement of 28 November 2013, *MDDP*, C-319/12, EU:C:2013:778, paragraph 28).

25 According to the judgments of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraphs 54 and 58), and of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 26), Article 132(1)(g) of Directive 2006/112 does not specify the conditions and procedures for recognition as a body devoted to social wellbeing. On the contrary, it is for the national law of each Member State to lay down the rules in accordance with which bodies may be granted the required recognition. In this context, it is for the national authorities, in accordance with EU law and subject to review by the national courts, to take into account the factors relevant to recognition. These include the following, according to the case-law of the referring court:

– the existence of specific provisions, be they national or regional, legislative or regulatory, 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 out the same activities already enjoy similar recognition; and

– the fact that the cost of the supplies in question may be largely met by Health Insurance Funds or other social security bodies.

Question 2(a)

26 According to the present state of the case-law of the national court, although the MDK is recognised by Paragraph 4(15a) of the UStG as a body devoted to social wellbeing within the meaning of Article 132(1)(g) of Directive 2006/112, that recognition does not extend to subcontractors of the MDK. This results in particular from the fact that, as it applies only to services of the MDK, the exempting provision in Paragraph 4(15a) of the UStG is linked to an identity-related characteristic in accordance with EU law. The principle of freedom to choose its organisational model does not mean that that characteristic could be omitted.

27 However, it is unclear whether the situation has changed, given the fact that the Assessment Guidelines now consist of rules approved by the Federal Minister for Health which govern, in a basic form, the involvement of third parties by the MDK in relation to assessment, but which are binding only on the MDK. This could constitute sufficient recognition, even if the expert is a subcontractor.

Question 2(b)

28 If the status as a subcontractor alone is not sufficient, clarification is required as to whether the fact that the Health Insurance and Care and Support Insurance Funds bear the entire cost incurred by the main contractor is sufficient for a subcontractor also to be regarded as a recognised body within the meaning of Article 132(1)(g) of Directive 2006/112.

29 This is because the Court of Justice has ruled that the factors relevant to recognition as a body devoted to social wellbeing can include the fact that the cost of the supplies in question may be largely met by Health Insurance Funds or other social security bodies (judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 31).

30 The funds required for the assessments made by the MDK are raised by the Health Insurance Funds by means of a levy calculated on the basis of the number of members residing in the MDK's area of responsibility. The funds are allocated irrespective of whether the MDK has made use of third parties to carry out its tasks. In the present case, therefore, the Health Insurance Funds or Care and Support Insurance Funds have ultimately borne the entire cost of the respondent's expert report work.

31 However, when transposing Article 132(1)(g) of Directive 2006/112 into national law, in some instances the German legislature chose the term remuneration, with regard to the requirement that the cost be met by Health Insurance Funds or other social security bodies. According to the case-law of the referring court, the term 'remuneration' requires that the competent authority be aware of the services provided by a subcontractor to another contractor in the context of the exempted activity and intended to bear the cost of those services, even if indirectly. If, however, the authority remunerates only the services of its contractual partner, and not services of the subcontractor, the cost to be taken into account in the assessment of recognition is not borne by that authority for the purposes of Article 132(1)(g) of Directive 2006/112.

32 In the present case, no findings have been made as to whether, in bearing the cost incurred by the MDK, the Care and Support Insurance Fund was aware of each individual subcontractor's services or intended to 'remunerate' those services. If indirect funding is not sufficient, the dispute would need to be referred back to the finance court.

Question 2(c)

33 If the first question referred is answered in the affirmative and status as a subcontractor is not sufficient, clarification should also be provided as to whether, where the cost is borne indirectly by a social welfare authority, recognition as a body devoted to social wellbeing can be made subject to the condition that the taxable person has actually entered into a contract with a social security or social welfare authority, or whether it is sufficient for such recognition if a contract could be entered into under national law.

34 According to the present state of the case-law of the referring court, bearing the cost can lead to such recognition within the meaning of Article 132(1)(g) of Directive 2006/112 only if it is governed by statute. Accordingly, recognition on the basis that the cost was borne pursuant to a contract can be possible only if there is a statutory basis for the conclusion of the contract.

35 According to that case-law, if there are only limited statutory requirements for the conclusion of a contract, the mere possibility of concluding a contract is sufficient. However, if the law provides for a large number of conditions for the conclusion of a contract, the abstract possibility of the cost being borne is not sufficient in itself.

36 The first sentence of Paragraph 18(1) of the SGB XI was amended, entering into force on 30 October 2012, to the effect that Care and Support Insurance Funds, rather than the MDK, may also commission other independent experts to assess whether the requirements for care and support needs have been met and to assess the extent of care and support required.

37 In cases in which independent experts are commissioned directly, the Independent Expert Guidelines issued pursuant to Paragraph 53b of the SGB XI apply to Care and Support Insurance Funds, in which, for example, the requirements imposed on the qualifications of the experts commissioned by the Care and Support Insurance Funds are regulated in detail in Paragraph 53b(2). This could be construed as meaning that a contract exists, subject to it being compatible with EU law.