



27.3.2024

NOTICE TO MEMBERS

Subject: Petition No 0540/2019 by Thomas Bublitz (German), on behalf of the German Federal Association of Private Clinics (Bundesverbandes Deutscher Privatkliniken e.V.) on transposition of the Value Added Tax Directive into German law

1. Summary of petition

The petitioner writes that private clinics licensed under Article 30 of the Industry Code but not included in a Federal State Hospitals Plan, under Article 108 of the Code of Social Law, are treated differently for VAT purposes from hospitals that are included in a Hospitals Plan, although they provide the same necessary medical services. He is asking the European Parliament to call for a change in the German legislation to transpose the principle of tax-law neutrality, enshrined in the Value Added Tax Directive, into the national law on turnover tax.

2. Admissibility

Declared admissible on 5 November 2019. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 26 May 2020

The Commission's observations

By virtue of Article 132(1)b of the VAT Directive, Member States shall exempt from VAT hospital and medical care and closely related activities undertaken by bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature. Article 133 of the VAT Directive authorizes Member States to make the granting of this VAT exemption to bodies other than those governed by public law subject to one or more conditions. One of those conditions can be that 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 (Article 133 point (c) of the VAT Directive).¹

It follows that Articles 132(1)b and 133 of the VAT Directive leave the Member States a certain degree of leeway in implementing the VAT exemption for hospital and medical care. In its judgement of 8 June 2006 in case C-106/05, L.u.P.² the Court of Justice of the European Union (CJEU) stated that, in order to determine whether establishments governed by private law may be recognised for the purpose of the application of the exemption for hospital and medical care, national authorities may take into consideration, inter alia, the fact that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies. The CJEU further held that the German 40%-rule, at that time provided for by German law (and not by administrative circular), does not go beyond the limits of discretion provided to the Member States³.

The provision of the German VAT Act implementing the VAT exemption for hospital and medical care has recently been revised by Article 12 No. 5 of the Law on the further tax promotion of electric mobility and the amendment of other tax regulations⁴. With effect of 1 January 2020, a 40%-rule is reintroduced to the German VAT Act.

Against the background of the judgement in L.u.P. (cited above) the Commission, at this stage, does not see any reason to further investigate this issue of alleged incompatibility with EU law.

This conclusion is not called into question by the principle of fiscal neutrality. In this respect, the CJEU has clarified in its judgement of 19 July 2012 in case C-44/11, Deutsche Bank AG⁵, that the principle of fiscal neutrality is not a rule of primary law which can condition the validity of an exemption. It is a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions⁶. It can thus not extend the scope of an express exemption in the absence of clear wording to that effect.

As a consequence, there are at present no indications that the measure would cause

¹ Article 133 of the VAT Directive reads as follows: “Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

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

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

² ECLI:EU:C:2006:380.

³ Paras. 53 and 54.

⁴ Gesetz zur weiteren steuerlichen Förderung der Elektromobilität und zur Änderung weiterer steuerlicher Vorschriften, published in BGBl 2019, part I, 48.

⁵ ECLI:EU:C:2012:484.

⁶ Para. 45.

discriminatory taxation of private clinics. Consequently, as for the time being there appears to be no breach of EU law based on the information submitted by the petitioner, the Commission would not have a basis to take any further action as regards the petition.

Conclusion

For the time being, there are no indications that Germany is in breach of EU law based on the information submitted by the petitioner. Consequently, the Commission would not have a basis on which to take any further action as regards the petition.

4. Commission reply, received on 23 March 2021

The Commission's observations

The Commission observes that in the meantime, the Court of Justice of the European Union (CJEU) has decided in case C-211/18 (*Idealmed III*) that the exemption of care services provided by private hospitals is subject to the condition that those services are provided under social conditions comparable to those applicable to bodies governed by public law. According to the CJEU, that requirement relates to the services provided and not to the provider in question; the proportion of the care services provided under comparable social conditions, within the meaning of that provision, in relation to all the activity undertaken by that provider is irrelevant for the application of the exemption laid down in Article 132(1)(b) of that Directive⁷.

It follows that a particular hospital should not benefit from the tax exemption for all of its hospital and medical care activities if it provides services under different social conditions. The application of the exemption can be limited to part of the treatments provided.

As regards the concept of 'comparable social conditions', within the meaning of Article 132(1)(b) of the VAT Directive, the CJEU observed that that provision does not define precisely the aspects of the provision of care concerned that must be compared for the purpose of assessing whether it applies⁸.

The question, when hospitals governed by private law do provide hospital care under social conditions comparable to those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of the VAT Directive, is currently pending before the CJEU in case C-228/20, I. The *Niedersächsische Finanzgericht* lodged its reference for a preliminary ruling with the CJEU on 2 June 2020.

As the answer to this question is essential in order to assess whether there is a possible infringement of EU rules, the Commission will await the judgement of the CJEU in the abovementioned procedure before taking any further action, if appropriate.

Conclusion

The Commission will closely monitor the case-law of the CJEU before taking further action, if necessary.

⁷ Judgement of 5 March 2020, *Idealmed III*, C-211/18, EU:C:2020:168, Nos 20 and 21.

⁸ *Idem*, No 24.

5. Commission reply, received on 27 March 2024

The petition

The petitioner claims that the VAT (Value-Added Tax) exemption provided for by Article 132(1)b of the VAT Directive is not correctly implemented in Germany, in violation of the principle of fiscal neutrality. In his submission of 7 February 2022, the petitioner refers to the opinion of AG Hogan in case C-228/20, I.

Commission's observations

On 7 April 2022, the Court of Justice of the European Union has delivered its judgement in case C-228/20.

The Court ruled that:

“1. Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national legislation which – by stipulating that the provision of medical care by a private hospital is to be exempt from value added tax if that establishment is approved in accordance with the national provisions relating to the general health insurance regime, following its inclusion in a Land-level hospital plan or the conclusion of care supply contracts with statutory health insurance or substitute funds – results in comparable private hospitals which supply similar services under social conditions comparable with those applicable to bodies governed by public law being treated differently as regards the exemption laid down in that provision.

2. Article 132(1)(b) of Directive 2006/112 must be interpreted as meaning that, in order to determine whether medical care provided by a private hospital is supplied under social conditions comparable with those applicable to bodies governed by public law, the competent authorities of a Member State may take into consideration – where they are intended to attain the objective of reducing medical costs and making high-quality care more accessible to individuals – the regulatory conditions applicable to the services supplied by hospitals governed by public law and indicators of that private hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management, in so far as those indicators are also applicable to establishments governed by public law. Account may also be taken of the method of calculating fixed-rate daily fees and the fact that the services supplied by that private hospital are borne by the social security regime or under contracts concluded with public authorities, so that the cost borne by patients is similar to that borne by patients for similar services supplied by hospitals governed by public law.”

The Commission is following-up on the implementation of the Court's ruling with the German authorities. On the first point, the national provision contained in section 4(14)(b) of the UStG (Umsatzsteuergesetz) was amended by the ‘Law on further tax promotion of electromobility and amending other tax provisions’ of 12 December 2019 (BGBl. I, p. 2451). The legislation now provides that private hospitals providing services under social conditions comparable to those applicable to bodies governed by public law are to benefit from the exemption. Hence, such private hospitals are not treated differently from the point of view of the exemption. On the second point, Germany informed the Commission that the implications arising from the Court's decision are currently discussed between the tax authorities of the Federal Government and the Länder. Furthermore, the referring national court has not yet delivered its judgment.

Conclusion

Since discussions on possible steps to implement the judgement in case C-228/20 are ongoing

in Germany, and the judgment of the referring court is pending, we do not see, for the time being, the need to take legal action. The Commission will continue to carefully monitor the developments and may reconsider its position in case new elements come to its attention, to ensure compliance with Union law.