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Assessment of VAT treatment of certain medical care services provided by modern ways in the light of EU VAT law and the principle of fiscal neutrality

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Abbreviation list

AG	Advocate General
B2B	Business to business
CJEU	Court of Justice of the European Union
EU	European Union
OECD	Organization for Economic Cooperation and Development
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

1. Introduction

1.1 Background and problem statement

Value Added Tax (here and after VAT) is an indirect tax that is aimed to tax consumption. EU has a common system of VAT which is established through the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (here and after the VAT Directive). As a general rule under the VAT Directive, VAT is to be levied on all goods and services. VAT is a consumption tax added to prices of goods and services, and eventually the end customer bears the burden of VAT while taxable persons are liable to tax. However, there is a number of exceptions to the general rule, where VAT is not levied and instead supplies of goods and services are VAT exempt. The exemption considered in this thesis is the exemption for medical care services in Articles 132.1 (b) and (c), 133 and 134 of the VAT Directive. Reasoning behind the medical care exemption is social. By exempting medical care services from VAT, prices of these services are kept under control and the public has unhindered access to these necessary and important services. This exemption entails that a taxable person does not charge output VAT on the prices of medical care services provided and on the other hand, that there is no right to deduction of input VAT either.

In the past, medical care services were a rather uncomplicated thing. A doctor's appointment was a face to face meeting and there was hardly any unambiguity regarding who is the supplier and who the provider of a service. Furthermore, the clear majority of hospitals and other centers for medical care services were establishments governed by public law.

The nature of medical care services has changed due to digitalization and privatization is also trending. The scenario described above hardly holds true anywhere anymore. Medical care has become at least party digital, even in some cases completely digital. As it is and has been, a provider of medical care service to a patient is a qualified physician, however, the supplier of medical care service does not have to be. It is rather common that physicians act as private proprietors and the supplier of medical services is a whole another undertaking, such as a private limited company. It is interesting to research whether the European VAT legislation can keep up with the rapid development and how the analogue concepts of the VAT Directive

apply to digital times.

Due to the change in the medical care market, interesting questions arise on the topic. The case law of the CJEU has brought along changes in, for example, what kind of medical care service fulfils the criteria of the VAT exemption and what counts as closely related activities to medical care. The state of the VAT exemption for medical care is not static, rather it continues to develop. This makes it possible to research and analyze novel issues revolving around the topic, such as the legal issues dealt with in this thesis.

1.2 Aim and contribution

The aim of this thesis is to **assess VAT treatment of certain medical care services provided by modern ways, namely 'digital medical care providers' and 'digital medical care platforms' in the light of EU VAT law and the principle of fiscal neutrality.** Although various areas of the VAT exemption for medical care services are dealt excessively in the CJEU, at the time of writing this thesis, there is a lack of case law on the CJEU level concerning the VAT treatment of modern ways of medical care services. However, with the increasing influence of digitalization, it is reasonable to assume that this situation is to be changed in the near future and therefore, warrants an interesting and complex topic to research. VAT treatment of medical care and especially closely related activities is not always clear and unambiguous. The aim is to clarify these concepts in the light of modern ways of medical care.

Furthermore, to reach the aim of this thesis, several sub-questions will be considered throughout the thesis and returned to in the final conclusion chapter:

- How is the exemption for medical care services regulated in the VAT Directive and in case law of the CJEU?

- What is the status of the principle of fiscal neutrality in EU law and how does it apply to the exemption for medical care services?

- What are 'closely related services to hospital and medical care' and how are they treated in EU VAT law?

Conclusions reached through the analysis of the research questions in the light of relevant materials are intended to on one hand clarify the VAT treatment regarding modern ways of medical care services and on the other hand suggest an application that is both in line with EU VAT law and the principle of fiscal neutrality.

1.3 Method and materials

The legal dogmatic method is applied in this research in order to analyze the research questions and attain the aim of this thesis. Aim is to examine the law as it currently stands. The intent is not to exhaustively cover everything regarding the exemption for medical care in the VAT Directive, rather to focus systematically on the more defined and problematic issues presented in the research questions. This research considers primarily tax law but has notions of especially competition law through the inspection of the principle of fiscal neutrality. VAT treatment of medical care services provided by modern ways in question is examined against the EU legal framework.

Most relevant EU law sources regarding this thesis are the VAT Directive read in conjunction with a plethora of relevant case law of the CJEU. Case law considered in this thesis is selected in a way that is relevant to the aim and research questions of covered in this work. Case law of the CJEU is of a central importance as it is the main point of reference in order to make assessment of the research questions. A limited amount of national case law of the Member States is considered due to the lack of case law on EU level on the topic, namely a couple of cases from Finland and Sweden. Legal doctrinal literature and academic articles relevant to the topic are used in this research. In addition to EU law sources OECD Guidelines are considered in order to understand the principle of fiscal neutrality.

1.4 Delimitations

As per the requirements of the Master's Programme this thesis is a result of, this research focuses on EU law and not the peculiarities of national legal systems. More specifically, it considers EU indirect tax law, namely VAT. Although the author endeavors to explain some rather elementary concepts of EU VAT law, it is presumed that the reader understands how VAT works and the effect of the EU VAT Directive on national legislations of the Member States. Aim is not to cover everything regarding the principle of fiscal neutrality and the VAT exemption for medical care services, but to narrow the research to aspects that are relevant in order to attain the aim of the thesis, which is to analyze VAT treatment of digital medical care services and digital medical care platforms in the light of the VAT Directive and the principle of fiscal neutrality. Although there are other modern ways of providing medical care services, only the two aforementioned are considered in this thesis. Although there are arguably other issues regarding digital medical care, this thesis focuses solely on the issues in legal sense revolving around indirect taxation. The author uses term 'medical care' because it is the term used in the VAT Directive and further clarified in the case law of the CJEU. Although often used synonymously, term health care can be seen as meaning non-medical health care such as exercising and other healthy habits. In order to avoid confusion only the term 'medical care' is used throughout this thesis.

1.5 Outline

A rather concise chapter about digitalization of medical care follows the introduction chapter. The main point of this chapter is to familiarize the reader with what is meant with modern ways of health care services in the scope of this thesis, namely 'digital medical care providers' and 'digital medical care platforms'. However, understanding these terms is integral in understanding the research questions and the analysis of the thesis. Chapter 3 deals extensively with the EU VAT Directive and the CJEU case law on the relevant topics. Chapter 4 in turn considers the principle of fiscal neutrality, both in a general manner and in particular in connection with the VAT exemption for medical care. This far the chapters are sort of preliminary overviews in order to understand and follow the assessment of the

research questions. Chapter 5 provides an assessment of VAT treatment of digital medical care providers both in the light of the VAT Directive and the principle of fiscal neutrality. Chapter 6 in turn considers the assessment of VAT treatment of digital medical care platforms, also in the light of the VAT Directive and the principle of fiscal neutrality. Chapter 7 in a conclusive chapter that compiles together the findings of this thesis and provides answers to the research questions presented in this introductory chapter.

2. Digitalization and modern ways of medical care services

2.1. Digitalization of medical care

The recent development of digitalization of medical care is considered briefly in this section, as well as a closer look is taken on what the author means by 'modern ways of medical care services' within the scope of this thesis. Introducing the reader to these aspects is elemental in understanding the legal problems considered in this thesis.

Scott Brennen and Daniel Kreiss describe digitalization in their book *International Encyclopedia of Communication Theory and Philosophy* as follows: *"the way many domains of social life are restructured around digital communication and media infrastructures"*.[1] The Oxford English Dictionary refers to digitalization as "*the adoption or increase in use of digital or computer technology by an organization, industry, country, etc.*". Digitalization continues to increasingly influence our society and businesses, and medical care sector is no exemption to this. Medical care is a field where we already see plenty modern innovations motored by digitalization and with all likelihood continue to do so in the future. Through digitalization and new innovations, medical care services have partly shifted from traditional physical appointments and consultations to be conducted via modern ways.

2.2. Digital medical care providers, i.e. online doctors

This thesis takes a closer look at the VAT treatment of certain business models within the field of medical care that make use of modern technology and digital communications. In this thesis, the term '*digital medical care provider*' is used to describe those medical care providers that offer consultations and medical care services by medical care professionals to customers via digital communications. In layman's terms, these are known as the so called '*online doctors*', although the use of this term is not limited to medical doctors but includes also other medical care professionals, such as nurses. Digital medical care

[1] S. Brennen and D. Kreiss, *International Encyclopedia of Communication Theory and Philosophy,* (John Wiley & Sons, Inc. 2016), abstract.

providers are not geographically restricted in the same way as traditional face-to-face doctor's appointments due to the nature of digital communication.

An example of a digital medical care provider is the company *Kry*, which operates also in England, France and Norway under the name *Livi*. Mainly, *Kry* offers online video consultations with doctors, nurses and psychologists depending on the need of the customer who seeks medical help. Next follows a simplified example of how this works. A customer logs into the *Kry* app, chooses whether he is seeking medical care for himself (or his child), and continues to fill in a form of his symptoms. Subsequently, based on the form describing his medical needs, he is offered digital consultation with a relevant medical care professional. In the usual manner of digital medical care providers, *Kry* cooperates with physical primary care centers, laboratories and pharmacies regarding, for example, taking samples. The company even has a primary care center in the city of Lund, Sweden, but the core of the operations is digital medical care.[2]

2.3. Digital medical care platforms

Other technical development in the field of medical care and its potential VAT treatment that this thesis examines is a '*digital medical care platform'*. They differ from digital medical care providers by way of not directly providing medical care to customers. Instead, a medical care platform is a technical platform which is aimed to assist physical medical care providers to also offer digital services. A medical care platform is sold, for example, by a technology company to a public or private primary care center, for that care center in question to be able to deliver digital medical care services alongside to traditional medical care services.

An example of a medical care platform provider is the undertaking *Visiba Care*. *Visiba Care* is the leading platform provider in the Nordic countries and operates furthermore in the United Kingdom. Its platform, among other things, enables the customer to

[2] G. Stiernstedt, D. Zetterberg, A. Stjernquist, C-O. Elgán, *Digifysiskt vårdval - Tillgänglig primärvård baserad på behov och kontinuitet* (Statens Offentliga Utredningar 2019:42), pages 274-275.

communicate online with medical care professionals and book online meetings. *Visiba Care's* customers include both public and private medical care providers. In conclusion, *Visiba Care* does not provide medical care itself, rather it provides a digital tool for the medical care providers to use.[3]

This concludes the brief overlook of digitalization of medical care and concepts of modern medical care services that will be analyzed regarding the research questions. This section provides clarification on the first sub-question of this thesis, namely what is meant by digital medical care providers and digital medical care platforms. The purpose of this thesis is to analyze the VAT treatment of the aforementioned modern medical care services in the light of EU VAT law and the principle of fiscal neutrality. A comprehensive overview of the VAT exemption for medical care in the EU VAT Directive follows in the next chapter.

[3] G. Stiernsted et al. *Digifysiskt vårdval - Tillgänglig primärvård baserad på behov och kontinuitet* (Statens Offentliga Utredningar 2019:42), page 278. See also Visiba Care's website, available online: https://www.visibacare.com/

3. The VAT exemption for medical care in EU VAT law

3.1. Introduction to the VAT exemption for medical care

This chapter will comprehensively introduce the reader to the VAT exemption for medical care under EU law. The VAT exemption for medical care is regulated in Article 132.1 b and c, Article 133 and Article 134 of the VAT Directive. Furthermore, impact of the VAT Directive and extensive case law practice of the CJEU on the topic will be considered. This is relevant for further analysis of the research questions presented in this thesis.

EU has a dual VAT system. On one hand, there is the EU level and on the other hand the national level of the Member States and their respective VAT legislations.[4] A Union level common system of VAT is established through the VAT Directive. The VAT Directive is subsequently adopted to the national laws of the Member States through legislative measures of their choosing.[5] The system of VAT is therefore harmonized in the EU territory. As a general rule, VAT is to be levied on all goods and services provided by a taxable person acting as such. Article 1.2 of the VAT Directive describes how VAT works on the EU level:

"The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage."

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[4] E. Kristoffersson & P. Rendahl, *Textbook on EU VAT*, (Iustus Förlag AB, 2016), edition 1:1, page 23.
[5] According to the legal basis for implementation of Directives, found in Article 288 of the TFEU

VAT is thus an indirect tax which purpose is to tax consumption but it is collected by means of adding obligations for the suppliers of goods and services.[6] However, there are some exemptions to the general rule that contradict the principle of taxing the added value at every step of the production and distribution chain.[7] In fact, two kinds of exemptions to the general rule can be distinguished. Namely, exemptions without the right to deduction[8] and exemptions with the right to deduction[9], also known as zero rating.[10] The former category of exemptions is relevant to this thesis as the medical care VAT exemption falls under exemptions without the right to deduction. Furthermore, two kinds of exemptions can be distinguished from those without the right to deduction; those that are intended to protect the public interest and all other exemptions.[11] Exemptions to the general rule are to be interpreted strictly.[12] This position of strict interpretation of exemptions to the general rule of VAT is consistently upheld by the case law of the CJEU.[13] The VAT exemption for medical care falls under the category of exemptions in the public interest. Purpose of the medical care exemption is to guarantee that VAT application does not hinder public's access to medical care, which is a position upheld by the CJEU's case law.[14] Article 132.1 (b) and (c), Article 133 and Article 134 of the VAT Directive lay down the conditions that define the scope of the medical care exemption and will be elaborated further in this thesis.

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[6] E. Kristoffersson & P. Rendahl, *Textbook on EU VAT*, (Iustus Förlag AB, 2016), edition 1:1, page 21..

[7] Ibid. Page 134.

[8] Articles 132-137 of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1.

[9] Articles 138-166 of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1.

[10] B. Terra & J. Kajus, *Introduction to European VAT* [online] (IBFD 2020) (last access: 29 August 2020), chapter 15.1.

[11] E. Kristoffersson & P. Rendahl, *Textbook on EU VAT*, (Iustus Förlag AB, 2016), edition 1:1, page 134.

[12] See Opinion of Advocate General Jacobs of 13 December 2001, *Zoological Society*, C-267/00, ECLI:EU:C:2001:698, para 18-19 on how strict interpretation does not necessarily mean restrictive interpretation; the unambiguous terms of an exemption that have been laid down do not call for a particularly narrow interpretation.

[13] Judgment of 20 June 2002, *Commission v Germany*, C-287/00, ECLI:EU:C:2002:388, para 43.

[14] See, for example judgment of 11 January 2001, *Commission v. France*, C-76/99, ECLI:EU:C:2001:12, para 23.

3.2. Article 132.1 (b) of the VAT Directive on hospital and medical care

Article 132.1 (b) of the VAT Directive exempts the following from the burden of VAT;

> *"hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature"*[15]

Essentially, to understand the scope of the Article, one must consider whether the body where the services are provided from is such as meant in the Article, and what is meant by '*hospital and medical care and closely related activities'*. Concepts used in the Article are not specified anywhere in the VAT Directive. Therefore, one must consider the case law of the CJEU. Here follows a number of clarifying examples from the CJEU case law on the issue.

Article 132.1 (b) of the VAT Directive covers all services supplied in a hospital environment. The CJEU clarifies the concept of '*medical care*' presented in Article 132.1 (b) in, among others, cases *PFC Clinic* and *Future Health Technologies.* Case *Future Health Technologies* dealt with collection, analysis and storage of blood from umbilical cords in case of the rare event these resources will be needed in medical care. The CJEU held that for an activity to fall under '*hospital and medical care'* VAT exemption, it should essentially diagnose, treat or cure diseases or health disorders.[16] In *PFC Clinic*, the CJEU held that plastic surgery and cosmetic treatments could fall under the scope of the Article where those services are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health.[17]

The concept of '*closely related activities*' is considered in the case *Commission v France*[18].

[15] Article 132.1 b of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1
[16] Judgment of 10 June 2010, *Future Health Technologies*, ECLI:EU:C:2010:334, para 37-38, 47.
[17] Judgment of 23 March 2013, *PFC Clinic*, C-91/12, ECLI:EU:C:2013:198, para 40.
[18] Judgment of 11 January 2001, *Commission v France*, C-76/99, ECLI:EU:C:2001:12.

In the case in question, the CJEU initiated infringement proceedings against France, where a tax was levied on the transmission of a medical sample. The CJEU held that collecting a sample and the transmission of the sample to a specialized laboratory are '*closely related activities*' to medical analysis within the meaning of Article 132.1 (b) and should therefore be VAT exempt.[19] In the case *Ygeia,* the issue was whether telephone services, hiring out televisions to patients in a hospital and providing meals and beds to persons who accompanied the patients, should be exempt as a '*closely related activity'* to medical care or subject to VAT. The CJEU held that when services like the above mentioned are of such a nature as to improve the comfort and well-being of in-patients, they generally do not qualify for the exemption.[20]

The case *L.u.P*. clarifies the CJEU's approach to *'other establishments of a similar nature*' (to hospitals and centers for medical treatment and diagnosis) and what is required for a body to fall under the scope of '*duly recognized establishments*'. The case deals with medical tests provided in a laboratory covered by private law, which falls under the category of '*other establishment of a similar nature'*. However, to be exempted from VAT, the establishment must also be '*duly recognized'*. Since the VAT Directive does not specify the conditions of '*duly recognized*', it is up to the Member States to regulate which establishment is accorded such recognition.[21] National authorities of Germany required that, in order to such a laboratory to fall under the VAT exemption, 40% of the services are provided to persons insured by a social security authority and test must be carried under medical supervision, precluding paramedical profession. The CJEU held that the Member State did not go beyond their discretion in the former requirement. However, the latter requirement was beyond the Member States discretion as the term '*medical care*' in Article 132.1 (b) covers also paramedical services given in hospitals under the sole responsibility of persons who are not medical doctors.[22]

Member States may accord the scope of Article 132.1 b to cover also bodies that are not

[19] Judgment of 11 January 2001, *Commission v France*, C-76/99, ECLI:EU:C:2001:12, para 30-31.
[20] Judgment of 1 December 2005, *Ygeia*, C-394/04 and C395/04 ECLI:EU:C:2005:734, para 29.
[21] B. Terra & J. Kajus, *Introduction to European VAT* [online] (IBFD 2020) (last access: 29 August 2020), chapter 15.2.1.2.
[22] Judgment of 8 June 2006, *L.u.P*., C-106/05, ECLI:EU:C:2006:380, para 41-55. See also judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 70-71 and 82.

governed by public law. This leads to the following point, which is the special delegation rule found in Article 133 of the VAT Directive. However, it is not necessary for the Member States to make use of this rule.

3.3. The special rule under Article 133 of the VAT Directive

Article 133 of the VAT Directive states that Member States may, subject to certain criteria, grant an exemption to bodies other than those regulated in Article 132.1 (b). One or more of the following summarized conditions, however, must be met;

- those bodies must have a non-profit aim[23],
- 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[24],
- those bodies charge prices that are under control and approved by public authorities, and
- the exemptions must not be likely to cause distortion of competition.[25]

This Article stresses the underlying protection of public interest when it comes to medical care. Social reasons are truly the reasoning behind VAT exemption for medical services.[26] In conclusion, the VAT Directive allows for limitations to the VAT exemption in relation to private actors. However, these can only be based on Article 132.1 (b). Medical care exemption is further regulated in Article 132.1 (c) of the VAT Directive. The scope of Article

[23] See Judgment of 21 March 2002, *Kennerman Golf*, C-174/00, ECLI:EU:C:2002:200 and judgment of 26 May 2005, *Kingscrest Associates and Montecello*, C-498/03, ECLI:EU:C:2005:322

[24] See judgment of 21 March 2002, *Zoological Society*, C-267/00, ECLI:EU:C:2002:202 on how the bodies may hire and pay personnel as part of the supply of the services.

[25] Article 133 of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1

[26] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 4.

132.1 (c) cannot be limited with further conditions; therefore, Article 133 does not apply to it. Article 132.1 (c) shall be considered next. This regulates the provision of medical care that the Member States must without exceptions exempt from VAT.

3.4. Article 132.1 (c) of the VAT Directive on medical care in professional exercise

Hospital and medical care services exemption in Article 132.1 (b) is to be read in conjunction with Article 132.1 (c) of the VAT Directive, that exempts "*the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned*".[27] Compared to Article 132.1 point (b), point (c) does not differentiate between whether services are provided by public or private establishments.[28] This exemption is not dependent on where the services are provided. Instead, what is relevant regarding Article 132.1 (c) is whether the provided services fall under the scope of '*medical services'* and who provides the services. In essence, the supplier of a service is required to fulfil necessary qualifications defined by a Member State concerned.[29] Furthermore, it is important to consider the CJEU's case law and clarifications of the concepts.

The scope of the medical care services that fall under the exemption in Article 132.1 (c) has often been discussed by the CJEU. For example, services provided by veterinary surgeons do not fall under the scope of Article 132.1 (c) because they are not provided to humans.[30] Genetic testing, such as paternity testing does also not fall under the scope of Article 132.1 (c), because the relevant services are not providing care to persons by diagnosing and treating a disease or any other health disorder, irrespective of the fact that the services are performed by a medical doctor.[31] Household services and general care are not covered by the exemption.[32] Furthermore, the exemption for medical care under Article 132.1 (c) is not limited to only covering medical doctors. In addition, it covers services provided by

[27] Article 132.1 c of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1

[28] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 4.

[29] E. Kristoffersson & P. Rendahl, *Textbook on EU VAT*, (Iustus Förlag AB, 2016), edition 1:1, page 137-138.

[30] Judgment of 22 May 1988, *Commission v. Italy*, C-122/87, ECLI:EU:C:1988:256, para 9-10.

[31] Judgment of 14 September 2000, *D. v W.*, C-384/98, ECLI:EU:C:2000:444, para 22.

[32] Judgment of 10 September 2002, *Kügler*, C-141/00, ECLI:EU:C:2002:473.

paramedical professionals such as qualified psychologists.[33]

As seen in the previous chapter, the CJEU has clarified in several cases what is meant with '*medical care*' stipulated in Article 132.1 (c). To be covered by the exemption, medical and paramedical care services must have a therapeutic aim in a broad sense and include preventive treatment.[34] It is important not to confuse medical care services under Article 132.1 point (b) and point (c). The former may cover services without a therapeutic aim so long services are provided from an establishment that is covered by the exemption.[35] Once again, Article 132.1 (c) stipulates requirements on the service provider whereas Article 132.1 (b) focuses more on the establishment where the services are provided.

3.5. Limitations to the exemption under Article 134 of the VAT Directive

Article 134 of the VAT Directive states that;

> *"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) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT."*

Supplies of goods and services that fall under the scope of the Article are not granted an exemption. Once again, it is important to note that these restrictions only apply to Article

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[33] Judgment of 6 November 2003, *Dornier*, C-45/01, ECLI:EU:C:2003:595.

[34] For example, see judgment of 11 January 2001, *Commission v France*, C-76/99, ECLI:EU:C:2001:12, para 23-24 on therapeutic aim and judgment of 20 November 2003, *d'Ambrumenil and Dispute Resolution Services*, C-307/01, ECLI:EU:C:2003:627, para 58 on therapeutic aim.

[35] E. Kristoffersson & P. Rendahl, *Textbook on EU VAT*, (Iustus Förlag AB, 2016), edition 1:1, page 138.

132.1 (b) and not to Article 132.1 (c). Article 134 is aimed at those transactions that are related to the tax exempted transactions but not essential to them.[36] As an example, what is not deemed as indispensable supplies of goods and services to VAT exempted medical care services could be supplies of comfort and convenience such as in the case *Ygeia* where a hospital hired out televisions to in-patients.[37]

This concludes the chapter on the medical care exemption under EU VAT law. This chapter also clarifies the second sub-question of the thesis, namely how the medical care exemption is regulated in the VAT Directive and in the case law of the CJEU. An overview of the principle of fiscal neutrality follows in the next chapter. The principle of fiscal neutrality is of central importance to the EU VAT system. The purpose of this thesis is to analyze the VAT treatment of certain modern ways of medical care services in the light of EU law. In order to be able to analyze the research questions, it is essential to consider the theory and role of the principle of fiscal neutrality in EU VAT law. This cannot be done without understanding the principle of fiscal neutrality, since it is both an interpreting tool and a core element of EU VAT law.

[36] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 4.

[37] Judgment of 1 December 2005, *Ygeia*, C-394/04 and C395/04 ECLI:EU:C:2005:734, para 25-26 and 29.

4. The principle of fiscal neutrality

4.1. Introduction to the principle of fiscal neutrality

Neither primary nor secondary EU law provides for an explicit definition of the principle of fiscal neutrality. A deeper look into the topic is required. The principle of fiscal neutrality is two-folded in the EU VAT law. Article 18 TFEU prohibiting discrimination serves as a good starting point. This is to be read in conjunction with the principle of equal treatment.[38] On one hand, the principle of fiscal neutrality is intended to relieve a taxable person acting as such from the burden of VAT payable or paid in taxable transactions. The same Article used to describe the system of VAT on EU level, Article 1(2) of the VAT Directive, lays also down the principle of fiscal neutrality as follows;

> *"The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.*
>
> *On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components."*

VAT is a consumption tax meant to be borne by the final consumers. Therefore, the VAT Directive provides for a taxable person the right to deduct input VAT in the course of his economic activities.[39] Fiscal neutrality in this sense means that since VAT does not remain as a cost for the taxable person, it does not influence taxable person's business decisions.[40] This aspect of the principle of fiscal neutrality is strengthened in several cases in the CJEU,

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[38] Judgment of 13 July 2000, *Idéal Turisme*, C-36/99, ECLI:EU:C:2000:405, para 16.

[39] The main rule in Article 168 of the VAT Directive stipulates that: "*In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct […] the VAT which he is liable to pay*".

[40] E. Kristoffersson, *Deduction of input VAT. Comparative Studies in Tax Law* (Örebro University 2019), p. 21.

for example in the cases *Ghent Coal*[41]*, Rompelman*[42] *and Commission v France*[43]. However, the author will not consider this aspect of the principle of fiscal neutrality further in this thesis. Since medical care services are an exception to the general rule of VAT, meaning they are VAT exempt and therefore do not entail the right to deduct input VAT. The second aspect of the principle of fiscal neutrality is relevant to the topic and legal issues of this thesis. This will be considered next.

Another aspect of the principle of fiscal neutrality is that it is a particular expression of the principle of equal treatment in the area of taxation.[44] The intention is that, in the specific area of taxation, similar situations are to be treated similarly, unless otherwise is objectively justified.[45] The principle of fiscal neutrality seeks to enable that economic, rather than fiscal considerations are the ones influencing business decisions.[46] OECD summarizes the principle of fiscal neutrality as follows:

> *"Taxation should seek to be neutral and equitable between forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Businesses in similar situations carrying out similar transactions should be subject to similar levels of taxation."*[47]

The preamble to the VAT Directive describes the equality aspect of the principle of fiscal neutrality as follows:

> *"The common system of VAT should, even if rates and exemptions are not fully harmonized, result in neutrality of competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the*

[41] Judgment of 15 January 1998, *Ghent Coal*, C-37/95, ECLI:EU:C:1998:1, para 15.
[42] Judgment of 14 February 1985, *Rompelman v Minister van Financiën*, C-268/83, ECLI:EU:C:1985:74, para 19.
[43] Judgment of 21 September 1988, *Commission v France*, C-50/87, ECLI:EU:C:1988:429, para 15.
[44] Judgment of 29 October, NCC, C-174/08, ECLI:EU:C:2009:669, para. 44. See also B. Terra & J. Kajus, *Introduction to European VAT* [online] (IBFD 2020) (last access: 29 August 2020), chapter 2.5.
[45] Judgment of 10 April 2008, *Marcs & Spencer*, C-309/06, ECLI:EU:C:2008:211, para 49 and 51.
[46] Committee on Fiscal Affairs Working Party No 9 on Consumption Taxes, "OECD International VAT/GST Guidelines—Guideline on Neutrality" (approved by the Committee on Fiscal Affairs on 28 June 2011), page 4.
[47] OECD, *'OECD International VAT/GST Guidelines - Guidelines on Neutrality'* (2011), para 4.

length of the production and distribution chain."[48]

It can be concluded from the aforementioned that equal treatment between taxable persons unless otherwise justified is an essential element of the principle of fiscal neutrality. According to it, VAT treatment of taxable persons performing similar transactions in similar circumstances should be neutral and fair.[49] Similar equation between the principle of fiscal neutrality and equality, aka the equal treatment of the taxable persons, is seen, for example, in the case *Dornier*. [50] However, the CJEU has pointed out in its case law that the principle of fiscal neutrality is a more particular expression of the general principle of equal treatment limited to the field of tax law.[51] This means that the principle of fiscal neutrality does not constitute primary EU law.

4.2. The CJEU's interpretation of the medical care exemption in the light of the principle of fiscal neutrality

It is clear from the CJEU's case law that it does not only stress the importance of the principle of fiscal neutrality as an integral element of the VAT system, but also as a practical tool aiding interpretation of the medical care exemption.[52] As the CJEU states in the case *Dornier*;

"*However, the interpretation of the terms used in that provision must be consistent with the objectives pursued by those exemptions and* ***comply with the requirements of the principle of fiscal neutrality*** *inherent in the common system of VAT*"[53]

The CJEU holds that the principle of fiscal neutrality reflects the general principle of equal treatment in the field of VAT.[54] More specifically, the CJEU held in the case *Orfey Balgaria*

[48] Recital 7 of the preamble of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1.
[49] OECD, *'OECD International VAT/GST Guidelines - Guidelines on Neutrality'* (2011), para 17.
[50] Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 69.
[51] Judgment of 29 October 2009, Case C-174/08 NCC Construction Danmark, EU:C:2009:669, para 44.
[52] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 6.
[53] Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 42.
[54] Judgment of 29 October 2009, NCC, C-174/08, ECLI:EU:C:2009:669, para 41.

that the principle of fiscal neutrality is "a particular expression at the level of secondary EU law and in the specific area of taxation".[55]However, it is important to notice that the principle of fiscal neutrality is not a notion of EU primary law. [56] This means that the principle of fiscal neutrality is not able to extend the scope of a VAT exemption beyond what is stipulated in the clear wording of an Article. This aspect of the principle of fiscal neutrality is further elaborated in chapter 6.4. of this thesis.

In the case *Klinikum Dortmund*, the CJEU explicitly refers to the principle of fiscal neutrality's role as a tool to aid interpretation and states that is should be read in connection with the principle of strict interpretation of exemptions;

"[…], the principle of fiscal neutrality cannot alter that conclusion. As the Advocate General noted at point 53 of her Opinion, that principle cannot extend the scope of an exemption in the absence of clear wording to that effect. ***That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation to be applied concurrently with the principle of strict interpretation of exemptions****".*[57]

Furthermore, case law of the CJEU ties together the principle of fiscal neutrality with the general EU law principle of equal treatment. This is present in the case L.u.P, where the CJEU observes, that;

> *"[…] it is for the national courts to examine whether the Member States, in imposing such conditions, have observed the limits of their discretion in applying Community principles, in particular the* ***principle of equal treatment****".*[58]

In the case *Wellcome Trust* the CJEU stressed the importance of equality between economic operators;

[55] Judgment of 19 December 2012, Orfey Balgaria, C-549/11, ECLI:EU:C:2012:832, para 33.
[56] Judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143, para 40.
[57] Ibid.
[58] Judgment of 8 June 2006, *L.u.P.*, C-106/05, ECLI:EU:C:2006:380, para 48. See also to that effect, Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 69. And Judgment of 27 April 2006, *Solleveld and van Houten, Gabarel,* C-443/04, ECLI:EU:C:2006:257, para 36.

"As far as the principle of fiscal neutrality is concerned, this does not have the significance attributed to it by the appellant. While ***it requires that all economic activities should be treated in the same way,*** *it also assumes that the activity in question can be classified as an economic activity, which is not the position in this case."*[59]

Examples provided from the case law of the CJEU would suggest that the Court indeed emphasizes the principle of neutrality's role as an aid of interpretation of the medical care exemption. In the following section, the author considers the principle of neutrality in the context of interpreting the medical care exemption in relation to more specific circumstances.

Regarding the EU system of exempt supplies, the principle of fiscal neutrality necessitates that the system of the exemptions is applied in a similar manner within the EU. This is best achieved through common definitions of the exemptions at EU level.[60]

It is evident from the CJEU's case law that the exemption for medical care services is not dependent on the legal form of the taxable person supplying the medical or paramedical services that fall under the scope of that exemption. The Vat Directive defines the exempt transactions regarding the nature of the services supplied without mentioning the legal form of the person supplying them.[61] In the case *Dornier*, the CJEU has stated that the principle of fiscal neutrality precludes economic operators carrying on the same activities from being treated differently concerning the VAT treatment.[62] In the case *L.u.P*. the CJEU emphasizes on checking the national legislations of the Member States and distinguish if there are issues regarding the principle of fiscal neutrality. In addition, the judgment empathizes the equal treatment of taxable persons, notwithstanding their legal form;

"It may be stated at the outset that ***compliance with the principle of fiscal neutrality***

[59] Judgment of 20 June 1996, Wellcome Trust, C-155/94, ECLI:EU:C:1996:243, para 38.
[60] Judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869, paras 43-44.
[61] Judgment of 10 September 2002, *Kügler*, C-141/00, ECLI:EU:C:2002:473, para 26-31. See also Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 18-21.
[62] Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 44.

***requires**, first, that all of the categories of establishments governed by private law referred to in Article […]* ***be subject to the same conditions for the purpose of their recognition for the provision of similar services**. In the present case, therefore, it is for the national court to ascertain whether the national legislation complies with that requirement or whether, on the contrary, it restricts the application of the conditions in question to certain types of establishments whilst excluding others."*[63]

According the medical care service exemption to cover all legal forms is neutral and consistent with the objective of reducing the cost of medical care. In addition, the delegation of legislative power in Article 132.1 (b) and (c) to domestic legislators of the Member States does not allow for different treatment of different legal forms that perform the same activities. In their respective legislations, Member States may not only use the legal form to differentiate between what is liable to VAT and what is VAT exempt.[64] Earlier in this thesis, in chapter 3.2., concepts used in Article 132.1 (b), such as '*closely related activities'* are considered more closely. In addition to what is previously discussed there on the topic, it can be deduced from the CJEU's case law that this concept must be interpreted relatively strictly in order not to disturb competition between producers of these services in question and thus preserving neutrality.[65] Thus, the principle of fiscal neutrality prevails also when interpreting the concepts of the VAT Directive within the same industry. [66] However, it is to be kept in mind that the concept '*medical care'* should not be interpreted strictly, because of the purpose of the medical case exemption, which is to lower the costs of medical care and making it thus more accessible.[67]

In the case *Solleveld*, that considers VAT treatment of medical care in the course of paramedical professions, the CJEU points out that the principle of equal treatment does not apply to identical situations, but also to situations that are similar. In other words, where a

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[63] Judgment of 8 June 2006, *L.u.P.*, C-106/05, ECLI:EU:C:2006:380, para 50.
[64] Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 44..
[65] Judgment of 8 June 2006, *L.u.P.*, C-106/05, ECLI:EU:C:2006:380, para 24-32 and Judgment of 1 December 2005, *Ygeia*, C-394/04 and C395/04 ECLI:EU:C:2005:734, para 24-31.
[66] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 6.
[67] Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595, para 48.

situation is not identical, it can be considered similar.[68]

This chapter provided an overview on what is meant by the principle of fiscal neutrality in EU VAT law and what implications it has to it. Chapter 4 clarifies what is the status of the principle of fiscal neutrality in the EU VAT law. In conclusion, it is an expression of the general EU law principle of equal treatment, but in special connection to the field of tax law. The principle of fiscal neutrality, however, is not itself a general principle of EU law. As can be concluded from this chapter, the principle of fiscal neutrality is both a core element of the VAT system and a tool for interpretation of the exemption for medical care. Case law of the CJEU has explicitly stated that the principle of fiscal neutrality is a principle of interpretation that must be read in conjunction with the narrow interpretation of exemptions. With the principle of fiscal neutrality covered, at this point of this thesis, all the basics regarding the research problems are considered; chapter 2 explains what are digital medical care providers, more commonly known as online doctors and how they differ from digital medical care platforms. Chapter 3 clarifies the medical care exemption under the VAT Directive and in the case law of the CJEU. It is time to move on to the assessment of the research questions.

[68] Judgment of 27 April 2006, *Solleveld and van Houten, Gabarel,* C-443/04, ECLI:EU:C:2006:257.

5. Assessment of VAT treatment of digital medical care providers

5.1. Digital medical care providers and the VAT Directive framework

5.1.1. ‘Hospital care’ under Article 132.1 (b) in connection with digital medical care providers

As explained in chapter 2 of this thesis, digital medical care providers are those medical care providers that offer consultations and medical care services by medical care professionals to customers via digital communications. These are the so-called ‘online doctors’. An example of a digital medical care provider is the company *Kry* that operates in Sweden. In this analysis chapter, the author establishes how a digital medical care provider falls under the framework of the VAT Directive. Digital medical care providers are not mentioned anywhere in the VAT Directive. Relevant starting point is to consider questions such as what counts as medical care under the VAT Directive, which Article of the VAT Directive could apply and what is required of a provider and a supplier of medical care services.

As discussed earlier in this thesis, medical care is dealt with in Article 132.1 (b) and (c) in the VAT Directive. Article 132.1 (b) exempts from VAT the following:

> *“hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature”.*

Article 132.1 (c) exempts from VAT the following:

> *“the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned”.*

Both part (b) and (c) of the Article refer to ‘medical care’. Therefore, it is rather evident that

term '*medical care'* itself cannot be used as a distinguishing factor. Based on several older cases of the CJEU[69] one might draw a conclusion that instead, the place where the supplies of medical care services are provided, namely whether medical care is provided inside or outside of a hospital, would be the distinguishing factor. However, the CJEU's case law practice merely reflected the reality of situation and did not seek to provide a distinctive criterion. Instead, one should distinguish between "in-patients" and "out-patients". Difference between these it that in-patients are in a medical condition so severe that requires them to be admitted to a hospital. In contrast, out-patients' medical condition allows them to visit either a hospital or a clinic for diagnosis or treatment rather than require them to be hospitalized.[70] In this connection the author considers also the Opinion of Advocate General Sharpston in the case *Klinikum Dortmund*. The AG observed, in relation to Article 132.1 (b), for the purposes of that exemption, medical care must be provided by the hospital. In the case where physicians provide medical care in a private capacity but in the hospital premises, it is not enough to trigger the criteria under Article 132.1 (b).[71] Based on the predeceasing analysis, the author concludes that Article 132.1 (b) does not apply to digital medical care providers because it applies to hospital and medical care provided in a hospital, by the hospital to an in-patient. Digital medical care is provided digitally where the physician and the patient do not physically meet and often deals with a medical consultation or other less severe care. Therefore, the service is evidently not taking place at a hospital.

5.1.2. 'Medical care' in Article 132.1 (c) in connection with digital medical care providers

It is established that digital medical care services in the sense they are described in this thesis do not fall under the scope of Article 132.1 (b). However, the medical care exemption in Article 132.1 (b) is to be read in combination with Article 132.1 (c). Point (c) of the Article focuses on the profession of medical care exercised in the capacity of medical and paramedical professionals as defined by the Member States. This exemption is not dependent on where the

[69] See, for example, Judgment of 8 June 2006, *L.u.P.*, C-106/05, ECLI:EU:C:2006:380, para 23.
[70] S. Chirichigno & V. Serge, *European Union - Hospital and Medical Care by Commercial Hospitals under EU VAT,* (International VAT Monitor, 2014) (Volume 25), No. 2, chapter 3.
[71] Opinion of Advocate General Sharpston of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143.

services are provided and would therefore better suit the geographically unlimited nature of digital medical care providers. [72] As can be recalled from the chapter 3 of this thesis, the medical care exemption depends on the concept of '*medical care*' and on whom they are provided by. Essentially the issue is whether these video consultations and other services digital medical service providers provide can be seen as '*medical car*e' within the meaning of Article 132.1 (c) of the VAT Directive.

The topic of e-consultations is touched upon in the VAT News of the International VAT Monitor (July/August 2015). It is stated that medical e-consulting is not explicitly excluded from the VAT exemption if it qualifies as the provision of medical care within the meaning of the provision in question.[73]As can be recalled from chapter 3 of this thesis, '*medical care*' in the case law of the CJEU means services that are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health.[74] With regards to the medical care exemption stipulated in the Article 132.1 (c), a specific requirement of 'therapeutic aim' is required to establish '*medical care*' which falls under the scope of the Article. An example can be recollected from the chapter 3 of this thesis that clarifies what the CJEU means with 'therapeutic aim'. As recollected from the example of the case *PFC Clinic*, plastic surgery does not fall under Article 132.1 (c) if reasons behind the surgery are purely cosmetic.[75] The fact that the surgery is performed by a qualified professional is not sufficient to establish tax exemption.[76]

In the light of this reasoning, it can be argued that e-consultations provided by digital medical care providers may fall under the exemption stipulated in Article 132.1 (c) of the VAT Directive, so long they are medical care in the sense of that they are intended to diagnose, treat

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[72] E. Kristoffersson & P. Rendahl, *Textbook on EU VAT*, (Iustus Förlag AB, 2016), edition 1:1, page 137.
[73] VAT News, *International VAT Monitor* (IBFD), July/August 2015, page 255.
[74] Judgment of 23 March 2013, *PFC Clinic*, C-91/12, ECLI:EU:C:2013:198, para 39-40.
[75] Ibid.
[76] See also VAT Committee Guidelines Resulting from the 94th Meeting of 19 October 2011 DOCUMENT B – taxud.c.1(2012)73142 – 715. Available online: https://ec.europa.eu/food/sites/food/files/safety/docs/fw_lib_guidelines-vatcommittee_en.pdf page 156. Large majority of the VAT Committee agree that for an exemption be granted pursuant to Article 132.1 (c), therapeutic aim (for plastic surgery) needs to be established. It is not enough to grant an exemption that a surgery is performed by a qualified medical practitioner.

or cure diseases or health disorders or to protect, maintain or restore human health and furthermore, they have a therapeutic aim. Next follows a national case law example from Sweden where the court's observations about the VAT treatment of e-doctors and digital medical care follow the same reasoning as in the aforementioned VAT News.

5.1.3. Case study from Sweden on digital medical care providers

The case number 2884-16 in the High Administrative Court or Sweden (Högsta Förvaltningsdomstolen) deals with an issue between a digital medical care provider (MinDoktor.se) and the Tax Authority (Skatteverket) regarding the company MinDoktor.se's VAT treatment. MinDoktor.se is a digital medical care provider located in Sweden. It provides medical care online that is aimed to diagnosing, caring for and curing diseases. Medical services are provided by qualified professionals. Medical doctors and patients communicate via company's internet platform. In this connection, MinDoktor.se states that the only difference between them and a normal primary care center is that doctor's in MinDoktor.se do not physically meet with the patients. MinDoktor.se appealed the Tax Authority's decision of VAT treatment and applies for an advance ruling from the High Administrative Court regarding whether their internet based medical care services are VAT exempt medical care. The High Administrative Court follows the reasoning of the CJEU in the case *PFC Clinic* in confirming that the exempt medical care services are such intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health. The High Administrative Court finds that the services MinDoktor.se provides are not only advice but medical measures for the purpose of diagnosing and providing care to cure diseases. The fact that a doctor does not come in physical contact with the patient does entail that this could not be medical care in the actual meaning stipulated in the national law. Therefore, services provided by Min.Doktor.se are considered medical care and therefore allowed the VAT exemption.[77]

[77] Högsta förvaltningsdomstolens dom 2016-12-02 i mål nr 2884-16.

5.1.4. Requirements on the service provider

As per Article 132.1 (c) of the VAT Directive, the supplier of services needs to fulfil necessary qualifications for the services to be allowed the tax exemption. It is up to the Member State to define these qualifications; *"[...] in the exercise of the medical and paramedical professions as defined by the Member State concerned"*[78]. However, as emphasized in the foregoing, the fact that a service provider fulfils the criteria of Article 132.1 (c) of the VAT Directive does not by itself justify for the medical care tax exemption. Instead, it must be considered in connection with the services provided. In essence, the services provided must be '*medical care'* deemed within the meaning of the Article.132.1 (c) of the VAT Directive. Subsequently, the provider of said '*medical care'* must fulfil additional criteria, which is up to the Member States to decide.

As can be recalled from the chapter 3 from this thesis, Article 132.1 (c) of the VAT Directive deals also with paramedical professionals. This exemption cover medical and paramedical professionals such as psychologists, but it is not limited to those. For example, in the joined cases *Solleveld and Van den Hout-van Eijnsbergen*, the CJEU considered paramedical professions such as physiotherapy and psychotherapy. The physiotherapist in this case was denied by the national authorities of the Member State partly the exercise of his paramedical activities, and psychotherapy was wholly excluded. In its judgment, the CJEU emphasized the fact that in order for a practitioner to enjoy the exemption for medical care under Article 132.1 (c), two conditions are to be met. The practitioner must provide '*medical care*' and this must be done 'i*n the exercise of the medical and paramedical professions as defined by the Member State concerned*'.[79] The CJEU concluded that although the Member States have the discretion to define paramedical professions, they need to do so while keeping in mind the objective of the said provision, which is that the exemption only applies to services provided by persons with the necessary professional qualifications. The kind of exclusion present in the case is contrary to the objectives of the provision. Furthermore, the national legislation excluding these said professionals is contrary to the principle of fiscal neutrality.[80]

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[78] Article 132.1 (c) of the VAT Directive

[79] Judgment of 27 April 2006, *Solleveld and van Houten, Gabarel,* C-443/04, ECLI:EU:C:2006:257, para 23.

[80] Ibid. Para 51.

With regard to the digital medical care service provider, it can be concluded in this context that if the physicians who are providing medical care in the digital medical care center, are medical professionals as defined by the Member State, they fall under the category of Article 132.1 (c) of the VAT Directive. This also includes paramedical professionals as defined by the respective Member States. Therefore, a digital medical care service could provide, for example, services of a qualified psychologist and be exempt for VAT.

5.1.5. Summary of the findings

In this section the author summarizes the findings of this chapter thus far. The aim of the chapter is to analyze VAT treatment of digital medical care providers, i.e. online-doctors, in the light of the VAT Directive and the case law of the CJEU. This is also part of the research question. It can be argued based on the findings presented in this chapter, that digital medical care providers may enjoy the VAT exemption for medical care provided for in Article 132.1 (c) in the VAT Directive, subject to fulfilling all the required conditions. The fact that digital medical care suppliers and providers lack the physical contact between patient and the medical care professional, seems to be of no consequence when it comes to VAT. What is essential is that the care provided is medical care, which is intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health. Furthermore, medical care services must have a therapeutic aim. Medical care must also be provided by medical or paramedical professionals as defined by the Member State concerned. Lastly, medical care is to be provided in the exercise of medical or paramedical profession as defined by the Member States. If these conditions are fulfilled, VAT exemption for medical care services may be granted.

5.2. Digital medical care providers in the light of the principle of fiscal neutrality

In the previous chapters, a comprehensive overview of the indications of the VAT Directive and the case law of the CJEU was considered with regard to the exemption for medical care. One domestic legal case from Sweden was also considered. Aim of this was to analyze how the VAT treatment would be on digital medical care providers as per the existing legislation.

That part of the main research question is therefore answered. A more concise answer can be found in the preceding Summary of the findings- chapter and in the final chapter of this thesis. More comprehensively on the principle of fiscal neutrality can be found in chapter 4 of this thesis. In this chapter, the author considers second aspect of the research question, namely how the VAT treatment of digital medical care providers looks like in the light of the principle of fiscal neutrality and would the VAT treatment of digital care providers as discussed be neutral.

One must start with a disclaimer when discussing the neutrality of medical care exemptions. There are derogations from the principle of fiscal neutrality imbedded even in the VAT Directive itself. One of which considers the topic of this thesis. Medical care exemption is part of the exemptions that are not allowed the right to deduct. These are one of the most prominent derogations from the principle of fiscal neutrality. What this means is that a supplier of a service will not charge an output VAT but is neither allowed to deduct input VAT on business acquisitions. However, regarding medical care, there are other systems of relieving taxable persons from the burden of input VAT in the national systems of the Member States. For example, in Finland there is a system between the state and municipalities that falls outside the scope of the VAT Directive. This system is used to return input VAT spent on public acquisitions that are intended for tax free operations back to the municipalities. This is based in the national law of Finland.[81] On the other hand, this can be seen problematic from the point of view of competition neutrality. Article 207 TFEU prohibits state aid which distorts competition. However, for the purposes of this thesis, national peculiarities of the Member State will not be considered further.

Although not an independent EU legal principle, the principle of fiscal neutrality is of central importance when it comes to the realm of VAT. As discussed earlier in the chapter 4 of this thesis, the principle of fiscal neutrality is two-dimensional. One aspect of the principle of fiscal neutrality is that it is aimed to relieve taxable persons from the burden of VAT by providing a system of input VAT deduction. However, it is clear that this does not apply to exemptions that do not entail the right to deduction of input VAT. Therefore, in connection with the digital medical care providers, one must consider the other aspect of the principle of fiscal neutrality

[81] Articles 130, 130 (a) and 133 of the Finnish VAT Act (Arvolisäverolaki)

in the VAT system. That is the expression of the EU's general principle of equality in the common system of VAT. Therefore, what is relevant to consider in connection with the research question is whether the VAT treatment of digital medical care providers is neutral in comparison to comparable situations.

As established previously in this chapter, digital medical care providers may be exempted from VAT in accordance with the rather strict criteria that applies to all medical care providers similarly. Therefore, one may argue that in that sense the application of the EU VAT rules is neutral as meant with the principle of fiscal neutrality.

6. Assessment of VAT treatment of digital medical care platforms

6.1. Introduction to medical care platforms

Digital medical care platforms are introduced in the chapter 2.3. of this thesis. However, there is surely cause to iterate what was discussed there. Digital medical care platform is a technical innovation used in the field of medical care. A digital medical care platform is, in essence, a technical tool. It is often offered to physical medical care suppliers and providers to assist their work and to enable to provide some digital services on the side of the traditional medical care. It is an application that is developed by a (technology) company and subsequently sold to, for example, to a primary care center. While digital medical care companies sell medical care expertise via digital ways, a company that develops platforms might not have anything else to do with medical care; they might only develop and sell platforms to medical care suppliers and providers. The author used the undertaking *Visiba Care* as an example of a platform and a platform provider. The company does not offer medical services in addition to providing platforms. In case of digital medical care providers, which the author deemed VAT exempt subject to certain conditions in the preceding chapter, the VAT exempt transaction is the one between the customer and the medical care supplier. A user logs into a digital medical care application and consults a medical care professional on his medical issues. This imposes a fee similarly to the normal fashion of doctor's appointment fees. The user subsequently pays for the fee, which is VAT exempt because the service he received is considered under the scope of the VAT exemption for medical care and therefore tax free. However, a different transaction is considered in the case of platforms in the sense of the VAT treatment of this supply. It is the business to business (B2B) transaction between the platform supplier and the medical care services supplier. The digital transaction between a customer and a medical care provider using a platform is not considered in this section of this thesis. Indeed, normally this B2B supply of service would be liable to VAT under Article 24 of the VAT Directive that broadly includes all the transactions that are not supplies of goods. For this supply of a platform to a medical care supplier to be VAT exempt, it should fall under the scope of Article 132.1 (b);

“ *hospital and medical care and* ***closely related activities*** *undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognized establishments of a similar nature”*.

In the authors opinion, the concept ‘*closely related activities*’ warrants much obscurity in the field of EU VAT law. There can already be detected different domestic approaches to ‘*closely related activities*’ to medical care in the absence of harmonization.[82] Therefore, it is an interesting topic to research. The author aims to establish a correct VAT application in relation to medical care platforms under the VAT Directive and subsequently consider the application from the point of view of the principle of fiscal neutrality.

6.2. ‘*Closely related activities’* in the EU legal practice

The CJEU’s approach to defining ‘*closely related activities’* in Article 132.1 (b) of the VAT Directive is considered in this chapter. It is worthy to note that this exemption only applies to Article 132.1 (b). There is no similar provision applicable in relation to Article 132.1 (c).[83] Furthermore, ‘closely related activities’ cover both goods and services.[84] As AG Sharpston states in her Opinion in the case *Klinikum Dortmund*; “if it is the public interest to exempt supplies of services closely related to hospital and medical care, then it is also in the public interest to exempt supplies of goods which have an equally close relationship.”[85]

The case *Ygeia* is considered in chapter 3.2. of this thesis. It dealt with supplies of services that were of comfort-increasing in nature. However, the CJEU does not consider such services as closely related activities to hospital care. The CJEU emphasizes that for a service to count

[82] Consider, on this topic, the different approach of Finland and Sweden to hiring medical care professionals through staffing agencies. Finland considers this a ‘closely related service’ to medical care and thus tax exempt. Sweden treats this as supply of workforce liable to VAT. See cases Högsta förvaltningsdomstolens dom 2020 02-05 i mål nr 3447-19, Högsta förvaltningsdomstolens dom 2020-02-05 i mål nr 3478-19 and Korkeimman hallinto-oikeuden vuosikirjapäätös 2013-03-07, KHO:2013:39, ECLI:FI:KHO:2013:39.

[83] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 8.

[84] Ibid. page 9.

[85] Opinion of Advocate General Sharpston of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143, para 21.

as closely related activity to hospital and medical care, it should be essential in achieving the therapeutic purpose that hospital and medical care pursues.[86] In the case Ygeia, the CJEU clarifies the point as follows;

"[…] It follows that only the supply of services which are logically part of the provision of hospital and medical-care services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to 'closely related activities' within the meaning of that provision. Only such services are of a nature to influence the cost of health care which is made accessible to individuals by the exemption in question."[87]

The case *De Fruytier II* deals with the transportation of samples of human origin to clinics and laboratories by a self-employed third party and whether this should be tax exempted as a closely related service to hospital and medical care. The CJEU held that that only the kind of supply of services that are logically part of the provision of hospital and medical-care services, and which constitute an indispensable stage in the process, is able to amount to '*closely related activities*' within the meaning of that provision.[88] Furthermore, the CJEU held that being self-employed third party, De Fruytier could not be considered as a '*body governed by public law'*, nor fall within the definition of a '*hospital'*, a '*centre for medical treatment'* or a centre for '*diagnosis'* or any '*other duly recognised establishment of a similar nature*', operating under social conditions comparable to those applicable to bodies governed by public law.[89]

Another case in the CJEU that deals with the concept of '*closely related activities'*, is *Commission v France*.[90] The case deals with whether transportation of samples should be exempted from VAT. Especially the concept of '*closely related activities'* is dealt with in paragraphs 23 and 24 of the judgment. The CJEU points out in paragraph 22 that '*closely*

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[86] Judgment of 1 December 2005, *Ygeia*, C-394/04 and C395/04 ECLI:EU:C:2005:734, para 29.
[87] Ibid. para 25.
[88] Judgment of 2 July 2015, *De Fruytier*, C-334/24, ECLI:EU:C:2015:437, para 29.
[89] Ibid. Para 39.
[90] Judgment of 11 January 2001, *Commission v France*, C-76/99, ECLI:EU:C:2001:12.

related activities' are defined in the VAT Directive at all.[91] In paragraph 23 the CJEU emphasizes how accessibility to medical care is the underlying idea behind the exemption for medical care and closely related activities;

> *"[…] the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it,* ***or closely related activities****, were subject to VAT."*[92]

In this connection, it is also worthy to mention an interesting case from the CJEU that considers the supply of drugs and their VAT treatment, which is previously considered in other contexts, the case *Klinikum Dortmund*. This case deals with a situation where doctors worked in a hospital in an independent capacity. Doctors carried out cancer treatments in their respective receptions and consequently supplied cytostatic drugs for out-patients (i.e. those patients that do not need to be hospitalized) from the hospital's pharmacy. According to the CJEU's observations;

> *"[…] the patient appears to receive* ***more than one supply****, namely, first, the medical care from the doctor and healthcare staff, and second, drugs from the hospital pharmacy managed by KD (Klinikum Dortmund),* ***which prevents their being considered indissociable, physically and economically.****"*[93]

From the point of view of the principle of fiscal neutrality, it makes sense to include the supply of cytostatic drugs prescribed by doctors working in an independent capacity in the VAT exemption for medical care. However, it is worthy to keep in mind that this is not the intention of the VAT Directive. In that case the VAT Directive would not include both Articles 132.1 (b) and (c).[94]

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[91] Judgment of 11 January 2001, *Commission v France*, C-76/99, ECLI:EU:C:2001:12, para 22-24.
[92] Ibid. para 23.
[93] Judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143, para 36.
[94] T. Tervoort, *Interpretation methods of the CJEU and the meaning of the principle of fiscal neutrality: a commentary on the Case C-366/12 Klinikum Dortmund*, (World Journal of VAT/GST Law 2015), page 118.

It can be concluded from the foregoing, that the supply of drugs and treatment are not considered physically and economically inseparable supply, but a separate supply from one another. However, the CJEU states that it is up to the Member States to determine whether the supplies are indispensable to one another in the light of the relevant facts. Should the facts of the issue not stipulate otherwise, the supply of cytostatic drugs is not considered a closely related activity to hospital and medical care and thus not liable for the VAT exemption.[95]

In essence, '*the closely related action'* must be subordinate to the principal '*hospital and medical care service*'.[96] The CJEU case law sheds light on ancillary services. It follows from the case *Card Protection Plan* that an ancillary service means a service that a customer did not request itself but enables better enjoying the primary service supplied.[97] This is not an adequate condition in itself. Instead, Article 132.1 (b) of the VAT Directive must be read in conjunction with Article 134 of the VAT Directive. Article 134 of the VAT Directive states that the exemption shall not be granted where the ancillary transaction to 'hospital and medical care' is not essential to those transactions.[98] It follows from the CJEU's case law that 'therapeutic purpose' is an obligatory requisite for Article 132.1 (b) medical care.[99]

6.3. Assessment in the light of the EU legal practice

It is evident from the foregoing that medical care platforms do not constitute '*medical care*' in the sense of the VAT Directive. They are a tool meant for medical care providers to do their work. However, it can be deduced from the analysis in the chapter 5 that providing medical care services via modern ways, i.e. digitally can fulfil the criteria of '*medical care*' as meant in the VAT Directive. Therefore, when a qualified physician uses a platform to, for example, video chat with a patient, with a therapeutic purpose and aiming to diagnose, treat or cure

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[95] Judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143. para 38.
[96] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 9.
[97] Judgment of 25 February 1999, *CPP*, C-349/96, ECLI:EU:C:1999:93, para 30.
[98] Article 134 (a) of the VAT Directive.
[99] R. Påhlsson, *The Vat Exemption for health care: EU Law and its impact on Swedish law*, (Nordic Tax Journal, 2015), page 8.

diseases or health disorders, this can be considered '*medical care'* as stipulated in the VAT Directive. Subsequently, a question arises regarding medical platforms; if providing medical care via said platform is medical care, can platforms therefore be considered '*closely related activities*' to hospital and medical care?

As discussed earlier, '*closely related activities*' cannot be considered with regard to Article 132.1 (c) of the VAT Directive. Regarding that Article, there is no such concept mentioned in the Directive. Therefore, one can conclude that Article 132.1 (b) of the VAT Directive applies. However, this means that '*closely related activiti*es' apply to the somewhat stricter concept of hospital medical care services of Article 132.1 (b), where in Article 132.1 (c), concept of medical care covers all medical care as understood in the respective Member States. After establishing which Article applies, it is relevant to compare the medical platform situation to the relevant case law of the CJEU.

As often discussed, the case *Yegia*, essentially concerned whether goods and services that are meant to increase comfort, such as television and extra beds, can be exempt for VAT under 'closely related activities' justification.[100] The CJEU precluded such goods and services from the VAT exemption. With regard to this aspect of the case, one can however conclude that a medical platform is not such a service which is meant to increase comfort of the user. The CJEU continued in the case *Yegia* and essentially laid down a two-folded criterion for the '*closely related activitie*s' concept to be fulfilled in order for an activity to be tax exempt. In order to qualify as a '*closely related activity'*, (1) the supply of services must be logically part of the provision of hospital and medical care services, and (2) the supply of 'closely related' services must be an indispensable stage in supplying to those services to achieve their therapeutic objectives. In addition, the CJEU observes that only these kinds of supplies can influence the cost of the medical care and therefore put its accessibility at risk. Such supplies would therefore be justified for an exemption.[101] In connection with medical platforms, it is reasonable to consider those criteria in turn. First being that the supply of the services must be logically part of the provision of hospital and medical care services. It can be argued that this

[100]Judgment of 1 December 2005, *Ygeia*, C-394/04 and C395/04 ECLI:EU:C:2005:734
[101]Ibid, para 25.

criterion is fulfilled. Tying up to the CJEU's point, one can argue that without the medical platform, there would not be hospital or medical care services. At least for those who seek medical assistance and advice via that online opportunity provided by the platform. Second point is that 'closely related activities' must be indispensable to primary service, to aim the primary service's therapeutic aim. The author argues that the use of the medical platform passes the criteria in point (2) as well. One could argue that the use of a platform is an '*indispensable stage'* as without it, perhaps no medical care is provided at all. As to the achievement of the therapeutic aim, for medical care to even count as medical care, this requirement must be fulfilled. Since using medical platforms can count as medical care, this requirement is met.

The case *De Fruytier II* the CJEU reiterated the two-folded criteria that was brought up in the previous point. This was considered with regard to the use of medical platform in the previous point and does not need to be repeated here. However, the case *De Fruytier II* has another dimension. The CJEU makes a specific reference to the legal form of De Fruytier not being one as to fall under the Article 132.1 (b) of the VAT Directive.[102] Furthermore, the CJEU emphasizes the need for the existence of an "*individualized entity*" in order to be able to characterize an establishment of similar nature to a hospital or center for medical treatment.[103] In other words, the exemption may only be claimed by legal persons.[104] For the purposes of this thesis, the author shall assume that the company behind the provided medical care platform is a large and prosperous company – how to otherwise enter such a market. Therefore, concerns regarding the fact that self-employment cannot be characterized as a 'body governed by a public law', or fall under any other concept provided in the Article 132.1 (b) of the VAT Directive, does apply regarding medical care platforms.

Returning to the wording of Article 132.1 (b) of the VAT Directive, it provides exemption to the following;

"hospital and medical care and closely related activities undertaken by bodies governed by

[102] Judgment of 2 July 2015, *De Fruytier*, C-334/24, ECLI:EU:C:2015:437, para 39.
[103] Ibid, para 35.
[104] B. Terra & J. Kajus, *A Guide to the Recast VAT Directive*, (IBFD 2919), chapter 9.2.2.

public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognized establishments of a similar nature".[105]

The case *L.u.P*. deals with conditions of establishing a 'duly recognized establishments of a similar nature'. The case concerns a private limited company whose single shareholder was a medical care professional. Among other things, the company carries out tests ordered by general practitioners (that are tax exempt in any event) as a part of the treatment they provide to patients. The issue is whether services that the company provides are liable to VAT or VAT exempt. The CJEU found that laboratories in question fall under the scope of "*establishments of similar nature*" as stipulated in the Directive.[106] Next the CJEU considered whether the condition of "*duly recognized*" is fulfilled. The CJEU found that as conditions are not specified in the Directive, it is thus in the discretion of the Member States to rule which requirements must be fulfilled in order to an establishment to be "*duly recognized*"[107].

Assessment of the preceding case law and the wording of the Article 132.1 (b) would preclude undertaking governed by private law, for example a technology company, that is not comparable with the establishments named in the same Article. As discussed in chapter 5.2. of this thesis, the system of exemptions without the right to deduct input VAT, such as the exemption for medical care, is inherently not neutral. Medical care providers are in a situation where they purchase equipment and services needed to provide medical care, but are not able to deduct input VAT on these purchases. This can be regarded as burdensome for the service providers.

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[105] Article 132.1 (b) of the VAT Directive
[106] Judgment of 8 June 2006, *L.u.P*., C-106/05, ECLI:EU:C:2006:380, para 35.
[107] Ibid. para 43.

6.4. Assessment in the light of the principle of fiscal neutrality

As discussed previously, Article 132.1 (b) of the VAT Directive only exempts closely related activities to hospital and medical services insofar they are carried out under social conditions comparable with those that apply to bodies governed by public law.[108] Article 132.1 (c) of the VAT Directive includes no mention about closely related activities, therefore, they cannot be applied in relation to Article 132.1 (c). This is a very literal interpretation taken by the CJEU, which means reference to a particular wording of a provision. It is to be kept in mind that strict interpretation, however, does not necessarily mean restrictive interpretation, as pointed out by AG Jacobs in his Opinion of case *Zoological Society*. AG Jacobs explains that VAT exemptions should apply only to what is intended and not go further than that.[109] Bear in mid the case *Klinikun Dortmund*, which is a good example of the CJEU's literal interpretation of the Article 132.1 (b) of the VAT Directive.

As established thus far, the principle of fiscal neutrality is unquestionably integral to the EU common system of VAT. However, it is not a rule of EU primary law and therefore cannot be used to condition the validity of an exemption.[110]Instead, it is an interpretation tool which is to be used in connection with the principle of strict interpretation of exemptions.[111]

What can be concluded from the preceding case law overview in connection with its application to medical care platforms as '*closely related activities to hospital and medical care'* that it would make sense to include platforms to '*closely related activities'* and exempt from VAT from the point of view of the principle of fiscal neutrality. The use of a digital medical care platform in the work of medical care professionals could be seen as a logical part of medical care service itself and even indispensable to achieve the service's therapeutic aim. This is the criteria laid down by the CJEU in the case *Ygeia* and considered in detail in chapter 6.3. of this thesis. The CJEU has furthermore established that in order to claim the VAT

[108] Judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143, para 32.
[109] Opinion of Advocate General Jacobs of 13 December 2001, *Zoological Society*, C-267/00, ECLI:EU:C:2001:698, para 18-19.
[110] Judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143, para 40.
[111] Ibid.

exemption for closely related activities to hospital and medical care, existence of 'individualized entity' is required. In this regards, VAT exemption can only be accorded to legal persons. This was the issue in the aforementioned case *De Fruytier II* where the CJEU ruled that the closely related activity exemption does not apply to self-employed activity. However, it is safe to assume that a platform supplier would probably be a legal person. The medical care platform example used in this thesis, *Visiba Care*, is a limited company.

Based on the considerations above and what is dealt with previously in this regard in this thesis, one might be quick to think that a medical care platform supplier could claim the exemption for medical care in the VAT Directive justified by reasons of the principle of fiscal neutrality. The principle of fiscal neutrality entails that, when it comes to VAT treatment, all economic operators carrying out same activities must not be treated differently.[112]

However, the closely related activities exemption applies only to Article 132.1 (b) of VAT Directive and not to point (c) of the same Article. Furthermore, the case law practice of the CJEU has established that this Article is to be interpreted literally, i.e. with regard to the literal wording of the provision. What this means is that only "*bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature*"[113] are covered by this exemption. A company that does not fulfil the qualifications required in the Article 132.1 (b) of the VAT Directive is unable to make use of the medical care VAT exemption in any case. As established in this research by inspecting the CJEU's case law on the matter, the principle of fiscal neutrality cannot extend the VAT exemption for medical care any further from that which is literally expressed in the wording of the Article.

It should be kept in mind that Article 132.1 (b) of the VAT Directive is to be read in connection with the mandatory limitations provided for in Article 134 of the same Directive.

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[112] Judgment of 10 September 2002, *Kügler*, C-141/00, ECLI:EU:C:2002:473, para 30.

[113] Article 132.1 (b) of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax

Article 134 of the VAT Directive prohibits exemptions in the following cases;

"(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT."[114]

6.5. Summary of the findings

It can be concluded that the legal status of the '*closely related activities'* is in constant flux. It is a concept that lives and develops constantly as hospital and medical care grow, change and is subject to new innovations. As the VAT treatment of closely related activities to hospital and medical care is rather unclear, there is reason to assume the CJEU will clarify the concept in the future. As discussed above, '*closely related activities'* have many faces in the legal practice of the CJEU. In conclusion, case law practice of the CJEU on the topic supports strict interpretation of '*closely related activities'* and the CJEU is extensively cautious in allowing for the VAT exemption to closely related activities. It is to be borne in mind that exemption is exception to the general system of VAT and therefore it should be interpreted narrowly. Furthermore, due to the legal status of the principle of fiscal neutrality being secondary law, it cannot be relied upon for extending the scope of the medical care exemption. In conclusion, the aim of the medical care exemption is to keep prices of medical care reasonably low so that medical care is accessible to the general public. An indispensable ancillary service to medical care could have the effect of raising the price of medical care, therefore such services can be granted an exemption. Furthermore, when allowing for a VAT exemption, it is important to not to go beyond that what is necessary to attain the social goals behind the medical care VAT exemption.

[114] Article 134 of the COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax

7. Conclusions

This conclusive chapter provides a summary of the findings made during this research. Furthermore, this chapter provides concise answers in a collective manner to the research questions presented in the chapter 1.2. of this thesis.

Aim of the thesis is to assess VAT treatment of certain medical care services provided by modern ways. Specific medical care aspects and services provided by modern ways considered in this thesis are 'digital medical care providers' and 'digital medical care platforms'. Digital medical care providers are the so called online doctors or e-doctors. A digital medical care platform on the other hand is a technical innovation that some medical care providers make use of. It is an application that enables medical care suppliers and providers to offer medical care digitally in addition to traditional medical care services. Assessment of VAT treatment of digital medical care providers and digital medical platforms is two-folded. Their respective VAT treatments are considered both in the light of the VAT Directive and care law of the CJEU, and in the light of the principle of fiscal neutrality.

In order to assess their VAT treatment correctly, a series of sub-questions are considered throughout this thesis and answered in summarized manner in this conclusive chapter. The following sub-questions have been considered;

- How is the exemption for medical care services regulated in the VAT Directive and in case law of the CJEU?
- What is the status of the principle of fiscal neutrality in EU law and how does it apply to the exemption for medical care?
- What does 'closely related services to hospital and medical care' entail and how are they treated in EU VAT law?

This conclusions chapter proceeds in the same analogy as the research questions and sub-questions are considered in this thesis. Therefore, the first conclusion to be presented is that considering the first sub-question.

The exemption for medical care is regulated in the VAT Directive. Legal basis for the medical care exemption is found in Article 132.1 of the VAT Directive that states that; "*Member States shall exempt the following transactions*". Point (b) and (c) of that Article regulates the medical care exemption. Member States may also implement Article 133 of the VAT Directive, should they so choose. It is not mandatory, however. Article 132.1 (b) is to be read in connection with Article 134 of the VAT Directive, which limits the Member States' scope of discretion regarding the conditions of granting the medical care exemption to other bodies other than those literally mentioned in the Directive. Medical care exemption is an exemption in public interest and does not include the right to deduct input VAT. Exemptions to the general rule of VAT, which is that VAT is to be levied on all goods and services in the EU, are to be interpreted strictly. This is the principle of strict interpretation. Case law considered regarding the medical care exemption in the VAT Directive is too broad to be summarized in this chapter.

Next the second sub-question is considered, namely the principle of fiscal neutrality is considered. In essence, it means that taxation should be as neutral as possible, to the effect that business decisions taken by taxable persons should be economically motivated instead of fiscally. As established in this thesis, the principle of fiscal neutrality is a tax law specific notion of the general EU principle of equal treatment. The principle of fiscal neutrality is two-folded; on one hand it allows for the deduction system presented in the VAT Directive, which relieves taxable persons from the burden of VAT, thus making it neutral. On the other hand, it is a tool of interpretation aimed to establish that taxable persons in similar conditions are treated similarly. As medical care is exempted from VAT, deduction aspect is not relevant with regard to this thesis. It is established in the case law of the CJEU that the principle of fiscal neutrality has the status of that of secondary law. This means that it requires legislation to be implemented in order for it to be applied. It does not enjoy the status of a general principle of EU law. Therefore, the principle of fiscal neutrality cannot be used to broaden the scope of the medical care exemption from what is explicitly expressed in the VAT Directive.

Assessment of VAT treatment of digital medical care providers warranted the following

analysis. Digital medical care can fall under the scope of Article 132.1 (c) of the VAT Directive, insofar the required conditions are met. The fact that digital medical care suppliers and providers do not have a physical contact with a patient is of no consequence when it comes to the VAT treatment. Physical contact is not a requirement in order to be VAT exempted. Neither is any specific legal form of the undertaking. What is essential is that the care provided is '*medical care'* as meant in the Directive and specified in the case law of the CJEU. The case law of the CJEU concludes that '*medical care*' is such which is intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health. Furthermore, medical care services must have a therapeutic aim. For example, plastic surgery undertaken due to purely cosmetic reasons does not have a therapeutic aim and cannot therefore enjoy the VAT exemption for medical care. Moreover, medical care must also be provided by medical or paramedical professionals as defined by the Member State concerned. This is not limited to medical doctors but also includes paramedical professions such as psychiatrist and psychotherapist. Lastly, medical care is to be provided in the exercise of medical or paramedical profession as defined by the Member States. If these conditions are fulfilled, VAT exemption for medical care services may be granted.

It can also be concluded that when the VAT exemption for medical care is in this way applied to digital medical care providers, the treatment is neutral from the point of view of the principle of the fiscal neutrality. In other words, a digital medical care provider who fulfils the aforementioned criteria should be VAT exempt according to the principle of fiscal neutrality. However, it holds also true that the exemption for medical care in itself is not neutral as it does not provide for a deduction mechanism for deducting input VAT, which is problematic from the point of view of the service supplier as they are not able to deduct VAT from purchases made for professional activity.

When considering VAT treatment of digital medical care platforms, firstly must be distinguished which transaction is the one in question. Medical care provided via platforms can be considered as medical care can therefore VAT exempt as established in preceding discussions. Therefore, the issue in this case is whether the B2B supply of a platform from a technology company to medical care supplier is '*closely related service to hospital and medical*

care'. Therefore, in order to be able to assess VAT treatment of digital medical care platforms, one must also consider the treatment of '*closely related activities to hospital and medical car*e'. It should be noted that these can be both goods and services. Closely related activities only apply in the context of Article 132.1 (b) of the VAT Directive. The CJEU takes a strict approach when it comes to closely related activities. In essence, a closely related activity is such which is logically part of the provision of hospital and medical care services, and the supply of '*closely related activities'* must be an indispensable stage in supplying to those services to achieve their therapeutic objectives. Furthermore, only legal persons can enjoy the closely related activity – exemption. Only the bodies expressively stated in Article 132.1 (b), "[…] *bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognized establishments of a similar nature*" may be granted the closely related activity exemption. This exemption does not apply to any other undertakings. Regarding '*duly recognized establishments of a similar nature*', it is up to the Member States to establish what is considered '*duly recognized*' in their respective legal systems.

Regarding the principle of fiscal neutrality in this context, the key finding is that the principle of fiscal neutrality cannot be used to broaden the scope of what is explicitly stated in Article 132.1 (b) of the VAT Directive. The principle of fiscal neutrality cannot be used to condition the validity of an exemption because it is primary EU law.

Bibliography

Articles

Göran Stiernstedt, Daniel Zetterberg, Annika Stjernquist, Caroline-Olivia. Elgán, Digifysiskt vårdval - Tillgänglig primärvård baserad på behov och kontinuitet (Statens Offentliga Utredningar 2019:42)

Robert Påhlsson, The Vat Exemption for health care: EU Law and its impact on Swedish law, (Nordic Tax Journal 2015)

Stefano Chirichigno & Vittoria Serge, European Union - Hospital and Medical Care by Commercial

Hospitals under EU VAT, (International VAT Monitor, 2014) (Volume 25), No. 2 (IBFD 2014).

Terence Tervoort, Interpretation methods of the CJEU and the meaning of the principle of fiscal neutrality: a commentary on the Case C-366/12 Klinikum Dortmund, (World Journal of VAT/GST Law 2015)

Literature

Ben Terra & Julie Kajus, Introduction to European VAT, (IBFD 2020)

Ben Terra & Julie Kajus, A Guide to the Recast VAT Directive, (IBFD 2019)

Eleonor Kristoffersson, Deduction of input VAT. Comparative Studies in Tax Law (Örebro University 2019)

Eleonor Kristoffersson & Pernilla Rendahl, Textbook on EU VAT, (Iustus Förlag AB 2016)

J. Scott Brennen and Daniel Kreiss, International Encyclopedia of Communication Theory and Philosophy, (John Wiley & Sons, Inc. 2016)

Legislative acts

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326

COUNCIL DIRECTIVE 2006/112/EC of 28 November 2006 on the common system of value added tax

Arvonlisäverolaki 1501/1993 (the VAT Act of Finland)

Communications (press releases)

VAT News, International VAT Monitor (IBFD), July/August 2015

VAT Committee Guidelines

VAT Committee Guidelines Resulting from the 94th Meeting of 19 October 2011 DOCUMENT B – taxud.c.1(2012)73142 – 715. Avalable online : https://ec.europa.eu/food/sites/food/files/safety/docs/fw_lib_guidelines-vatcommittee_en.pdf

OECD Publications

OECD, 'OECD International VAT/GST Guidelines - Guidelines on Neutrality' (2011)

Committee on Fiscal Affairs Working Party No 9 on Consumption Taxes, "OECD International VAT/GST Guidelines—Guideline on Neutrality" (approved by the Committee on Fiscal Affairs on 28 June 2011)

Table of Cases

CJEU

Judgment of 14 February 1985, *Rompelman v Minister van Financiën*, C-268/83, ECLI:EU:C:1985:74

Judgment of 22 May 1988, *Commission v. Italy*, C-122/87, ECLI:EU:C:1988:256

Judgment of 21 September 1988, *Commission v France*, C-50/87, ECLI:EU:C:1988:429

Judgment of 20 June 1996, Wellcome Trust, C-155/94, ECLI:EU:C:1996:243

Judgment of 15 January 1998, *Ghent Coal*, C-37/95, ECLI:EU:C:1998:1

Judgment of 25 February 1999, *CPP*, C-349/96, ECLI:EU:C:1999:93

Judgment of 13 July 2000, *Idéal Turisme*, C-36/99, ECLI:EU:C:2000:405

Judgment of 14 September 2000, *D. v W.*, C-384/98, ECLI:EU:C:2000:444

Judgment of 11 January 2001, *Commission v. France*, C-76/99, ECLI:EU:C:2001:12

Judgment of 21 March 2002, *Zoological Society*, C-267/00, ECLI:EU:C:2002:202

Judgment of 21 March 2002, *Kennerman Golf*, C-174/00, ECLI:EU:C:2002:200

Judgment of 20 June 2002, *Commission v Germany*, C-287/00, ECLI:EU:C:2002:388

Judgment of 10 September 2002, *Kügler*, C-141/00, ECLI:EU:C:2002:473

Judgment of 6 November 2003, *Dornier*, C45/01, ECLI:EU:C:2003:595

judgment of 20 November 2003, *d'Ambrumenil and Dispute Resolution Services*, C-307/01, ECLI:EU:C:2003:627

Judgment of 26 May 2005, *Kingscrest Associates and Montecello*, C-498/03, ECLI:EU:C:2005:322

Judgment of 1 December 2005, *Ygeia*, C-394/04 and C395/04 ECLI:EU:C:2005:734

Judgment of 27 April 2006, *Solleveld and van Houten, Gabarel,* C-443/04, ECLI:EU:C:2006:257

Judgment of 8 June 2006, *L.u.P.*, C-106/05, ECLI:EU:C:2006:380, para 41-55

Judgment of 10 April 2008, *Marcs & Spencer*, C-309/06, ECLI:EU:C:2008:211

Judgment of 29 October 2009, NCC, C-174/08, ECLI:EU:C:2009:669

Judgment of 10 June 2010, *Future Health Technologies*, ECLI:EU:C:2010:334

Judgment of 19 December 2012, Orfey Balgaria, C-549/11, ECLI:EU:C:2012:832

Judgment of 23 March 2013, *PFC Clinic*, C-91/12, ECLI:EU:C:2013:198

Judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143

Judgment of 2 July 2015, *De Fruytier*, C-334/24, ECLI:EU:C:2015:437

Judgment of 16 November 2017, *Kozuba Premium Selection*, C-308/16, EU:C:2017:869

AG Opinions

Opinion of Advocate General Jacobs of 13 December 2001, *Zoological Society*, C-267/00, ECLI:EU:C:2001:698

Opinion of Advocate General Sharpston of 13 March 2014, *Klinikum Dortmund*, C-366/12, ECLI:EU:C:2014:143

High Administrative Court of Sweden

Högsta förvaltningsdomstolens dom 2016-12-02 i mål nr 2884-16

Högsta förvaltningsdomstolens dom 2020 02-05 i mål nr 3447-19

Högsta förvaltningsdomstolens dom 2020-02-05 i mål nr 3478-19

High Administrative Court of Finland

Korkeimman hallinto-oikeuden vuosikirjapäätös 2013-03-07, KHO:2013:39, ECLI:FI:KHO:2013:39