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The Swedish Healthcare VAT on the Hiring out of Medical Care Staff and its Compatibility with EU Law

by

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Table of content

Summary **4**

Preface **5**

Abbreviation list **6**

1 Introduction **7**
1.1 Background 7
1.2 Aim 8
1.3 Method and Material 9
1.4 Delimitation 9
1.5 Outline 10

2 EU Law **11**
2.1 Introduction 11
2.1.1 Articles 131 and 132(1)(b) & (c) of the VAT Directive 11
2.1.2 Article 133 of the VAT Directive 12
2.1.3 Article 134 of the VAT Directive 13
2.2 Interpretation of the Exemptions under EU Law 13
2.3 Neutrality in VAT 14
2.4 Judgments of the CJEU 15
2.4.1 Article 132(1)(b) 15
2.4.2 Article 132(1)(c) 17
2.4.3 An analogue application of Article 132(1)(g) 18
2.5 Remarks on The EU Interpretation 19

3 The concept of hiring out of medical staff in Sweden **21**
3.1 Introduction 21
3.2 Article 132(1)(b) & (c) in the Swedish Value Added Tax Act 21
3.3 The Scope of the exemption in the Swedish law 21
3.3.1 Preparatory works 21
3.4 The Judgments of the Supreme Administrative Court 22
3.4.1 Medcura AB 22
3.4.2 The Judgements of the 5th of February 2020 24
3.4.3 Dissenting opinions 25
3.5 Care company or temporary-work agency? 26
3.6 Remarks on The Swedish interpretation 27

4 The Swedish Interpretation v EU Law **30**
4.1 Introduction 30
4.2 Strict interpretation & fiscal neutrality 30
4.3 Article 132(1)(b) 32

4.4 Article 132(1)(c) 33
4.5 An analogue application of Article 132(1)(g) 33
4.6 What are the consequences of the Swedish interpretation? 36

5 Conclusions **37**

Bibliography **39**

Summary

In 2018, the Swedish Supreme Administrative Court decided in a case. The decision of the court, came to change the scope of the exemption for medical care in Sweden. The court ruled that the hiring out of medical care staff is to be regarded as a taxable service and not exempted from VAT. This interpretation has raised many questions and opinions. One of them is the compatibility of the interpretation with the VAT Directive and the judgements of the CJEU in that regard.

This thesis aims to answer this question by looking at the relevant Articles in the VAT Directive and analysing the judgments of the CJEU concerning these Articles. Amongst other things, the thesis looks at the compatibility of this interpretation with the principles of strict interpretations and fiscal neutrality. When looking at the selected case law, and the Swedish interpretation, it appears that a breach of these two principles is possible. Further, a discussion in regard to the case law referred to by the Swedish court is also made. The thesis intends to discuss the differences in the circumstances between the Swedish cases at issue and the cases that the Swedish court based its assessment on (Horizon College and go fair). These differences can be summarized in the client company's control over the hired staff, where the cases Horizon College and go fair do not regard staff that act under their own responsibility and legitimacy. The hired staff in the Swedish cases at issue do act their own responsibility and legitimacy. Thus, it is arguable whether these cases can be used to justify the Swedish interpretation. Another aspect that the thesis regards, is the different interpretation made by Finland. This opens the floor to further discussions concerning the uniform interpretation and application of EU law, which gives another reason to question the interpretation made by Sweden.

The Swedish interpretation is now being investigated by the Swedish Government. It remains unclear what the outcome of this investigation is going to be. Will, the Swedish interpretation, be regarded as incompatible with the EU law, namely, the VAT Directive and the judgments of the CJEU, or will Sweden continue to tax the hiring out of medical staff.

Preface

I would like to express my sincere gratitude to my supervisor, Dr. Marta Papis-Almansa, for her guidance, help and support throughout the process of writing this Master thesis. Your passionate and animated teaching made me understand and become interested in a complex area such as VAT.

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Finally, many thanks to all my classmates whose diverse academic backgrounds have made this year even more enjoyable. I wish you all the best in whichever path you choose in your lives.

Abbreviation list

AG – Advocate General

CJEU – Court of Justice of the European Union

EU – European Union

Para. – Paragraph

Paras. – Paragraphs

Swedish VAT Act – Swedish Value Added Act

VAT – Value Added Tax

VAT Directive – Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006

1 Introduction

1.1 Background

Value added tax is a general tax on consumption and its intention is to tax all private expenditure in order to maintain neutrality.[1] However, an exception from the general rule has been justified in, among other things, the public interest.[2] Article 132(1) is one of the Articles in the Council Directive 2006/112/EC on the common system of value added tax of 28 November 2006[3] that lays down exemptions for certain activities in the public interest. Amongst other exemptions, the VAT exemption for hospital and medical care can be found in the letters (b) and (c) of the previously mentioned Article.[4] These exemptions are based on protecting the public interest, in essence not increasing the costs in order to make medical care available and accessible to everyone.[5] The Swedish corresponding provision for VAT exemptions in regard to hospital and medical care is to be found in chapter 3 Paras. 4 & 5 of the Swedish Value Added Act (1994:200)[6]. Para. 4 sets out the medical care services that are exempt from VAT, whilst para. 5 explains the definition of medical care.[7]

In 2018 the Swedish Supreme Administrative Court decided in a case[8] that regarded the hiring out of medical staff. The Court's decision concerned the interpretation of the VAT exemption for hospital and medical care laid down in Article 132(1)(b) and (c) of the VAT Directive. The Swedish Supreme Administrative Court ruled that the hiring out of medical staff is to be regarded as a taxable service provided by a temporary-work agency and not as a service related to hospital or medical care and therefore exempt from VAT. The concept of "hiring out of medical staff", refers to a company that hires out its own medical staff, to other companies that are in need of medical staff. It is therefore important to look closely at the concepts of the hiring out services of a temporary-work agency and the hiring out in regards to medical staff.[9]

This interpretation has received many reactions and has raised many questions. Furthermore, the interpretation has been viewed as "narrower than before"[10], that Sweden has made its "own

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[1] Terra B.,Kajus J. (2021) "Introduction to European VAT", *Global topics IBFD,* Section 7.2.1.
[2] See for example judgement of the court (Sixth Chamber) 11 January 2001, Commission V France, C-76/99, ECLI:EU:C:2000:289, para. 23.
[3] Hereinafter VAT Directive.
[4] Terra B., Kajus J, Chapter 15. Exemptions.
[5] Rendahl P., Karlsson H. (2019) "Mervärdesskatt på sjukvård- en akut rättssäkerhetsfråga?", *Svensk skattetidning*, p. 257.
[6] Hereinafter Swedish VAT Act.
[7] Påhlsson R. (2015) "Momsfri sjukvård- en rättsvetenskaplig studie av EU-rätten och dess genomförande i svensk rätt", p. 140-141.
[8] See judgment of the Swedish Supreme Administrative Court, HFD 2018 ref. 41, case number; 7270-17.
[9] See section 3.5 for a further discussion in regard to the two concepts.
[10] See for example: Deloitte, "moms på sjukvård/social omsorg", Tax News/VAT, 2020/10/12, https://www2.deloitte.com/se/sv/pages/tax/articles/moms-sjukvard-social-omsorg.html, (accessed 2021/03/15).

interpretation of the exemption"[11] and the the interpretation is to be considered to entail a "highly restrictive interpretation of the exemption for medical care"[12]. In its judgments, the Court of Justice of European Union[13] has decided that the exemption for VAT can be applied at several levels, this entails that a service is exempt from VAT even if it is performed by a subcontractor.[14] Consequently, the Swedish interpretation has been questioned and it is unclear whether it is compatible or not with EU law. In the summer of 2019, the Swedish tax authorities started to apply the judgement of the Supreme Administrative Court by considering all the services of hiring out of medical staff as taxable services.

The problems that arise from this interpretation is that VAT is now levied on services that are essential for hospital and medical care operators, which will increase the cost of medical care. Furthermore, this interpretation is clearly putting private care operators in an unfair competition with public care operators since private operators cannot be compensated for the VAT paid whilst operators in the public sector have the possibility to be compensated.[15] It is interesting to see how this interpretation relates to the ongoing Covid-19 pandemic since medical care operators, not only in Sweden but worldwide, are already under pressure due to the critical situation. It is, moreover, of great importance for medical care operators to collaborate under these circumstances. A collaboration in this case could be in the form of hiring medical staff when needed. This interpretation, may therefore, stand in the way of this possibility.

This thesis intends to discuss the concept of hiring out according to the Swedish Supreme Administrative Court and see how it relates to the concept of medical care in regard to EU law. As mentioned above, the Swedish interpretation has received many opinions. Therefore, this thesis aims to summarize the ongoing Swedish discussion for a broader audience, as well as taking stand on the different opinions in that matter. Finally, The thesis will update the discussion by considering some aspects that have not been considered by the Swedish Supreme Administrative Court or other authors.

1.2 Aim

The Aim of this thesis is to analyse whether the Swedish interpretation of Article 132(1)(b) and (c) in regards to exemptions for medical care services, in particular the hiring of medical care staff, is in line with EU law as interpreted by the CJEU. In order to fulfill this purpose, the concept of medical care in the EU will be examined. This implies an analysis of the case law of the CJEU in that area. In addition to that, an analysis of the Swedish interpretation in the area will also be made, this includes the judgements reached by the Swedish Supreme Administrative

[11] See for example: Bergendahl, H., Edman, M., "Vårdemomsen- en sjuk skatt", *Dagens industri,* 2020/06/23, https://www.di.se/debatt/vardmomsen-en-sjuk-skatt/, (accessed 2021/03/15).
[12] Agrell J., Claesson I. & Frennberg E. (2020) "sjukvård eller personaluthyrning", *Skattenytt 2020,* p. 616.
[13] Hereinafter CJEU.
[14] See for example the judgement of the court (eighth Chamber) 8 October 2020, Finanzamt D, C- 657/19, ECLI:EU:C:2020:811.
[15] See further explanation in that regard in Section 4.2.

Court and its interpretation in regards to the hiring out of medical care staff. Consequently, the main question of the thesis is:

Is the Swedish interpretation of the hiring out services in regards to medical care in line with EU Law?

1.3 Method and Material

To fulfill the purpose of this thesis a legal dogmatic method has been used.[16] This entails that the basis of the analysis relies on a valid source of law. Articles of the VAT Directive are used, mainly Articles 131, 132(1)(b)(c) and (g), 133 and 134 together with judgments by the CJEU in regards to Articles 132(1)(b)(c) and (g) in order to obtain some guidance about the scope of the Articles at issue. Furthermore, literature in the area of VAT, written by experts such as Ben Terra, Eleonor Kristoffersson, Pernilla Rendahl is also used to receive a better understanding of the topic and to look at different experts' opinions. Reference has also been made to the Swedish Value Added Tax Act and preparatory work. Judgements from the Swedish Supreme Administrative Court have also been used in the thesis as well as many articles written by Swedish experts in regard to VAT on medical care in Sweden. Some Finnish sources have also been included in order to understand the finnish interpretation of the exemptions for medical care.

1.4 Delimitation

For the purpose of this thesis, only Article 132(1) letters (b) & (c) will be regarded which entails no further consideration of the remaining letters of the mentioned Article. However the (g) will also be taken into consideration in order to make an analogue application. The remaining letters, nevertheless, lay down exemptions for other activities in the public interest e.g. postal services, supply of human organs, blood and milk, dental services, education etc. A short presentation of the Articles 131, 133 and 134 will also be included in order to see the limitation and delegation rules set out by the Directive regarding medical care. The selection of case law from the CJEU is based on the most relevant cases for the purpose of this study, this entails cases that regard the scope of VAT exemptions in regards to the concept of medical care, especially Articles 132(1)(b) and (c) but also cases concerning Articles 132(1)(i) and (g). This means that cases from the CJEU that regard the remaining letters of the previously mentioned Article will not be included.
The selection of the Swedish case law is based on the cases that regard the hiring out of medical care staff only since it is the main purpose of this thesis. The focus will be made on the problem of hiring out exclusively. Therefore, no further consideration will be made to other services concerning medical care such as online services for medical care.

[16] Douma S.C.W. (2014) " Legal Research in International and EU Tax Law", *Wolters Kluwer,* p. 17-18.

1.5 Outline

In the first chapter of the thesis, a brief introduction of the subject is given, as well as a description of the aim, the method and material used in the thesis and finally a delimitation of the subject.

In the second chapter, a description of the EU law in regard to VAT exemptions of medical care is presented. This includes a presentation of the relevant Articles in the VAT Directive as well as case law from the CJEU.

In the Third chapter, the scope of the exemption for medical care in Sweden is presented. Followed by a discussion of the concept of hiring out of medical staff according to the judgments of the Swedish Supreme Administrative Court. Also, an explanation of the concepts of care company and temporary-work agency is given.

Chapter four of the thesis, gives an analysis of the Swedish interpretation and whether it is in line with EU law, its consequences and what can be done in order to mitigate these consequences.

The last Chapter consists of conclusions of the presented information and the analysis.

2 EU Law

2.1 Introduction

This chapter aims to present all the relevant Articles of the VAT Directive in order to look at the applicable law. Some general remarks in regard to the interpretation of exemptions mentioned, will be presented, followed by short comments in respect of neutrality in VAT and its importance. Finally, a presentation of the case law in the area will be made followed by a discussion of the most important takeaways.

2.1.1 Articles 131 and 132(1)(b) & (c) of the VAT Directive

Article 131 implies that the exemptions provided in Chapter 2 to 9 in the VAT Directive are to be applied without prejudice to other Community provisions and that Member States are allowed to lay down conditions in order to ensure that the exemptions are applied in a correct and straightforward means. In addition to that, Member States shall prevent any possible evasion, avoidance or abuse.

The exemption for hospital and medical care can be found in Article 132(1)(b) of the VAT Directive. This Article refers to certain criteria that the suppliers have to comply with.[17] Article 132(1)(b) reads as follows: "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". It must be noted that 'medical care' has no definition in the VAT Directive. It is also of great importance for the delimitation of the provision of medical care to know what is meant by 'closely related activities'.[18] However, there are judgments of the CJEU in regard to the concept of 'closely related activities'.[19]

Article 132(1)(c) lays down the exemption from medical care.[20] This provision is presented in the Directive as follows: "The provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned". Even in this provision it is unclear what the concept of 'medical care' is.[21] However, according to CJEU it seems to be a subset of the concept of medical care in the letter (b) of the same Article.[22] The main distinction between the exemption in Article 132(1)(b) and (c) is the place where the services are being provided. While Article 132(1)(b) covers all services that are supplied in a hospital environment,

[17] Terra B., Kajus J. (2021) Chapter 15. Exemptions, hospital and medical care.
[18] Påhlsson R. (2015) p. 34- 35.
[19] The Judgements will be discussed later in the thesis.
[20] Terra B., Kajus J. (2021) Chapter 15. Exemptions, medical care.
[21] Påhlsson R. (2015) p. 41.
[22] See for example judgment of the court (Fifth Chamber) 6 November 2003, Dornier, C-45/0, ECLI:EU:C:2003:595, para. 20.

Article 132(1)(c) covers the services that are provided outside hospitals. By that, it could be services provided at the private address of the care provider or at the patient's home or any other place.[23]

The Exemptions mentioned in Article 132(1) are "exemption for certain activities in the public interest".[24] The purpose behind this exemption is to reduce costs for medical care. Reducing the cost of healthcare leads to greater accessibility, which otherwise risks leading to major inequalities between the country's inhabitants depending on which part of the country you live in, or where you are in the country in the event of an emergency accident or illness. This is due to the fact that VAT is a consumption tax where its purpose is to burden the consumption.[25]

2.1.2 Article 133 of the VAT Directive

In Article 133, it is mentioned that "Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1)". The possibility of a delegation in this case is related to the conditions mentioned in the Article, where one or more of the conditions must be fulfilled. Moreover, the condition can be summarized in four categories; profit ban, voluntary work, price control and lack of distortion of competition. This entails that Article 133 regards the characteristics of such private bodies.[26] Furthermore, the delegation in the previously mentioned Article is only applicable to the concept of medical care in Article 132(1)(b) and not (c). Also, it must be noted that Article 133 is optional. This implies that Member States have the right to add one or more conditions to gain the exemption of VAT.[27] Furthermore, there is also a possibility for Member States to not implement all of the conditions in Article 133. However, the right to implement additional conditions is restricted. An unacceptable condition could be a membership in a certain association.[28] It must be noted that the restriction in this case relates to neutrality in VAT "which precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes".[29] Furthermore, neutrality in regard to competition is essential and must therefore be regarded in Article 133 since it imposes a restriction upon its application.

[23] Judgement of the court (Third Chamber) 8 June 2006, L.u.P., C-106/05, EU:C:2006:380, para. 22 and judgement of the court (Eighth Chamber) 2 July 2015, De Fruytier, C-334/14, EU:C:2015:437, para. 19.
[24] See the VAT Directive, Title IX, Chapter 2, Exemption for certain activities in the public interest.
[25] Rendahl P., Karlsson H. (2019) "Mervärdesskatt på sjukvård- en akut rättssäkerhetsfråga?", *Svensk skattetidning,* p. 257.
[26] Påhlsson R. (2015) p.37.
[27] Ibid., p.38.
[28] See judgment of the court (Sixth Chamber) 7 May 1998 Commission v Kingdom of Spain, C-124/96, ECLI:EU:C:1998:204.
[29] See for example L.u.P., C-106/05.

2.1.3 Article 134 of the VAT Directive

Article 134 lays down mandatory limitations.[30] It is of great importance to note that the limitations in this Article apply to 132(1)(b) and do not apply to (c). Moreover, the limitations refers to "supply that is not essential to the transactions exempted; and if its basic purpose is to obtain additional income for the organization by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax".

An example of a service that is not essential to the transaction could be the comfort services that a hospital provides in combination with the medical care in Joint C-394/04 Ygeia and C-395/04 Ypourgos. These kinds of services cannot be considered as essential to achieve the purpose of exempted medical care.[31] The provision in the letter (b) of the mentioned Article, could be interpreted in many ways. It is important to view the provision in the light of all the services and transactions in accordance with Article 132(1), regardless of by whom they were provided.[32] In regard to scope of the exemption in Article 132(1), Påhlsson means that Article 134 appears to be as a general clause, designed to emphasise that the definition of the tax-free area must be done with a great restriction.[33] This could be interpreted as meaning that the restriction in this area relates to the services provided by Article 132(1)(b) and not to (c).

2.2 Interpretation of the Exemptions under EU Law

The EU VAT system is based on two basic principles, the first one is the principle of VAT as a general indirect tax on consumption and the second is the principle of fiscal neutrality which is a consequence of that legal character.[34] In addition to these two fundamental principles, the CJEU in its case law, has developed various sub-principles. The principles of VAT uniformly, equality and elimination of distortion in competition, were developed as corollaries of the principle of fiscal neutrality, as well as the principle of the right to deduct. Moreover, the principle of VAT as a general consumption tax has also two corollaries; the principle of strict interpretation and the destination principle.[35] In regard to the CJEU interpretation of the exemptions, it can be that the fundamental principles have the role of interpretive aids.[36] De la Feria, However, is of the opinion that, it is because of the CJEU's stronger emphasis on fiscal neutrality in the interpretation that strict interpretation is of lesser emphasis.This entails that the Interpretation of

[30] Terra B., Kajus J. (2021) Chapter 15. Exemption, Exemption for certain activities in the public interest, limitations with regard to the exemptions.
[31] Joined judgment of the court (Third Chamber) 1 December 2005, C-394/04 Ygeia and C-395/04 Ypourgos, ECLI:EU:C:2005:734, para. 35.
[32] Påhlsson R. (2015) p.40.
[33] Ibid., p. 39.
[34] De la Feria R. (2015) "EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox", *SSRN,* p. 1.
[35] De la Feria R. (2015) p. 6.
[36] Ibid., p. 7.

the scope of VAT exemption is not solely based on strict interpretation of the legal provision anymore.[37]

According to AG Jacobs[38], VAT Exemptions should not be whittled away by interpretation, instead they should be interpreted in a way where they apply in relation to their intention (what they were intended to apply to) and no more. The AG further added that, "limitations on exemptions should not be interpreted narrowly, but nor should they be construed so as to go beyond their terms and that it is appropriate to consider the purpose of the relevant provisions in their context".[39]

2.3 Neutrality in VAT

It is not surprising that the CJEU refers to the principle of neutrality regularly in its judgements.[40] The principle is explicitly stated as a ground for European VAT in the preamble to the VAT Directive.[41] It is important to note that the preamble has a significant meaning in regard to the interpretation of the provisions of the Directive and it is usually referred to by the CJEU.[42] In its judgements, the CJEU has stated that the exemptions must be interpreted strictly "since they constitutes exceptions from the general principle that VAT is to be levied on all services supplied for consideration by a taxable person"[43]. This can be understood as an assertion that the tax system is neutral.[44]

An example of the importance of neutrality in VAT is stated in C-106/05 L.u.P. A case that concerned the refusal to exempt from VAT medical tests carried out by L.u.P GmbH for companies operating laboratories with which are connected to the general practitioners who prescribed those tests in the course of the care they provide.[45] The court stated here that an interpretation of Article 132(1)(b) meaning that such services are to be regarded as medical care would be consistent with the principle of fiscal neutrality, "which precludes treating similar

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[37] De la Feria R. (2015) p. 11, see also, Schulyok F. (2010) "The ECJ's interpretation of VAT exemptions", *InternationalVAT Monitor,* Comments.

[38] Opinion of Advocate General Jacobs delivered on 13 December 2001 in case London Zoological Society, C-267/00, ECLI:EU:C:2002:202.

[39] See opinion of AG Jacobs in London Zoological Society, C-267/00, para. 19.

[40] See for example judgment of the court (Second Chamber) 8 June 2000, Midland Bank, C-98/98, ECLI:EU:C:2000:300, judgement of the court (Sixth Chamber) 13 July 2000, Ideal tourism, C-36/99, ECLI:EU:C:2000:405, and judgment of the court (Sixth Chamber) 10 September 2002, Kügler, C-141/00, ECLI:EU:C:2002:473.

[41] See points 4, 5, 7, 20, 28, 30, 34 och 39 in the preamble of THE COUNCIL DIRECTIVE 2006/112/EC.

[42] See for example judgment of the court 12 July 1988, Direct Cosmetics, C-138/86 and C-139/86, ECLI:EU:C:1988:383, para. 23, judgment of the court 21 February 1989, Commission v Italy, C-203/87, ECLI:EU:C:1989:74, para. 9, judgment of the court (Sixth Chamber) 2 August 1993, Lange, C-111/92, ECLI:EU:C:1993:345, para. 20 and judgement of the court (Third Chamber) 6 October 2005, My Travel, C-291/03, ECLI:EU:C:2005:591, para. 33.

[43] See judgment of the court (Second Chamber) 13 July 2006, United Utilities, C-89/05, ECLI:EU:C:2006:469, para.21, See inter alia, judgement of the court (Fifth Chamber) 5 June 1997, SDC, C-2/95, ECLI:EU:C:1997:278, para. 20 and judgment of the court (First Chamber) 3 March 2005, Arthur Andersen, C-472/03, ECLI:EU:C:2005:135, para. 24.

[44] Påhlsson R. (2015) p.54.

[45] Case L.u.P, C-106/05, para. 2.

supplies of services, which are thus in competition with each other, differently for VAT purposes". The court also added that "It would be contrary to that principle to make medical tests prescribed by general practitioners subject to a different VAT scheme depending on where they are carried out when they are equivalent from a qualitative point of view in the light of the professional qualifications of the service providers in question".[46]

Moreover, the significance of neutrality appears again when discussing Article 132(1)(c). In joined cases C-443/04 Solleveld and C-444/04 van Eijnsbergen it was mentioned that Article 132(1)(c) is to be "interpreted as meaning that it confers on the Member States the discretion to define the paramedical professions and the medical care coming within the scope of such professions for the purpose of the exemption laid down by that provision".[47] However, this discretion is not unlimited,[48] since it must be exercised by taking into account the objective criteria of quality in regard to the professional training of the providers and the principle of fiscal neutrality.[49]

2.4 Judgments of the CJEU

This section intends to discuss cases from the CJEU in regard to Article 132(1)(b)(c) and (g). The purpose of this presentation is to gain a better understanding of the reasoning of the court in respect of the previously mentioned Article, its scope and interpretation.

2.4.1 Article 132(1)(b)

Case CopyGene C-262/08, concerned the interpretation of Article 132(1)(b). The services at issue in the case consisted of collection, transportation, analysis and storage of blood from the umbilical cord for the purposes of using stem cells from that blood for future treatments.[50] In this case the court looked at the nature of the services provided and stated that the services provided by CopyGene seek only to ensure that a particular resource will be available for medical treatment in the uncertain event that it becomes necessary. The services, however, did not constitute activities seeking to avert, avoid or prevent disease, injury or health problems, or to detect latent or incipient conditions. Therefore the activities in this case "could not be regarded as being, by themselves, preventive".[51] Case C-86/09 Future Health Technologies, regarded similar circumstances and the same judgement was reached by the court.

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[46] Case L.u.P, C-106/05, para. 32, see also, judgment of the court (Fifth Chamber) 23 October 2003, Commission v Germany, C-109/02, ECLI:EU:C:2003:586, para. 20; and judgment of the court (Third Chamber) 26 May 2005, Kingscrest Associates and Montecello, C-498/03, ECLI:EU:C:2005:322, para. 54, judgment of the court (Fifth Chamber) of 6 November 2003, Dornier, C-45/01, ECLI:EU:C:2003:595, para. 49; and judgement of the court (Third Chamber) 27 April 2006, Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paras. 40 and 41.

[47] Joined C-443/04 Solleveld and C-444/04 van Eijnsbergen, paras.29-30.

[48] Ibid., para. 31.

[49] Ibid., para. 37.

[50] Judgement of the court (Third Chamber) 10 June 2010, copyGene, C-262/08, ECLI:EU:C:2010:328, para. 2.

[51] Ibid., para. 36.

In Commission v France C-76/99, the court further emphasized what activities are covered by Article 132(1)(b). The services in this case concerned the taking of samples for medical analysis and whether it falls under the exemption in Article 132(1)(b). The court pointed out in that regard, that the interpretation of the concept of 'closely related activities', does not call for 'specially narrow interpretation'. This interpretation depends on the fact that "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".[52]

The concept of closely related activities was also discussed in case Klinikum Dortmund C-366/12. The case concerned the use of cytostatics drugs prepared in its hospital pharmacy, and provided for outpatient care, and whether it was exempt from VAT under Article 132(1)(c) or not. The outpatient care, in this case, was provided by doctors working in an independent capacity in the hospital managed by it.[53] The court stated in this matter that "the wording of Article 132(1)(c) does not contain any reference to activities closely linked to the provision of medical care, despite the fact that that provision immediately follows that of Article 132(1)(b). It must therefore be concluded that, in principle, that article does not refer to activities closely linked to the provision of medical care and that that concept is not relevant to the interpretation of Article 132(1)(c) of the Sixth Directive".[54] The court further added; as for the possibility of exempting a supply of services under Article 132(1)(c), "apart from the minor provisions of goods which are 'strictly necessary' at the time when the care is provided, the supply of drugs and other goods is physically and economically dissociable from the provision of the service and cannot therefore be exempted under Article 13A(1)(c)".[55]

Moreover, in joined cases C-394/04 Ygeia and C-395/04 Ypourgos the court discusses another example of activities closely related to hospital and medical care, exempt in accordance with Article 132(1)(b). The court stated 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". This entails that "only such services are of a nature to influence the cost of healthcare which is made accessible to individuals by the exemption in question".[56] Furthermore, in order for such services to be exempt, they must be essential to the exempted transactions.[57]

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[52] Case Commission V France, C-76/99, para. 23.
[53] Judgement of the court (Third Chamber) 13 March 2014, Klinikum Dortmund, C-366/12, ECLI:EU:C:2014:143, para. 20.
[54] Ibid., para. 32.
[55] Ibid., para. 33, see, to that effect, case Commission v United Kingdom, C-353/85, [1988] ECR 817, para. 33.
[56] Judgment of the court (Third Chamber) 1 December 2005, joined C-394/04 Ygeia and C-395/04 Ypourgos, ECLI:EU:C:2005:734, para. 25.
[57] Ibid., para. 26.

2.4.2 Article 132(1)(c)

Case Unterpertinger C-212/01, regards the interpretation of the exemptions in Article 132(1)(c). The services at issue were provided by doctors where they make expert reports on a person's state of health.[58] The court held that the purpose of the exemption in Article 132(1)(c) is not "to exempt all the services which may be affected in the exercise of the medical and paramedical professions, but only the provision of 'medical care' which constitutes an independent concept of community law".[59] Furthermore, it was also mentioned that "seeking to extend the scope of the exemption under Article 13A(1)(c) to all the activities normally included in the functions of doctors must therefore be rejected".[60] The court refers to the AG Stix-Hackl's opinion, paras. 66-68, where the AG pointed out that in order to determine whether a service is exempt or not, the purpose of that service must be examined. Which entails that the service's principal purpose must be "the protection, including the maintenance or restoration, of health".[61]

Similar circumstances are illustrated in case D. C-384/98. Where it discusses the services of a medical expert, whose job is to establish, on the basis of a genetic test, whether the plaintiff in main proceedings could be the child of the defendant. The Court stated that "the exemption in Article 132(1)(c) does not apply to services consisting, not in providing care to persons by diagnosing and treating a disease or any other health disorder, but in establishing the genetic affinity of individuals through biological tests".[62] This case entails that genetic testing did not qualify as medical care according to letter (c).

In d'Ambrumenil C-307/01, the question regarded various supplies of services,[63] and the criteria for the construction of Article 132(1)(c) to enable the determination of the VAT treatment in regard to these various services, which can be provided in the exercise of the medical profession.[64] The court refers to the fact that the exemptions set out in Article 132(1) are to be interpreted strictly.[65] It also follows that the purpose of such service must be to protect, remain or restore human health, in order to benefit from the exemption. It is the 'principal purpose' of the service that must be examined.[66]

Additionally, the legal form of the provider of the service, is also an aspect that has been regarded by the CJEU. The question was raised in case Kügler C-141/00, regarding the charging of VAT at a reduced rate on outpatient care provided by the company (Kügler). In this case, the court argued that Article 132(1)(c) defines the exempt transactions by referring to their nature

[58] Judgement of the court (Fifth Chamber) 20 November 2003, Unterpertinger, C-212/01, ECLI:EU:C:2003:625, para.1.
[59] Ibid., para. 35.
[60] Ibid., para.37.
[61] Ibid., para. 42.
[62] Judgment of the court (Fifth Chamber) 14 September 2000, D., C-384/98, ECLI:EU:C:2000:444, para.22.
[63] Judgement of the court (Fifth Chamber) 20 November 2003, d'Ambrumenil, C-307/01, ECLI:EU:C:2003:627, para.2.
[64] Ibid., para. 16.
[65] Ibid., para. 52.
[66] Ibid., paras. 59-60.

and not the legal form of the person supplying them. This can also be concluded on a literal interpretation of the provision.[67] There are two conditions that must be satisfied; medical services must be involved and they must be supplied by persons who possess the necessary professional qualifications".[68] Furthermore, the court also stated that the exemption of medical services supplied by legal persons is consistent with the purpose of the exemption (to reduce the costs of medical care) and also consistent with the principle of neutrality, the provision discussed would be in breach of the principle of neutrality if its application was dependent on the the legal from of the person supply the services.[69] In case Dornier C-45/01, regarded the VAT treatment of psychotherapeutic treatment provided by Dornier.[70] Even in this question, the legal form of the provider was discussed. The Court referred to the principle of neutrality inherent in the common system of VAT and also "to the fact that the same treatment could have been provided on a tax-exempt basis by psychotherapists employed by Dornier if they had provided it not as employees but as self-employed taxable persons".[71]

C-700/17 Peters, is one of the latest cases concerning the interpretation of Article 132(1)(c). The cases concerned the application of the medical exemption to medical laboratory and assistance services that are performed by an individual practitioner to a laboratory company.[72] The court referred to 'De Fruytier C-334/14', and stated that the distinction between the exemption in 132(1)(b) and (c) is mainly the place where the relevant services are being provided and not the nature of the services.[73] Further, the court stated here that it is not apparent from the wording of 132(1)(b) that the provision is intended to limit the scope of 132(1)(c). In addition to that, it would be "contrary to the principle of fiscal neutrality to make medical tests prescribed by general practitioners subject to a different VAT scheme depending on where they are carried out when they are equivalent from a qualitative point of view in the light of the professional qualifications of the service providers in question".[74]

2.4.3 An analogue application of Article 132(1)(g)

Case Finanzamt D C-657/19, concerned a nurse that prepared expert opinions for the Health Insurance Medical Service (MDK). The nurse provided the service as an expert subcontractor of MDK and her services were not seen as exempt from VAT in accordance with Article 132(1)(g) by the German tax authorities.[75] The court, again, stated that "exemptions provided in article 132(1) of Directive 2006/112 must be interpreted strictly, this should not deprive them from their

[67] Case Kügler, C-141/00, paras. 26- 27.
[68] Ibid., para. 27.
[69] Ibid., paras. 29-30.
[70] Case Dornier, C-45/01, para. 2.
[71] Ibid., para. 18.
[72] Judgement of the court (Sixth Chamber) 18 September 2019, Peters, C-700/17, ECLI:EU:C:2019:753, paras. 7-16.
[73] Ibid., para. 20.
[74] Ibid., paras. 21-30.
[75] Case Finanzamt D, C-657/19, para. 2.

effects and objectives nor infringe the principle of fiscal neutrality.[76] Furthermore, the court established that for social welfare matters the service must be essential for the performance of such activities and the reports prepared by the expert nurse in this case satisfy this condition.[77] Moreover, the court implied that it is not necessary for welfare services to be performed directly by the persons carrying out the social activities and that levying VAT on these services would increase their cost and that it would be contrary to its purpose.[78]

2.5 Remarks on The EU Interpretation

It must be noted here that the CJEU takes into consideration many aspects in regard to the interpretation of the VAT exemptions in Article 132(1)(b) and (c). Further, some discretion is given to Member States in order to assure a correct and straightforward application of the VAT exemptions. An example is the possibility for Member States to define the context of which medical care is exempt from VAT in accordance with Article 132(1)(c). The discretion given to the Member states is based on the common principles of loyalty and to ensure the effects of EU law at a national level.[79] This discretion is however limited since all member states are obliged to strict interpretation in respect of VAT exemptions. It must be borne in mind, however, that the strict interpretation cannot deprive the exemptions from their intended meaning and scope, nor infringe the principle of fiscal neutrality. This conclusion was reached in many judgments of the CJEU, amongst them are the case d'Ambrumenil and Finanzamt D.

The next aspect is neutrality which is also an important element. It is important that two services in competition with each other receive the same treatment. In case Peters, the court stated that it would be contrary to the principle of fiscal neutrality to make medical tests prescribed by general practitioners subject to a different VAT scheme depending on where they are carried out since they are similar, from a qualitative point of view in the light of the professional qualifications of the service providers in questions. It can, therefore, be concluded that it is of great importance for Member States to regard the strict interpretation of the exemptions and neutrality when interpreting in order to comply with EU law in that area. The strict interpretation, nevertheless, shall never deprive the exemptions from their meaning.

Concerning the interpretation of medical care in Articles 132(1)(b) and (c) there are additional aspects that must be regarded as well. Starting with Article 132(1)(b), it was stated in case CopyGene that the services must "constitute activities seeking to avert, avoid or prevent disease, injury or health problems, or to detect latent or incipient conditions". Which entails that services cannot be exempt from VAT, in accordance with Article 132(1)(b), unless they constitute one of the above mentioned criteria. In Commission v France the court discussed what services are to be

[76] Case Finanzamt D, C-657/19, para. 28.
[77] Ibid., para. 34.
[78] Ibid., para. 35.
[79] Kristoffersson E., Rendahl P. (2019) " Textbook on EU VAT", *iUSTUS,* 2nd ed, p. 138.

considered as closely related activities in Article 132(1)(b). Here it was stated that the concept "does not call for specially narrow interpretation since the exemption is designed to ensure that the benefits flowing from such care are not hindered by the increased costs in case it would be subject to VAT". This entails that the purpose of the exemptions is an essential aspect that must be regarded when interpreting. It also seems that the intention of the exemption is to ensure that the benefits of the medical care are not hindered, in terms of increasing its costs. In Joined cases Ygeia and Ypourgos, the court added that only the supply of services which are logically part of the provision of hospital and medical care, constitutes an indispensable stage in the process of the supply of those services to achieve the meaning of that provision. This could be interpreted as meaning that the service must be essential and of high importance to the supply in order to be exempt. Furthermore, in Klinikum Dortmund, the court established that Article 132(1)(c) does not refer to activities closely linked to the provision of medical care and that this concept is not relevant to its interpretation.

Regarding Article 132(1)(c), it was pointed out in case Unterpertinger that Article 132(1)(c) only refers to services affected in the provision of medical care and that seeking to extend the scope of the exemption to all the activities normally included in the functions of doctors must be rejected. Further, the purpose of the service must be examined and it must be to ensure "the protection, including the maintenance or restoration, of health". Also in case d'Ambrumenil, it was mentioned that the purpose of such services must be to protect, remain or restore human health. In case D. the court stated that the exemption does not apply to a service that consists in not providing care to persons by diagnosing and treating a disease or any other health disorder. Therefore it can be concluded here that the purpose of the service at issue is important in order to determine whether it can be exempted from VAT or not. The services at issue must also aim to protect, remain or restore human health.

As regards Article 132(1)(c), the legal form of the provider of the service has been discussed in a number of cases by the CJEU. In that matter, the court established that the exemptions in Article 132(1)(c) are defined by referring to their nature and not the legal form of the person supplying them. However, two conditions must be satisfied; medical services must be involved and they must be supplied by persons who possess the necessary professional qualifications. The court also referred to the purpose of the exemption and stated that the purpose must be taken into account even if the provider is a legal person. Neutrality was also mentioned by the court, both in Kugler and Dornier, where it was said that the provision would be in breach of the principle of neutrality if it was dependent on the legal form.

Finally, in regard to Article 132(1)(g), the court stated in Finanzamt D that it is not necessary for welfare services to be performed directly by the persons carrying out the activities and that levying VAT on these services would increase their cost and would be contrary to the purpose.

3 The concept of hiring out of medical staff in Sweden

3.1 Introduction

This chapter intends to present the corresponding provision in the Swedish law concerning the VAT exemptions for medical care and to clarify the scope of the exemption in Sweden, as well as a brief explanation concerning the concept of hiring out in preparatory works. This is followed by the judgements of the Swedish Supreme Administrative Court in that regard. In addition, a discussion about the concepts of care company and temporary-work agency will be made in order to gain a better understanding of the difference between the two concepts. Finally, a discussion about the Swedish interpretation is to be made at the end of the chapter.

3.2 Article 132(1)(b) & (c) in the Swedish Value Added Tax Act

According to Chapter 3, Para. 4, section 1 of the Swedsih VAT Act, services that constitute medical care and services of other kinds and the goods that the person providing the care sells as part of the care, are to be considered as VAT exempt. Furthermore, by healthcare it is meant, according to Chapter 3, Para. 5, section 1 of the Swedish VAT Act, “measures to medically prevent, investigate or treat e.g. diseases and injuries, provided that either the measures are taken at a hospital or at other institution run by the public or, in private activities, at inpatient facilities or that the measures are otherwise taken by someone with special credentials to practice a profession in healthcare”.

3.3 The Scope of the exemption in the Swedish law

Previous to the judgement of the Swedish Supreme Administrative Court made in 2018 there was no case law from the court regarding the provisions on VAT exemption for healthcare and whether they should be interpreted as meaning that the activities of hiring out of medical care staff can be exempted. However, the Swedish Tax Authorities have stated that in its application of the provisions, it has always considered that such services are exempt due to statements in the preparatory work for the Swedish VAT Act.

3.3.1 Preparatory works

The now repealed VAT Act (1968: 430) contained an explicit provision stating that the medical care exemption also covered a service performed by someone on behalf of a care provider, considering that the service would have been exempt from VAT if it had been provided to the care recipient directly by the provider of the service. In the preparatory work for this particular provision, it was stated that the service which the provider sells to the client company could be regarded as hiring out of labor. However, the decisive factor in this case would be that the client company's use of the labor constituted a health care service and that the service provider would

have been regarded as a care provider if he himself had sold the service directly to the care recipient.[80]

As mentioned above, this provision no longer exists and there is no corresponding provision in the current Swedish VAT Act. In the preparatory work for the new VAT Act, however, it was stated that the exemption for medical care was formulated so that it would be applicable regardless of the level or by whom the service was actually provided as long as the service referred to such services as specified in the regulations. The fact that the service was actually performed by someone other than the person in whose care the care was provided would thus not mean that the service becomes taxable.[81]

3.4 The Judgments of the Supreme Administrative Court

The 7th of June 2018 the Swedish Supreme Administrative Court announced a very vital judgment that came to change the interpretation of the VAT exemption in regards to hospital and medical care. By its judgment, the court established that the hiring out of medical staff is to be regarded as a taxable service and not as an exempt medical service. Due to this interpretation of the court, the Swedish tax authorities published a new standpoint of the interpretation, in which it explained the new scope of the VAT exemption regarding medical care services.[82]

3.4.1 Medcura AB[83]

Medcura AB is a company that recruits and hires out its medical staff to private and public healthcare providers. The hiring out includes everything from individual substitutes to staffing an entire department, units or operations teams. The company wanted to find out whether its hiring of doctors to an alarm center is exempt from VAT. The company considered the hiring out to be covered by the exemption for medical care services because the services that the hired staff perform in the company's opinion are to be assessed as medical care. The Council for Advanced Tax Ruling[84] found that the hiring out is not covered by an exemption from tax liability. Further it explained that some of the services performed by the hired doctors can admittedly be characterized as medical care services that could be covered by the VAT exemption. However, this was irrelevant because the service provided by the company is a taxable hiring out service. The cases regarded two types of services where the first type is provided by doctors and the second provided by medical managers.

[80] Proposition 1991/92:122, p. 8.
[81] Proposition 1993/94: 99, p. 151.
[82] Agrell J., Claesson I. & Frennberg E. (2020) “sjukvård eller personaluthyrning”, *Skattenytt 2020,* p. 615.
[83] HFD 2018 ref. 41, Case number: 7270-17.
[84] The Council for Advanced Tax Ruling is an authority under the Ministry of Finance that issues binding advance rulings in tax matters in Sweden (Skatterättsnämnden).

The Supreme Administrative Court upheld the judgement made by the Council for Advanced Tax Ruling and stated that the hiring out services provided by Medcura AB are to be regarded as taxable. The court started by stating that the hired doctors, among other things, make a diagnosis of the patient, prioritise how the ambulance staff should carry out their work and decide what efforts should be made. Such services were found to be covered by the definition of what is meant by medical care in chapter 3, paragraph 5 of the Swedish VAT Act.

With regard to the services provided by the medical manager, consisting of e.g. follow-up, evaluation and improvement of the medical quality of the business as well as participating and supporting the medical decision making process, these services were not found to constitute medical care services according to Chapter 3, Paragraph 5.[85] These services have an independent value for the client, are priced separately, and in the opinion of the Council for Advanced Tax Ruling are not to be considered in any other way subordinate to the medical care provided by the hired doctors who serve as SOS doctors.

The court concluded that the services that the hired doctors perform to some extent can be characterized as medical care in accordance with Chapter 3, Paragraph 5. However, the company's hiring out of licensed doctors to the client in the opinion of the court must be considered as a hiring out service by a temporary-work agency as was decided in case "go fair"[86] and “Horizon College”[87]. In the present case it is not a question in regard to the services provided by doctors within the framework of the agreement with the client, but the services provided by the company whereby the doctors are made available to the client. The company's hiring out services, of both doctors and medical managers, can therefore not be covered by the VAT exemption according to Chapter 3, Paragraphs 4 and 5 of the Swedish Value Added Tax Act.

In the opinion of the Swedish Supreme Administrative Court, it is not clear that the statements in the preparatory work, should be understood as meaning that the current healthcare exemption in the VAT Act is intended to be applicable to a temporary-work agency's hiring out of medical care staff. Moreover, the Swedish court further explained that it is first of all the content of the underlying VAT directive that must be considered and not statements in the preparatory work that gives guidance for the interpretation. It must therefore be examined what guidance can be drawn from the Directive and from the case law of the European Court of Justice on the current issue.[88] Consequently, the Swedish court decided to refer to the cases, go fair and Horizon College, in order to receive guidance and chose to disregard the statements in the preparatory work.

[85] See cases RÅ 2007 ref. 88, case number: 6957-06; and HFD 2011 note. 11, case number: 5772-10.
[86] Judgement of the court (Ninth Chamber) 12 March 2015, go fair, C-594/13, EU:C:2015:164.
[87] Judgement of the court (Third Chamber) 14 June 2007, Horizon College, C-434/05, EU:C:2007:343.
[88] See HFD 2018 ref. 41, case number: 7270-17.

3.4.2 The Judgements of the 5th of February 2020

Case Medicalmo AB[89], regarded a consulting company that provides specialist doctors to a private care company that runs a hospital on behalf of a region. Medicalmo AB applied for preliminary ruling and asked the question whether these services are to be regarded as medical care services or only hiring out services by temporary-work agencies. The court referred to case Medcura AB and the same case law from the CJEU (go fair and Horizon College). Also in this case the court stated the hired out doctors in this case are part of the client company's organizations and that it is essential that the provider of the service has the overall responsibility for deciding which tasks are to be performed. Furthermore, in this case, the provider of the service performs his assignment in accordance with the client's company's instructions. Therefore in this case it was found that the services provided by Medicalmo AB constitutes hiring out services that are taxable.

Klara T AB[90] is a company that provides nurses for various nursing homes. The nurses provided healthcare to the nursing homes. The company also asked whether its hiring out of nurses is to be considered as exempt or not. The company further asked whether the assessment is affected by the fact that the compensation for the services is paid not only with a fixed amount per month but also with additional amount that is based on the time of the work performed. The court used, once again, the same reasoning for the previous cases and claimed that the services are regarded as hiring out services by temporary-work agencies and therefore taxable. Furthermore, case number: 3477-19 regarded a number of medical care companies that intended to enter into assignment agreements to, through their employed licensed doctors, provide services to a private medical care provider that has undertaken to provide medical care services to patients via a digital platform. Even in this case, the same conclusion was reached by the Swedish court. Finally, in Attendo Sverige AB[91], the court also decided that the hiring out services provided by Attendo Sverige AB must be regarded as taxable and not as exempt medical services. This was decided in spite of the fact the company in this case conducts activities in elderly care and it intends to, through its licensed nurses, provide services to other companies active in elderly care or home care. The court, in this case, referred to Article 134(b) and stated the exemption cannot be granted if the purpose of the activity carried out is to obtain additional income.

It must be noted that in all of these cases the Swedish Supreme Administrative Court decided to not refer the question for preliminary ruling to the CJEU and stated that for the assessment in the present case, there is sufficient guidance from the CJEU to be applied.

[89] HFD 2020 ref. 5, case number: 3478-19.
[90] 2020 not. 3, case number: 3447-19.
[91] 2020 not. 3, case number: 4431-19.

3.4.3 Dissenting opinions[92]

Judge Fored, in Medcura AB, had a dissenting opinion and stated that the hiring out of licensed doctors does not constitute a taxable service but is covered by the exemption in Chapter 3, Para. 5 of the Swedish VAT Act. He further added that the regulation in Chapter 3, Para. 5 of the Swedish VAT Act corresponds to Article 132(1)(c) of the VAT Directive which states "Medical care provided by medical or paramedical professionals as defined by the Member State concerned". In case Kügler, the CJEU examined whether the exemption from VAT referred to in Article 132(1)(c) depends on the legal form of the taxpayer. The CJEU ruled that the exemption in Article 132(1)(c) does not depend on the legal form of the taxpayer who provides the medical or paramedical services mentioned there.[93] The judgment in 'go fair', referred to by the court, concerns the interpretation of Article 132(1)(g) of the VAT Directive and cannot be used as a basis for interpreting the meaning of Article 132(1)(c).

In Medicalmo AB, Judges Fored and Sandberg Nilsson had dissenting opinions. They are of the opinion that the services at issue are to be interpreted as meaning medical care services within the meaning of Article 132(1)(c) and therefore the interpretation of the services cannot be limited by the limitations rules laid down in Article 134 since the Article only applies to 132(1)(b). They also refer to the fact that exemptions are to be interpreted strictly but that the requirements of strict interpretation "does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive the exemptions of their intended effect".[94]

In Attendo AB, Judge Fored had a dissenting opinion and once again added that Chapter 3, Paragraphs 4 and 5 corresponds to Article 132(1)(c) of the VAT Directive. Therefore, Article 134 cannot be applied in this case since it only refers to Article 132(1)(b). He further stated that the difference between Article 132(1)(b) and (c) is that (b) regards the place of where the medical care has been provided and (c) regarded by whom the care has been provided and that it has to be "in the exercise of the medical and paramedical professions". Moreover he added that according to the case law of the CJEU, if the two criteria are fulfilled, namely the services in question are medical care services and are provided by persons that have the medical and paramedical professions required by the Member State, then the service is to be regarded as exempt.[95] This entails that the services at issue, fulfill these requirements and must therefore be regarded as exempted medical service in accordance with Article 132(1)(c) meaning that Article 134(b) cannot be applied.

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[92] A dissenting opinion arises in case one of the judges does not share the same opinion and has reached a different judgement.
[93] See case Kugler, C-141/00, para. 31.
[94] Case Horizon College, C- 434/05 para.16, see, to that effect, judgement of the court (First Chamber) 18 November 2004, Temco Europe, C-284/03, [2004] ECR I-11237, para. 17.
[95] See case Kügler, C-141/00, para. 27.

3.5 Care company or temporary-work agency?

It can be concluded from the above mentioned cases that the first case regarded a company that does not carry out medical care, but it only hires out its staff (medical staff) to private and public healthcare providers. The other decisions concerned also situations where care companies (that carry out medical care) undertook to provide various forms of medical services using their own medical staff. For example incase number: 3477-19, where the company as well as hiring out its own medical staff, it was also engaged in medical care meaning that the company's intention is not to solely, hire out medical staff. It is clear from the judgments that the Swedish Supreme Administrative Court did not differentiate between these two situations.

In order to determine the scope of the exemption for medical care, it might be of interest to investigate what is meant by a temporary-work agency, as stated by the Swedish Supreme Administrative Court, and a care company.[96] Starting with the temporary-work agency and its definition- according to "Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work" and "the Swedish Act (2012:854) on the hiring of workers"; "temporary-work agency means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction".[97]

A care company, on the other hand, does not normally have the purpose of hiring staff. The care company's purpose is instead to provide healthcare services by employing staff that perform healthcare services within the framework of its own identification. A care company is subject to medical law legislation and thereby has a medical law responsibility and acts as a care provider.[98]

To clarify the difference between a temporary-work agency and a care company in respect of medical care, a distinction must be made between the characteristics of the service provided by the two types mentioned above from the client's point of view. A client contacting a temporary-work agency is usually in need of resources in the form of workers. This entails that there are no further requirements in regard to who these workers are. When the workers later arrive, it is up to the client to describe their tasks, make and adjust their schedules. When a client, on the other hand, is in need of medical care staff, he contacts a care company that is registered as a care provider and is therefore responsible for the medical care provided by its staff. It can be said here that the client in this case is requiring specific services that the care company undertakes to provide. Consequently, it can be concluded that there is a difference between

[96] Agrell J., Claesson I. & Frennberg E. (2020) "sjukvård eller personaluthyrning", *Skattenytt 2020,* p. 622.
[97] Article 3(1) b of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.
[98] See some of the Swedish legislations that a care company must follow: Hälso- och sjukvårdslagen (2017:30), patientsäkerhetslagen (2010:659), patientlagen (1967:837), patientsäkerhetsförordningen (2010:1369), lagen (2017:372) om stöd vid klagomål mot hälso- och sjukvården, patientdatalagen (2008:355).

services provided by a temporary-work agency and a company that intends to hire out medical staff. [99] Therefore, there is yet another reason to question the interpretation of the Swedish court.

3.6 Remarks on The Swedish interpretation

The Swedish VAT Act is formulated, in the preparatory work, in a way where, regardless of the level or by whom the service is actually provided, it is to be included in the exemption for medical care. However, the Swedish Supreme Administrative Court decided that the guidance must be retrieved from the VAT Directive and case law from the CJEU.[100] In its interpretation, the Swedish Supreme Administrative Court referred to Horizon College[101], the case regarded whether the hiring out of teachers is to be considered as exempted from VAT in accordance with Article 132(1)(i). Horizon College was an educational establishment that made some of its own teachers available to other educational establishments.[102] A contract was concluded and it was up to the host establishment to define the duties of the teacher concerned.[103] In this case, the CJEU decided that "the making available of a teacher to the host establishment, cannot be regarded, of itself, as an activity capable of being covered by the term 'education' within the meaning of Article 132(1)(i)". The court also added that this interpretation was not affected by the fact that the body that makes the teacher available, to the host establishment, is an educational establishment for the purposes of Article 132(1)(i).[104]

In addition, the Swedish court also made reference to "go fair"[105]. Go fair was a business in the form of general partnership with the intention to contract out labour.[106] The employers were nurses and geriatric nursing assistants hired out to inpatient and outpatient care establishments. The question regarded whether these services are to be considered as exempted in accordance with Article 132(1)(g). In that regard the CJEU stated that the staff of a temporary-work agency cannot be considered as carrying out an economic activity independently within the meaning of the VAT Directive and therefore cannot be exempt.[107] This entails that the exemption is tested against the hiring out services provided by the temporary-work agency and not against the services that the nurses are providing.

With that being said, it is clear that the Swedish court is relying on these two interpretations of the CJEU in its own interpretation, meaning that it is the hiring out service that must be tested

[99] See Agrell J., Claesson I. & Frennberg E. (2020) "sjukvård eller personaluthyrning", *Skattenytt 2020,* p. 616.
[100] Case HFD 2018. ref. 41, Case number: 7270-17.
[101] Case Horizon College, C-434/05.
[102] Ibid., para. 6.
[103] Ibid., para. 7.
[104] Ibid., paras. 22-23.
[105] Case go fair, C- 594/13.
[106] Ibid., para. 10.
[107] Ibid., paras. 23-24.

against the exemptions in Article 132(1). Consequently, the services at issue cannot be seen as medical care in accordance with Articles 132(1)(b) and (c).

Furthermore, the Swedish court discussed whether the services can be regarded as essential to the exempted transaction and therefore exempt as well. The Swedsih court referred to the CJEU judgements in Horizon College where it was stated that the hiring out of teachers form one educational establishment to another, is an activity that can be described as closely related and therefore exempt "both the principal activity of education and the supply of goods or services which are closely related to that activity must be provided by one of the bodies referred to in Article 13A(1)(i) of the Sixth Directive".[108] The Swedish court stated here that if the company that is hiring out medical staff to care companies, also carries out a care company, its services can be exempt in accordance with the judgement of the CJEU. However, in mål nr 3477-19 and Attendo AB, were the companies did carry out medical services, the court referred to Article 134(b) of the VAT Directive and recalled that exemption from VAT cannot be granted if the purpose of the supply is to obtain additional income and that it is not given that these companies has another purpose then obtaining additional income.

In this regard, there have been a number of dissenting opinions from Swedish judges. In all of the cases the dissenting opinions have mostly referred to the same thing. The most important one is that the exemption in this case must be viewed in the light of Article 132(1)(c) and not (b). This depends on the fact that the two criteria in order to apply Article 132(1)(c) in this case are fulfilled; the service at issue must be a medical service and it must be provided by a person that satisfies the medical and paramedical professions set out by the Member State in regard to that Article. Furthermore, it is not required for the medical care to be provided by a taxable person with specific legal form in order for the medical care to be exempted, this is in accordance with the judgement in case Kügler. Therefore all the requirements in order to apply Article 132(c), in the cases mentioned above, are fulfilled. This depends on the fact that all the cases have regarded medical care services and the provider of the services are persons that satisfy the medical and paramedical professions set out by Sweden (doctors and nurses). In this case it becomes apparent that Article 134(b) cannot be applied since it does not refer to Article 132(1)(c) and therefore there is no limitation.

It is essential for the discussion to clarify the difference between a temporary-work agency and a care company. First of all, a care company has to follow many medical law legislations and has to register as a care provider. This entails that a company that provides medical care services, even in the form of hiring out medical staff, is obliged to take responsibility for the services provided by its staff. Second of all, this difference must be looked at from the point of view of the client. A client who is in need of medical staff is asking for a specific service that the care company undertakes to provide where medical staff act under their own control and legitimacy.

[108] Case Horizon College, C-434/05, paras. 30 and 34.

The circumstances differ when it is a normal temporary-work agency since the clients often define the tasks of the hired staff which entails that they do not act under their own control and legitimacy the same way medical staff do. In this case the difference is that, a care company is obliged to medical law legislations and is responsible for the services it offers. This entails an additional responsibility taken by a care company beside offering services. Which is not a thing that a temporary-work agency regards. Furthermore, the hired staff of a care company act under their own legitimacy since they are doctors or nurses that carry out their tasks without intervention of the client company that hires them in.

Finally, it is important to point out the significance of the difference between a care company and a temporary-work agency. As mentioned above, the difference depends mostly on the responsibility that a care company undertakes when hiring out and the fact that its hired staff act under their own control and legitimacy. These circumstances have never been regarded in the cases that the Swedish court referred to (go fair and Horizon College). Therefore, it becomes important for the discussion to identify the difference and argue whether these two cases can justify the judgement of the Swedish court.

4 The Swedish Interpretation v EU Law

4.1 Introduction

This part intends to discuss whether the Swedish interpretation is in line with VAT Directive and interpretation made by CJEU in the cases mentioned above. The discussion focuses mainly on the principles mentioned in the case law, in addition to all the relevant aspects in regard to Article 132(1)(b) (c) as well as (g).

4.2 Strict interpretation & fiscal neutrality

It can be concluded from the case law presented above that the principle of strict interpretation together with the principle of fiscal neutrality are two aspects that the CJEU keeps referring to in its judgements. The strict interpretation is to be made with consideration to the purpose of the exemption. Further, the scope of the exemption cannot be extended. In order for the services to be considered as medical care within the meaning of Article 132(1)(b) or (c), it is obvious that the purpose of these services must be to protect, remain or restore human health. Such services must also encompass a whole range of medical care that is normally provided on a non-profit-making basis. According to Påhlsson, the strict interpretation and neutrality are the most important interpretive aids that the court uses in its interpretation in regard to exemptions. Neutrality has also an important role in the interpretation of the CJEU. It is specially looked at in relation to the legal form of the service provider and also in respect of competition, where the court states that two goods or services that are in competition with each other cannot be treated differently. Neutrality is also taken into consideration in regard to the term 'medical care' in Article 132(1)(c) where Member states have the right to define what to be included in that term and also the delegation in Article 133. Further, neutrality is there to restrict the delegation in these cases and to assure that an equal treatment, and that the objective criteria for quality are not breached.

The interpretation of the Swedish Supreme Administrative Court, on the other hand, states that the services provided by a temporary-work agency are to be regarded as taxable and the services of a medical care provider acting as a subcontractor should also be regarded as such even if the purpose of the company is to provide medical care services. This interpretation can be considered as a very narrow interpretation of the VAT exemptions that is in breach with the purpose of the exemptions as mentioned in the VAT Directive.[109] While strict interpretation is required when interpreting VAT exemptions, it must be done in a way that does not deprive the exemptions from their intended meaning. Further, the purpose of the service must be looked at and examined in order to determine whether it is exempted or not. These aspects do not seem to be regarded when looking at the interpretation of the Swedish court. Furthermore, it is important

[109] Agrell J., Claesson I. & Frennberg E. (2020) "sjukvård eller personaluthyrning", *Skattenytt 2020,* p. 615.

to establish whether a subcontractor acting under his or her own statutory responsibility, can really be considered to be under the control and direction of someone else in such a way that the service constitutes a hiring out of staff and not medical care? This part will be elaborated on and further discussed in section 4.5.

An important aspect that must be borne in mind is the lack of neutrality in relation to competition that occurs between the private and public care companies when applying the interpretation of the Swedish court. This lack of neutrality depends on the difference in treatment that arises from the fact that private care companies incur a cost in the form of a non-deductible VAT when acquiring hiring out services. The same cost does not arise in public care companies since compensation for VAT is paid through the compensation scheme laid down in the Act (2005:807) on compensation for certain VAT for municipalities, county councils, associations of municipalities and coordination associations. It is unclear whether this lack of neutrality can be justified in this regard.[110] This is due to the fact that neutrality, as stated previously, is one of the most vital aspects that the CJEU regards in its interpretation in respect of exemptions. It is therefore unsurprising that neutrality must be taken into account and that two services that are in competition with each other cannot be treated differently. In this case, it is obvious that unequal treatment has arised from the interpretation of the Swedish court and that measures must be taken in order to adjust this lack of neutrality.

Furthermore, it is of high relevance to discuss the Finnish interpretation of the hiring out of medical staff in this regard since Sweden has decided to apply an interpretation that has been disregarded by Finland. According to the Finnish interpretation, the decisive factor in the assessment is whether the service provided is performed by a subject who has relevant professional training in the health sector and whether the client company is authorised to carry out health care activities. A similar requirement for the company hiring out is not relevant, but it is the legitimacy of the staff provided that is decisive for the assessment and that the provision falls within the concept of health services. It is also not decisive whether the client company provides private or public health care. Moreover, a distinction is made here between medical care services and social care services. The latter are subject to VAT, as concluded by the CJEU in go fair, while medical services are exempt.[111] The question to be asked here is to what extent this difference in treatment will affect neutrality and equal treatment in this area, since different Member States have chosen different interpretations.[112] It is therefore interesting to see the results of this considering the importance of ensuring a uniform interpretation and application of EU law at the national level in the Member States.[113]

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[110] Ek M. (2020) “högsta förvaltningsdomstolen praxis avseende uthyrning av vårdpersonal inom mervärdesskatterätten”, *Svensk skattetidning* p. 194.

[111] See Finnish tax administration instructions of the 1 of April 2019, Taxation of healthcare services (momsbeskattning av hälso- och sjukvården), Dnr A97/200/2018.

[112] Rendahl P. (2019) “ Utlåtande avseende EU-förenligheten av förslag till ändring av sjukvårdsundantaget i mervärdesskattelagen”, p.12.

[113] Kristoffersson E., Rendahl P. (2019) p. 24 - 26.

To sum up, it is obvious that Sweden has decided to apply a very narrow interpretation of an exemption in the public interest. While such exemptions must be interpreted strictly, according to case law of CJEU, Member States cannot deprive the exemptions of their intended meaning and scope. Therefore the Swedish interpretation cannot be seen as consistent with the principle of strict interpretation. Further, there is an obvious difference in treatment between public and private companies when looking at the Swedish interpretation, which is inconsistent with the principle of fiscal neutrality. Another aspect that concerns neutrality, is the difference between the Swedish and Finnish interpretations in regard to the hiring out med medical care, something that is considered to threaten the importance of uniform interpretation and application of EU law.

4.3 Article 132(1)(b)

According to the case law mentioned in section 2.4.1, services that are covered by Article 132(1)(b) must seek to avert, avoid or prevent disease, injury or health problem, or to detect latent or incipient conditions. The services provided by the Swedish companies at issue were all medical care services provided by either doctors or nurses, satisfying the above mentioned criteria. When looking at Article 132(1)(b), it must be noted that this Article refers to closely related activities. In case Commission v France the court stated that the concept of closely related activities does not call for specially narrow interpretation because of the way exemptions are designed. In joined cases Ygeia and Ypouros, it was mentioned 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". It is therefore of importance to argue that the hiring out service in this case is an essential and indispensable stage in the process of the supply of the medical care services provided by the hired medical staff. This interpretation is supported by the fact that the concept of closely related activity does not call for specially narrow interpretation due to the purpose of the exemption, as mentioned in case Commission v France. It must be noted that the possibility of considering the services at issue as closely related activities, was quickly disregarded by the Swedish court. Concerning the concept of closely related activity, the Swedish court referred to case Horizon College and stated that it is only possible to apply this concept if the hiring out is made between one care company that carries out medical care and it hires out its own medical staff to another care company that also, in its turn, carries out medical care.

In summary, the author is of the opinion that the concept of closely related activities, can be applied in the Swedish cases, since the hiring out service, in all of the cases, is an essential part of the medical care service provided that cannot be seen as an indispensable stage in the process of the supply of the services. Therefore taxing these services would be contrary to the judgement in case Commission v France, where it was stated that the exemption of closely related activities were 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.

4.4 Article 132(1)(c)

The Swedish court stated in Medcura AB that the hiring out of medical care staff can be regarded as an exempt service if the care company in question is carrying out medical care activity and is hiring out its staff to another company that is also carrying out a medical care activity. Later in the judgements of 2020, the court stated again that even if it is a situation of a care company hiring out to another care company, the services cannot be regarded as exempt due to the limitation in Article 134(b). The Swedish court established that in this case the purpose is to obtain additional income and therefore an exemption cannot be granted. In this case, it is important to recall the dissenting opinion of the Swedish judges claiming that in this case, Article 132(1)(c) is to be applied since all the criteria mentioned in the case law in regard to that Article are satisfied. This entails that Article 134 cannot be applied since it only refers to Article 132(1)(b). This is yet another interesting argument since it enables the application of Article 132(1)(c) in this case and when using that Article it must be borne in mind that the structure of Article 132(1)(c) is different from the rest of the exemptions in the other letters of the Article. The difference is based on the fact that Article 132(1)(c) refers to the person providing the medical care and not the medical service per se. Consequently, it is questionable to make an interpretation of Article 132(1)(c) based on case law that refers to other exemptions in that Article.[114] This part will be further discussed in the next section.

To sum up this part, Article 132(1)(c) can be applied in the Swedish cases. This depends on the fact that the criteria in order to apply this Article are fulfilled since all cases regard medical care services provided by doctors and nurses. Consequently, when applying Article 132(1)(c), the court must be careful when referring to case law that concerns other exemptions, due to the different structure of Article 132(1)(c).

4.5 An analogue application of Article 132(1)(g)

It is arguable whether using cases that have regarded other branches is a sufficient ground to justify the interpretation of the Swedish court. This is based on the fact that the Swedish court has referred to Horizon College, a case that looks as the exemption for education (Article 132(1)(i)) and also go fair, a case regarding a temporary-work agency's hiring out of labour to care establishments (Article 132(1)(g)). Looking at the wording of Article 132(1)(i), it can be said that Member States are not given the same space to define the subjects of that Article. Therefore they cannot define what to be included in the exemption the same way it can be done

[114] Rendahl P. (2019) "Utlåtande avseende EU-förenligheten av förslag till ändring av sjukvårdsundantaget i mervärdesskattelagen", p.12.

in regard to medical care.[115] Furthermore, the author is of the opinion of Agrell, Claesson and Frennberg that caution must be taken into consideration when referring to case law from other branches as this can result in the fact that the purpose of the exemption for medical care, to reduce the costs, would be lost. Further, they also state that the Swedish court must have implied that the case law referred to does not consider staff that act under their own responsibility and legitimacy.[116] Therefore, it becomes essential for the discussion to look at the difference between the hiring out of medical staff and the hiring out of staff of a temporary-work agency, since the latter do not act under their own responsibility and legitimacy. Moreover, it seems that the Swedish court is taking for granted the fact that all exemptions in the public interest are applied in the same way in regard to the hiring out which explains why the Swedish court has chosen to not refer the question to the CJEU.[117]

Regarding the difference between the hiring out of medical care staff and the hiring out of temporary-work agency, the services provided by a care company must be viewed in the light of the purpose of the exemption for medical care which is, once again, to reduce the costs. A care company, as regards its services, takes explicit civil and medical liability for these services. As well as that, a care company is obliged to follow and comply with a number of medical law legislation and thereby has a medical law responsibility. This consideration is, however, irrelevant in regard to a temporary-work agency whose purpose is to provide resources in the form of workers. The hiring out of staff in a temporary-work agency can be defined as "a person hired out to provide a service under the control of the client company".[118] This entails that a care company's staff cannot be regarded as under the control of the client company because it is still this care company that decides their salaries, conditions for vacations etc. This means that one of the decisive facts, in order to determine whether the service is solely a hiring out service of a temporary-work agency and not medical care service, is the control of the client company over the subcontractor, is it up to the client company to identify the work tasks and how to carry out the work or is it up to the subcontractor to decide. Such services are exempt from tax as long as there is no commitment to hire out staff where the staff are fully integrated into the client company's organisation and where the client company is responsible for all control and management. This is, of course, provided that the activities performed qualify as health services in their own right.[119]

However, Forssén is of the opinion that if the care company in question provides medical care, the exemption from VAT under Chapter 3 Para. 5 of the Swedish VAT Act applies. If the company on the other hand hires out medical staff, then the company constitutes a

[115] Ibid.
[116] Ek M. (2020) "högsta förvaltningsdomstolen praxis avseende uthyrning av vårdpersonal inom mervärdesskatterätten", *Svensk skattetidning*, p.194.
[117] Ibid.
[118] Agrell J., Claesson I. & Frennberg E. (2020) "sjukvård eller personaluthyrning", *Skattenytt 2020,* p. 630.
[119] Ibid.

temporary-work agency and it is a case of taxable hiring out of medical staff in accordance with the general rule that the supply of goods and services is taxable, Chapter 3, Para. 1 of the Swedish VAT Act. It is irrelevant in this case whether or not the medical staff is licensed.[120] The author disagrees and argues that the hiring out of a medical staff cannot be equal to the hiring out services of a temporary-work agency regardless of whether the care company is actually carrying out medical care activity or not. This argument is based on the fact that the subcontractor, regardless of the form of the care company, is always acting under his own responsibility and legitimacy and is still under the control of the care company which undertakes responsibility in relation to the services provided.

Furthermore, it is of high relevance to differentiate between a temporary-work agency's services and care company due to the difference in their purposes, business objectives and also the characteristics of the services provided. Therefore, it must be noted that different exemptions in Article 132(1) have different purposes and that the social conditions for the exempted transactions differ. Also, there are structural and legal differences in the way exemptions are built.[121] However, Mikael Ek is critical to this argument. He states that it is not clear how the CJEU would reach a different conclusion than the one reached by the Swedish Supreme Administrative Court, this is due to the similarity between the exemption for education in Article 132(1)(i) and the exemption for medical care in Article 132(1)(b) and (c) and there is therefore no need to reflect over the differences regarding to the purpose and structure.[122] The author, nevertheless, does not agree with this argument regarding the importance of the strict interpretation of the exemptions, consideration must be given to the difference between the different interpretations and that it should not be taken to granted that all exemptions in regard to public interest are to be interpreted the same way.

Due to the above mentioned differences between a care company and a temporary-work agency, it becomes important to point out that the Swedish court cannot refer to the cases go fair and Horizon College since the circumstances are not identical and the cases also regard different exemptions in Article 132(1).

Finally, it is important to note that the interpretation of Swedish court entails a general presumption that when a subcontractor, whose services are provided to the patients of the client company, is regarded as a taxable hiring out service regardless of whether it is a question about a care company or not. It is, therefore, arguable whether this presumption is compatible with the cases Peters and L.u.P. where the CJEU found that the services provided in the two cases did not qualify as taxable services even though they were provided by subcontractors that did not operate the care company providing the medical care to the patients. Further, in Finanzamt D, a case that

[120] Forssén B. (2017) "Bemanningsföretagens momsstatus inom vård och omsorg", *Svensk skattetidning*, p. 15-25.
[121] Rendahl P., Karlsson H. (2019) "Mervärdesskatt på sjukvård- en akut rättssäkerhetsfråga?", *Svensk skattetidning,* p. 257..
[122] Ek M. (2020) "högsta förvaltningsdomstolen praxis avseende uthyrning av vårdpersonal inom mervärdesskatterätten", *Svensk skattetidning*, s.194.

regarded Article 132(1)(g), the court implied that it is not necessary for welfare services to be performed directly by the persons carrying out the social activities and that levying VAT on these services would increase their cost and that it would be contrary to its purpose. If an analogue application of other exemptions in Article 132(1) is to be made after all, then it becomes important to take into consideration this case since it clearly states that it is not necessary that services must be performed directly by the persons carrying out the social activities, something that was not stated in go fair. The author is, nevertheless, still of the opinion that analogue applications of other exemptions must be done with great caution due to the difference in the purpose and the structure of these exemptions.

4.6 What are the consequences of the Swedish interpretation?

In regard to the consequences of the Swedish interpretation, it is important to recall the purpose of the exemptions in the public interest, which is to reduce the costs of medical care and to make it available for everyone. The costs of not respecting EU law may impact the medical care that can be provided in different parts of the country not only for care companies but also for individuals. This interpretation can lead to increased costs for society as a whole and the question of damages due to the incorrect application of EU law may arise. The availability of medical care throughout the country will be affected by the way the medical care exemption is applied. There will also be a lack of neutrality between care providers that may lead to lack of equal treatment of care recipients. There is also the competitive advantage enjoyed by the public care companies. An advantage that is not only affecting neutrality in this case but also undermining the purpose of the medical care exemption.[123]

This interpretation has however received much criticism from, not only Swedish experts in the area of VAT, but also from a large number of care providers throughout the country. As a result of the criticism, the Swedish government decided to start an investigation in regard to the medical care VAT paid on the hiring out of medical staff.[124] The investigation is still not completed and it is estimated to be finished by the beginning of June 2021.

[123] Rendahl P., Karlsson H. (2019) "Mervärdesskatt på sjukvård- en akut rättssäkerhetsfråga?", *Svensk skattetidning,* p. 257- 269.
[124] The ongoing investigation can be found at: Tilläggsdirektiv till utredning om mervärdeskatt vid inhyrd personal för vård och social omsorg, Dir. 2020:137, www.regeringen.se/rattsliga-dokument/kommittedirektiv/2020/12/dir.-2020127/ (accessed 2021/05/26).

5 Conclusions

From the above mentioned, it can be concluded that EU law gives Member States discretion in order to assure a correct and straightforward application of the VAT exemptions. This discretion is however limited by the principle of strict interpretation and also by fiscal neutrality. According to the case law from the CJEU concerning the provision of medical care in Article 132(1)(b) and (c) there are a number of aspects that must be considered. It is unsurprising that the principle of strict interpretation and the principle of fiscal neutrality are the most important interpretative aids as regards exemptions.

It can also be concluded that the Swedish interpretation is in breach of the principle of fiscal neutrality which is one of the most vital principles within EU law. Neutrality is not considered when speaking of competition between public and private care providers. And this interpretation will eventually come to undermine the purpose of exemption in the public interest. Furthermore, it must be noted that by choosing to tax the hiring out of medical staff, Sweden has decided to apply an interpretation that Finland has dismissed. It is therefore important to raise the question about the importance of ensuring a uniform interpretation and application of EU law.

When looking at the interpretation of the Swedish court, it becomes clear that the court has decided to apply a very narrow interpretation. While the principle of strict interpretation is referred to in many cases in regard to interpretation of exemptions, it must also be borne in mind that the strict interpretation cannot deprive the exemptions from their intended meaning and scope. Therefore, deciding to narrowly interpret an exemption in the public interest will undermine the purpose of the exemptions and the VAT Directive and consequently goes against EU law.

Accordingly, in its judgments, the CJEU stated that the provision of closely related activities does not call for a strict interpretation considering the purpose of exemption in regards to medical care since the exemption is designed to ensure that benefits flowing from such care is not hindered by the increased costs. As well as that, the judgements of the CJEU have established several aspects concerning the services of medical care. Those aspects refer mostly to the characteristics of the service at issue where it was stated, among other things, that such service must protect, remain or restore human health. Also, a medical service must constitute an indispensable stage in the process of the supply of those services to achieve the meaning of the provision of medical care. This thesis discussed the possibility of applying the concept of closely related activities to the hiring out of medical care staff, stating that the hiring out in this case constitutes an essential part and an indispensable stage in the process of the supply of those services and therefore they shall be regarded as exempt. This conclusion is also reached based on the concept of closely related activities does not call for specially narrow interpretation due to its purpose.

The Swedish Supreme Administrative Court decided in its judgements that the hiring out of medical staff is to be regarded as taxable service if the hiring out is provided by a temporary-work agency. An interpretation that must be considered as highly strict with no consideration to the purpose of the exemption and how they were designed. Regarding care companies that carry out medical care, the Swedish court decided that even in this an exemption cannot be granted due to the limitation rules in Article 134(b). It can be concluded from the above mentioned that the services at issue can be interpreted as corresponding to Article 132(1)(c) since they satisfy the two conditions mentioned in Kügler, they are medical care services provided in the exercise of the medical and paramedical professions as defined by Sweden. This entails that an application of Article 134(b) is not possible since the Article only refers to the provision of medical care within the meaning of Article 132(1)(b).

Furthermore, the difference between a temporary-work agency and a care company must be pointed out. A company hiring out medical care staff cannot be regarded as a temporary-work agency due to the fact that this company, even after hiring out its medical staff, is still responsible for them and its staff always act under the control of their own responsibility and legitimacy. Something that is not fulfilled when looking at the definition of a temporary-work agency since its staff always act under the control of the client company. A temporary-work agency is also not responsible for its staff. Hence, the Swedish Supreme Administrative Court cannot base its argument on the judgements of the two mentioned cases (Horizon College & go fair) since the cases do not regard hired staff that act under their own control and legitimacy. However, even if the court decides to make an analogue application of exemptions in other branches, consideration must be taken to the new judgement in Finanzamt D where it was stated that it is not necessary that services must be performed directly by the persons carrying out the social activities.

It is, however, interesting to see that the Swedish Government has decided to take action concerning this interpretation. It is unclear, thus far, whether there will be a change, in essence, a new law in that regard or will the Swedish Government reach the conclusion that this interpretation is in line with EU law and therefore applicable. In case the Swedish Government decides that this interpretation is in line with EU law, the question of the importance of the uniform application and interpretation of EU law would arise. This depends on the different interpretation applied by Finland. This decision would open the floor to further discussions in that regard, considering that the Swedish interpretation in that case, will not only affect Sweden but the rest of the EU.

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