Lund University

School of Economics and Management
Department of Business Law

On The Exemption of Closely Related Activities in Article 132(1)(b) & (i) in The VAT Directive

by

Robin Kratz

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Tutor: Giorgio Beretta

Author's contact information:

Eko15rkr@student.lu.se

+46761950832

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Abstract

The exemptions in the public interest in Article 132 of the VAT directive constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another. In deciding whether a good or service is exempt the case law of the CJEU has established two main principles, the principle of fiscal neutrality and the principle of strict interpretation.

In addition to the supplies which are explicitly stated as exempt, subparagraph 132(1)(b) and 132(1)(i) also exempts certain activities which are closely related to either medical supplies in a hospital setting, or educational supplies made by institutions.

The interpretation of a closely related supply is a question that has been posed by the member states to the CJEU frequently. But it is still to some extent uncertain and has not been widely covered in the existing doctrine. Therefore, the main purpose of this thesis is the research question: What does it mean that an activity is closely related.

In answering the research question, the thesis considers the current body of case law, published papers, and the underlying principles, in order to answer three underlying research questions of importance to closely related activities.

In response to the first question, this research has found that the neutrality of the closely related activities is regulated in the corollary Article 134 of the VAT directive, which stipulates that a closely related activity needs to be essential to the transactions exempted, and that the service provided can not be for the basic purpose of attaining additional income.

The research has further examined the statement by the CJEU, that a closely related supply needs to be ancillary to the principal supply of the body providing it. It has found that these terms are used differently in the case of closely related activities than they are in the established composite supply doctrine. This is as closely related activities tend to be ancillary to the purpose of the exempted supply, and can be supplied by a different legal person than the one making the principal supply.

Lastly, the research has considered also closely linked supplies, that are also covered by the corollary articles 133 & 134 of the VAT directive, to investigate if these are the same as closely related activities. It has found that closely linked supplies are not the same as closely related activities, this is as they only consider if entire categories of services are closely linked to their respective subparagraph.

Abbreviations

AG	Advocate General
CJEU	The Court of Justice of the European Union
EU	European Union
IBFD	International Bereau of Fiscal Documentation
VAT	Value Added Tax

1. Introduction

1.1 Background

One of the core principles of the VAT system is that it is a general system that taxes consumption. This general nature of the tax is one of the main pillars of the VAT system; as it ensures the similar treatment of same value goods and the neutrality of the system. [1] However, some exceptions have been made to this general rule in the form of reduced rates and different exemptions. One of these exceptions can be found in Article 132 of the VAT directive, which constitutes exemptions in the public interest.

The exemptions in the public interest constitute independent concepts of Community law which are justified by the need to avoid divergences in the application of the VAT system from one member state to another. [2]

Amongst the other exemptions, there are certain exemptions which except for the primary supply also exempts either 'closely related' activities or supplies of goods and services which are 'closely linked' to exempt activities or supplies.[3]

These terms are not defined in the directive and the court has therefore consistently held that the provision must be interpreted in the light of the context in which it is used and of the aims and scheme of the VAT Directive, with particular regard to the underlying purpose of the exemption which it establishes.[4]

Due to the specific nature of the exemptions it has been the subject of a vast amount of case law, in which two primary principles of interpretation have been used by the court of justice, namely the principle of strict interpretation

[1] Terra, Kajus,. Introduction to European VAT, Chapter 7
[2] See on this Commission v France, C-76/99, EU:C:2001:12, para 21
[3] See Article 132(1)(b) and (i) for Closely related and e.g. Article 132(1)(g) (h) and (l) for closely linked supplies
[4] See on this Commission v France, C-76/99, EU:C:2001:12, para 22

and the principle of fiscal neutrality. [5]

This thesis is primarily dedicated to the interpretation of closely related activities that exist in two subparagraphs of the exemption in the public interest, namely article 132(1)(b) and (i). This line of research has been chosen as there are a lot of uncertainties in what exactly constitutes closely related activities.

1.2 Purpose and research question

The basis for this thesis will be one of the interpretative questions that have been frequently revisited by the CJEU, but yet not widely debated in doctrine. Namely, the meaning of the term 'Closely related activities' contained therein.

It will do so by answering the following research questions:

What is the relationship between closely related activities and the principle of neutrality?

What is the meaning of the term ancillary in the case law of the closely related activities and how does it relate the case law on composite supplies?

Are closely linked supplies interpreted similarly as closely related activities, as they share the same corollary articles in 133 and 134?

1.3 Delimitations

For the purpose of the analysis of this thesis, the focus will be on article 132 (1)(b), (g), (h), (i), (l), (n), and (m). Other cases have been included, but only in so far as they help with describing the principle of the court or where they draw parallels to closely related acitivites. This is because these Articles contain the phrases 'closely linked' and 'closely related'. Article 133 and 134 will also be handled as it sets out either voluntary or mandatory limitations to the scope. In the theoretical chapter cases from other articles will be used to create an overarching description of the concepts 'fiscal neutrality', 'strict interpretation' and 'composite supplies'.

[5] See for example cases handled in Chapter 3 and 4

Furthermore, this thesis will not discuss what is left to the Member States discretion when comes to 'duly recognised establishment', but only the specifically mentioned cases where the court has made a clear statement on what is to be taken into account for recognising an establishment not governed by public law as an exempt provider of closely linked supplies or closely related activities.

1.4 Materials and method

To fulfil the research purpose of the thesis the legal-dogmatic method has been used. [6] As part of this the research has been made based in valid sources of law. In the research the Article 132 and subparagraphs containing the words 'closely linked' and 'closely related' has been analysed. To gain insight on the principles that guides that interpretation, information has been gathered from experts in the field of tax law in the form of publications from established sources.

As the closely related activities are in large parts unchartered territory when comes to the existing doctrine, the main source of law used in the thesis are the cases which refer to these activities. This has then been analysed together with the principles and other case law which has been either important to the principles or to the concepts of closely related activities and closely linked supplies.

1.5 Structure

The first chapter of this thesis briefly introduces the reader to the exemptions as a whole and the concepts of closely related and closely linked activities, together with establishing the aim of the thesis and the research questions posed. In chapter two the reader is introduced to the articles and concepts the thesis is examining, together with the principles that guide their interpretation. In chapter three and four, a summary of case law on closely related activities and closely linked supplies is made as to keep separate the description of the cases and the analysis that is being made. Chapter four analyses and answers the research questions on closely related activities through the lense of the principles and the

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

information on the cases previously provided, while also providing for a more in-depth description of the intricacies of the cases. In chapter six, a conclusion of the findings made in the process of the research is made.

2. The Exemptions in the Public Interest

2.1 In the VAT Directive

2.1.1 Article 131 & 132

Article 131 of the directive lies down that all exemptions provided for in Chapter 2 & 9 of Title IX without prejudice shall apply to other Community provisions and that it is at the Member States discretion to implement conditions that ensure correct and straightforward application of those exemptions. The conditions laid down by the Member States shall also prevent any possible evasion, avoidance, or abuse of the exemptions.

As for article 132 of the VAT directive. Which lays out the exemptions in public interest, not all subparagraphs are equally relevant. As the aim is of the thesis is to establish the interpretation of 'closely related activities' and if closely linked supplies share the same meaning as closely related activities. The subparagraphs which are of relevance are primarily article 132(1)(b) and article 132(1)(i), and the terms 'closely related activities contained therein'. While subparagraphs (1)(g)(h)(l)(m) and (n) that exempts for example services and goods closely linked to social welfare[7] are also to a certain extent important.

As each of these paragraphs will be handled to some extent in further chapters of this thesis, an exact explanation of each article will not be given at this point.

2.1.2 Article 133

The closely related activities and closely linked supplies in article 132 of the VAT

[7] Article 132(1)(g) of Council Directive on the Common System of Value Added Tax [2006], Consolidated version 01/07/2021, OJ L347

directive are both also regulated in article 133 and 134 of the same directive. [8] Article 133 of the VAT directive limits the discretion of member states to extend the exemptions to bodies governed by public law. [9]

The criteria of Article 133 (1)(a-d) can be divided into four categories. For a body not governed by public law to be granted an exemption from VAT they first need to not systematically aim to make a profit, and any profit arising must accordingly not be distributed, but instead, be assigned to further use in the exempt activity. Secondly, the body needs to be managed on an essentially voluntary basis, by people who have no interest in the result of said body. Thirdly, subparagraph c stipulates that the prices of the goods need to be either lower than the prices charged by commercial enterprises or prices decided by the public authorities. Lastly, the exemption of these bodies should not be likely to distort competition, which would disadvantage commercial enterprises.[10]

2.2 Fiscal interpretation & Strict interpretation

2.2.1 The Principle of Fiscal Neutrality

Already at the inception of the first VAT directive, which was the first non-cumulative tax common to the European Union, neutrality was seen as one of the most important foundations. The EU at the time, rightly so, stated in its motives that a turnover tax needed to be structured neutrally; so that similar value goods had similar tax treatment and that the length of the supply chain, or the country of origin would not matter for taxation reasons. [11] Today fiscal neutrality is one of the most important factors of the modern VAT system, and it is still enshrined in the directive. In the preambles of the directive it is clarified that the common system of VAT aims for amongst other things neutrality in competition[12], as neutral levying of the tax as

[8] Council Directive on the Common System of Value Added Tax [2006], Consolidated version 01/07/2021, OJ L 347,

[9] The exemptions in the subparagraphs previously mentioned

[10] Council Directive on the Common System of Value Added Tax [2006], Consolidated version 01/07/2021, OJ L347, Article 133

[11] Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes [1967] OJ Spec Ed 14. P.8

[12] Council Directive on the Common System of Value Added Tax [2006], Consolidated version 01/07/2021, OJ L347, Article 133, preamble 7

possible[13] and a general aim to have a non-discriminatory nature[14].[15] The benefit of neutrality is clear, as the similar treatment of similar goods makes it so that there are no tax incentives for certain levels of integration or focusing on certain product areas, which in turn ensures that the taxable treatment does not distort competition in the internal market. According to Terra, Kajus, neutrality can be divided into two different categories. Internal and external neutrality. As external neutrality is not important regarding interpretation of the exemptions, given that the main questions only concern the service/good supplied and not the supply in itself, but also that there is rarely a cross boarder element to exempt activities, this thesis will focus on the internal aspect of neutrality.[16] Internal neutrality can according to Terra, Kajus be divided into three further subcategories: Firstly, legal neutrality, meaning that the equal treatment of situations with the same circumstances. Secondly, competition neutrality, meaning amongst other things that the calculation of tax levied by the retail price ensures that the length of the supply chain or the level of supply chain integration does not affect the tax levied. Thirdly, economic neutrality, meaning to ensure that the level of tax does not affect companies' decisions on how to use their means of production.[17]

[13] Ibid, preamble 5

[14] Ibid, preamble 13

[15] Marta Papis, 'The Principle of Neutrality in EU VAT' in Cécile Brokelind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014), p.3

[16] Ben Terra and Julie Kajus, Introduction to European VAT (IBFD 2022), ch 7.3

[17] Ibid

2.2.1.1 Fiscal Neutrality in case law

Although the importance of the neutral nature of VAT was already firmly established in the motives to the first directive, the principle of fiscal neutrality was one that was further developed by the court of justice in one of its earlier cases, *"Hong Kong"*.[18] The court stated that to achieve the neutrality aimed for in the first directive, there was a need for the elimination of such legislation which would distort the factors of competition. This means that legislation within each country should ensure that similar goods should bear the same tax burden, no matter the length of production or distribution chain.

In further case law, the court established in '*Kügler*' that the principle of fiscal neutrality precludes economic operators that carry on the same services from being treated differently, and that by not exempting out-patient care services performed by a limited liability company, it would in essence disregard the principle in its entirety. The court also held in '*Commision v France'*[19] that the principle of neutrality precludes a member state from subjecting reimbursable medicinal products to a lower VAT rate than non-reimbursable medicinal products. The principle of neutrality also, amongst other things, prohibits the different VAT treatment of lawful and unlawful transactions if they are of the nature as those in the case '*CPP'*. [20] The Court has also several times held that the principle of neutrality is not a rule of primary law, and that it cannot condition the validity of an exemption. [21]

Although not all-encompassing, the cases above aim to illustrate that the principle of fiscal neutrality is not only of interest in legislative procedures, but also commonly used by the CJEU to interpret cases on exemptions or reduced rates.

[18] Case 89/81 Staatssecretaris van Financiën v Hong-Kong Trade Development Council [1982] EU:C:1982:121para 6
[19] Commission v France, C-76/99, EU:C:2001:12, paragraph 21
[20] Case C-349/96 "Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise"
[21] Case C-366/12, Klinikum Dortmund, [2014], EU:C:2014:143, para 40, and C-334/14, De Fruytier, [2015], EU:C:2015:437 para 37

2.2.2 The Principle of Strict Interpretation of exemptions in Relation to Fiscal Neutrality

When it comes to the exemptions, it is well established in case law, that they must be interpreted strictly, as they are a departure from the general principle that VAT is to be levied on each supply of services made for consideration by a taxable person.[22] According to de la Feria, the courts historical preference for strict interpretation as the primary interpretation tool of exemptions has been accompanied by a stronger emphasis on fiscal neutrality. This change in the system she partly assigns to the rapid changes in the economy, and she commends the courts recent increase in neutral based judgments as they help create a less distortive system. However, she also notes that interpreting judgments less strictly and on a more neutral basis also presents challenges as to legal certainty. [23]

In regard to the closely related activities, these services have as well not been to widely covered by strict interpretation. As it has since long been held that closely related activities are designed to ensure that the benefits flowing from the exempted medical care as in 132(1)(b) and education in 132(1)(i) are not hindered by the increased costs that would follow if such services where subject to VAT.[24]

Instead, these activities have classically been interpreted in the light of article 134 (a) and (b) of the VAT directive, namely that in order to be exempt, the supply in addition to having a therapeutic purpose needs to be essential to the service provided, and not be for the basic purpose of obtaining additional income. [25] The second of which has been held by the Court to be a specific expression of fiscal neutrality.[26]

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[22] Felix Schulyok, "The ECJ's Interpretation of VAT Exemptions", International VAT Monitor, Volume 21, Issue 4, 2010, p. 266 and Rita De la Feria, "EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox", in Lang et al. eds., Recent VAT Case Law of the CJEU. p. 6 see also Case C-513/20, Termas Sulfurosas de Alcafache, [2022], EU:C:2022:18, para 25

[23] Rita De la Feria, "EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox", in Lang et al. eds., Recent VAT Case Law of the CJEU. P. 25

[24] Case C-287/00, Commission v Federal Republic of Germany, [2002], EU:C:2002:388, para 47, and Case C-76/99, Commission v France [2001], EU:C:2001:12

[25] See for example Case C-434/05, Horizon College, [2007], EU:C:2007:343, paras 38, 42 and 46, and Case C-394/04, Ygeia, [2005], EU:C:2005:734, paras 25 and 34

[26] Case C-434/05, Horizon College, [2007], EU:C:2007:343, para 43

These two criteria together with the purposeful analysis helps ensure that closely related and closely linked activities are not interpreted in a way which distorts competition.

Furthermore, it has been widely held by the court that in order to be essential to the service supplied, the supply needs to be ancillary to the principal supply of either healthcare or education.[27] This is not entirely unproblematic, as it is unclear how it relates to other principal and ancillary supplies.

2.3 Composite Supplies

As well as the exemptions, the issue of composite supplies is one that has been covered in extensive case law by the CJEU. A composite supply issue arises when a company is supplying a package of multiple services or goods which are subject to different VAT treatments. The main principle is to treat each of the supplies as a separate supply, but not to the extent that it leads to artificially splitting services that from an economic viewpoint is a single supply of a service.[28]

There are two different cases where a split of services could be seen as artificial, when the service constitutes a single indivisible supply, or when it is comprised of a main principal supply and a secondary, ancillary supply. A single indivisible supply is characterized by multiple services being equally integral to the customer experience, a package pricing of the supply, the supplies not being separately available to the customer or it being artificial to split the supplies. [29]

The second exception is when a supply is made up of a principal and an ancillary supply. It follows from the landmark CPP case, that when one service is made up of a principal and an ancillary supply. The status as ancillary is given to a supply if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.[30] In this case the result will be an absorption by the ancillary supply of the VAT treatment of the principle supply.[31] The other distinguishing factor of an ancillary supply is that the value of the ancillary supply

[27] See Ygeia, [2005], EU:C:2005:734, paras 25 and 34 and Horizon College, [2007], EU:C:2007:343, para 29

[28] This follows from Article 1(2) and Article 2(1) of the Vat Directive, see also Case C-349/96, Card Protection Plan, [1999], EU:C:1999:93

[29] Case C-581/19, Frenetikexito, [2021], opinion of AG Kokott EU:C:2020:855 paras 25-33

[30] Case C-349/96, Card Protection Plan, [1999], EU:C:1999:93, para 30

[31] Ibid

is of a smaller proportion to the customer, such as for example hoteliers who provide minor services through third parties, which only consists of a small part of the supply.[32] Traditionally, the principal and ancillary services has not been extended to different entities. A door can be argued to have been opened in *Mapfre*, where it was left to the referring court to decide whether warranties made by an independent operator could be seen as ancillary to the sale of second hand vehicles.[33] But the gap in the doorway can be seen to have lessened as later reasoning in *KPC Herning* made clear that legally distinct transactions carried out by different contractors is a determining factor in a supply not being a composite supply.[34] [35]

3. Closely related activities

3.1 Case Law

3.1.1 The early cases

The first case that partly dealt with the exemption in Article 132(1)(b) was the Case 'Commission *V United Kingdom'*, where UK and Ireland had failed to translate the provisions into national law. The interpretation problem was whether the provision of medical care in the sense of Article 132(1)(c) was to have the same meaning, as the provision of hospital and medical care in the sense of Article 132(1)(b).[36] The court in the case held that they should not be interpreted the same and that while in the exemption for medical care provided in a hospital setting the supply of goods was also covered, this did not extend to the provision in Article 132(1)(c).[37] The relevance of this case was later pointed out in AG Tizzanos's

[32] Joined Cases C-308/96 and C-94/97, Madgett and Baldwin, [1998] EU:C:1998:496, para 24

[33] C-584/13 - Mapfre asistencia and Mapfre warranty EU:C:2015:488, para 57 and 58

[34] See also Van Doesum, Cornielje, Van Kesteren, (2nd edition, Kluwer Law, 2020) p. 166

[35] Case C-71/18, KPC Hearning, EU:C:2019:660, para 44

[36] C-353/85 Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [1988] EU:C:1988:82

[37] Ibid para 34

opinion in the '*Kügler'* case where he held that the case had an analogous relevance and that the similar wording of different subparagraphs in article 132 does not mean that their meaning can be translated to other subparagraphs. [38]

This was followed by a landmark case on the interpretation of closely related activities, namely '*Commission v France'*.[39] The national provision that led to this case was a French rule that provided only specialised laboratories the license to perform analysis of certain patient samples. The right to administer and take the sample was however still granted to local laboratories. [40]

In the case at hand, the service of sample taking was performed by a local laboratory, the sample was then transported to the specialised facility for testing, and separate invoices were sent by the laboratories for the service they provided. While both the invoices sent for sample taking and the analysis were deemed exempt from VAT, the French government believed that the transmission of the sample between the laboratories constituted taxable transactions. This was on the basis that the contract was not a collaboration contract where only the sample-taking party would be responsible vis-á-vis the patient, but rather a fixed-fee contract, where both of the parties were responsible vis-á-vis the patient. [41]

The French reasoning relied on the narrow interpretation of the exemption and that a series of transactions could only be seen as a single transaction if they were affected between the same persons. However, the court together with the AG held, while the directive does not hold a definition of "closely related activities", that the purpose of exempting "activities closely related to hospital and medical care" is to ensure that the provision of such care is not burdened by the increased costs that would follow where they subject to VAT. [42]

In its analysis of the purpose, the court stated that if the transmission is ordered by duly-authorized health care workers for diagnosis purposes with a therapeutic aim,

[38] C-141/00 Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften [2002] EU:C:2001:498, Opinion of AG Tizzano, para 46

[39] Commission v France, C-76/99, EU:C:2001:12

[40] Ibid Para 10

[41] Case C-76/99 - Commission v France [2001] EU:C:2001:12

[42] Ibid para 23

the transmission must be seen as a "closely related activity" to the analysis and therefore be exempt.[43]

This case was also the birth of an integral part in the jurisprudence of CJEU on closely related activities, namely the occurrence of a principal and ancillary supply. Because the French government had based their defense in large part on the '*CPP'* case and the statement that a single price [by analogy: invoice] is a factor that helps determine the occurrence of a single supply, the court made a response in this regard. [44]Although the result of the case was not mainly based on this conclusion; the court held that it, from the patient's view, is irrelevant to the service if the taker of the sample is obliged to send it to a specialised laboratory or not.[45] Therefore, they considered the supply of a test analysis as one principal supply supplied together by the laboratories, and the transmission of the sample to be a supply ancillary to the principal supply. [46]

The court again dealt with the concept of closely related activities in '*Commission V Germany*' [47], this time in regards to the exemption for educational activities in article 132(1)(m). The court here restated its opinion in '*Commission V France*', that the term 'closely related' although not defined in the directive is meant to alleviate costs related to the supply of the exempted service.[48] The court in its ruling held that the provision of education for consideration from publicly owned educational establishments was not regarded as essential to the purpose of education, and therefore not considered a 'closely related activity'.[49]

3.1.2 Dornier, Ygeia & Horizon College

In regards to the medical exemption. The Case '*Commission v France*' was promptly followed by '*Dornier'*[50] which dealt with the question of if services

[43] Ibid para 24
[44] Ibid para 21, 27
[45] Ibid para 25
[46] Ibid para 28
[47] Case C-287/00 Commission v Federal Republic of Germany [2002] EU:C:2002:388
[48] Ibid para 47
[49] Ibid para 52
[50] Case C-45/01 Dornier [2003] EU:C:2003:595

performed by an out-patient psychological clinic, provided by professional psychologists, could be regarded as services 'closely related' to medical care. [51]

The court found that for there to be a provision of care that is exempt by Article 132(1)(b), it is clear from the wording of the article that the legislators envisaged medical care that is either performed in a hospital setting, or closely related to care the hospital patients might receive. Since Dorniers services constituted an end in itself, these services could followingly not be regarded as related to such care. [52]

Interestingly, the court, in this case, submitted that for a service like this to be "closely related" to medical care in the sense of Article 132(1)(b), it has to be the ancillary supply to a principal supply of hospital and medical care in the sense of that provision i.e. the services could be regarded as 'closely related' only if they were provided for not as an end in itself, but rather as part of a patient's hospital treatment.

Of great interest to the research question is the following case, '*Ygeia*'[53], which concerned the provision of television to in-care services and logistic supplies to the persons accompanying them. By this time a sort of test was forming for the meaning of 'closely related'. The court held the following:

"*It follows that only the supply of services which are logically part of the provision of hospital and medical care services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to 'closely related activities' within the meaning of that provision. Only such services are of a nature to influence the cost of health care which is made accessible to individuals by the exemption in question."*[54].

This case also built further on two previous points of discussion. Firstly, it was held as in '*Dornier'* that for the service to be closely related, they have to constitute an ancillary service to the principal service supplied. Secondly, the court referred back to the exemption in Article 132(1)(i) by holding that, as in the case 'Commission V Germany', the service that is 'closely related' needs to be essential to the objective

[51] Ibid para 10

[52] Ibid para 34

[53] Case C-394/04 - Ygeia [2005] EU:C:2005:734

[54] Ibid, para 25

of the service. Further establishing that the interpretation of both articles is analogous when it comes to 'closely related activities'.

In '*Ygeia'* and '*Commission V Germany'* the cases were ultimately decided on two bases. One is that the provision of television services and accommodation to persons close to the patients, as well as the provision of education for consideration, can not be regarded as essential to the purpose of the articles. The other consideration was one of fiscal neutrality, namely that these services competed with other businesses providing the same services, and for this reason, it can not be the main purpose of the supply to gain additional income for the persons supplying them.

On closely related activities in the educational sector, one of the most important cases is case C-434/05 '*Horizon College'*[55]. The case was about a college that hired out teachers to another educational establishment. [56] It was first clarified by the court that it is not enough that the activity is performed by a public university[57] or a similar institution, the activity must also in itself be covered by the term 'education' for it to be exempt. Therefore, the hiring of teachers could not be considered exempt merely because Horizon College was an educational establishment. [58] The second question, in line with the previously developed case law, was whether the educational services were considered an ancillary supply of the primary supply, being the teaching at the host college. The court here again referred to CPP on what is regarded as ancillary, an ancillary service is defined as not constituting an end in itself, but a means to better enjoy the principal service.[59]

The interesting circumstance of the case was that the principal service was the education provided by the host establishment, and the service that could be considered 'closely linked' was the hiring of teachers from Horizon College, a different educational establishment. The CJEU principally held that it is not

[55] Case C-434/05 - Horizon College [2007] EU:C:2007:343

[56]"Ibid, para 28, in future referred to as "the host establishment"

[57] "A body governed by public law that has an educational aim"

[58] Case C-434/05 - Horizon College [2007] EU:C:2007:343, para 24

[59] Ibid, para 29

necessary for the students of the host establishment to enjoy the service of education that the education is provided directly by that establishment. The court here also held that "*any lack of a close connection between the principal activity of the establishment making teachers available and its secondary activity – the supply of services closely related to education – is, in principle, irrelevant*". [60]This paragraph is very interesting as it can only be interpreted to mean that it does not matter if there are two separate establishments involved in a 'closely related' transaction, if they are both duly recognised establishments and the service provided is closely related to an exempt principal service. In the light of this the court concludes that the renting out of a teacher to another educational establishment can constitute a closely related service, provided that firstly, it is essential to the teaching of that host establishment. Secondly, there could be no equivalent teaching given by the host establishment, and thirdly, the basic purpose of renting out is not to obtain additional income, thereby competing with commercial enterprises liable to VAT.

3.1.3 Frentikexito & Termas Sulfurosas

The very extensive case law described in this chapter can at times feel overwhelming, but there seems to have been a concerted effort by the court and the AG in later years to give clear and structured summarization of what a closely related activity is. This has been done particularly through AG Kokott's opinion in '*Frenetikexito'* and most recently in the judgment '*Termas Sulfurosas'*.

In '*Frenetikexito'* the AG Kokott addressed one of the most prevalent questions regarding 'closely related activities'. Namely the connection between the composite supply theory on principal and ancillary supplies and closely related activities. As has been previously explained in this chapter the use of CPP as a defense from the French court put the composite supply theory and the CPP test firmly in the case law of the 'closely related activities', and this was further on done expanded upon in '*Dornier'*, '*Ygeia', 'Commission V Germany'. 'Horizon College'* etc. Where the principal-ancillary supplies were essential to the interpretation of closely related activities. What AG Kokott did in her opinion was to put into light two different problems with the terminology used. First of all, if "closely related activities" were of the same characteristics as dependant ancillary supplies, why would there be a

[60] Ibid, para 32

need for a specific exemption of 'closely related activities? [61] Secondly, she opposed the use of the word ancillary as e.g. in Horizon College where the supplies were done independently, rather than dependently which the word ancillary suggests. This reasoning by AG Kokott is of course also supported by the already mentioned opinion of AG Sharpston in '*Klinikum Dortmund'*; "*Where separate supplies are made by separate persons it seems inevitable those supplies cannot form, objectively, a single, indivisible economic supply, which it would be artificial to split"*. [62]

In '*Termas Sulfurosas'* the court pedagogically listed the requirements for closely related activities when examining whether the putting together of individual files by doctors with the aim of granting thermal treatment to the patient could be regarded as a closely related activity. [63] The criterion for closely related activities is in the case summarized by the court as follows. First of all, the purpose of Article 132(1)(b) is the diagnosis, treatment, and as far as possible cure of diseases or health disorders. [64] Furthermore, this can in certain cases be extended to the purpose of protecting, maintaining, or restoring human health. [65] As there is no definition of 'activities closely related', the provision must be interpreted with the purpose in mind i.e. that transactions relating to health care should not be imposed with VAT because taxation would increase the costs and decrease the access to healthcare, thus hindering the benefits flowing from such care.[66] It goes on to mention the need for the service to be an indispensable stage of the process of achieving the therapeutical aim. [67] For this to be decided one needs to consider the purpose for which the services are carried out in each specific case.[68] It further notes that it follows from '*Copygene'* that a service needs to have been at the very least envisaged to be regarded as closely linked, even if it is not necessary that the

[61] Case C-581/19 - Frenetikexito, opinion of AG Kokott , EU:C:2020:855, para 46

[62] Case C-366/12 Klinikum Dortmund, opinion of AG Sharpston, EU:C:2013:618, para 49

[63] Case C-513/20 Termas Sulfurosas de Alcafache [2022], EU:C:2022:18, paras25 & 26

[64] Ibid, para 26, Case C-394/04 Ygeia [2005] EU:C:2005:734, para 24, Case C-45/01 Dornier [2003] ,EU:C:2003:595, para 48

[65] [65] Case C-513/20 Termas Sulfurosas de Alcafache [2022], EU:C:2022:18, para 26, and Case C-262/08 CopyGene [2010] EU:C:2010:328, para 30

[66] Case C-513/20 Termas Sulfurosas de Alcafache [2022], EU:C:2022:18, para 29 and Case C-394/04 Ygeia [2005] EU:C:2005:734, para 23 and Case C-76/99 - Commission v France [2001] EU:C:2001:12, para 23

[67] Case C-513/20 Termas Sulfurosas de Alcafache [2022], EU:C:2022:18, para 32

[68] Case C-513/20 Termas Sulfurosas de Alcafache [2022], EU:C:2022:18, para 33 and Case C-394/04, Ygeia [2005] EU:C:2005:734, para 32

services are performed at the same time as the transaction for it to be exempt.[69] The court after stating the jurisprudence referred the case back to the Portuguese authorities with instructions to take into account all of the above. Of course, the interesting conclusions to be drawn from this case is not the lack of new information or the recital of old criteria; what is noteworthy and of interest is the omission of the principal-ancillary supply doctrine which was, before Kokotts opinion in Frenetikexito, integral to the CJEUs definition of 'closely related activities'.

4. Supplies of Goods & Services which are 'closely linked'

4.1 Case Law

4.1.1 Article 132(1)(g) and Article 132(1)(h) – Exemption of supplies and services closely linked to Social Welfare

As the case law of the term 'closely related' merited them being handled together the same can be said for closely linked activities and the need to separate them. As the exemptions constitute independent concepts of community law that are to be interpreted strictly it is logical to handle these subparagraphs separately.

The first exemption to deal with in this section is the exemption for supplies of services and goods which are closely linked to social welfare which can be found in article 132(1)(g).

To start off, the '*Kügler'* case. The case was about Kügler, an out-patient limited liability company that pursued purely charitable aims, such as looking after people incapable of taking care of themselves. It was found in the case that the activities performed by Kügler were not exempt as medical services, because they were not

[69] Case C-513/20 Termas Sulfurosas de Alcafache [2022], EU:C:2022:18,

carried out by medical or paramedical professionals. However, it was found by the court that the provision of domestic care and help is in principle 'closely linked' to social assistance, which would make it applicable to fall under 132(1)(g).[70]

AG Tizzano elaborated by stating that general care and domestic help are normally seen as connected to social welfare [71] before agreeing with Küglers argument that the link is not only established through the intrinsic nature of the service but also due to the financing of the services, which costs are borne largely by health insurance funds and welfare and social security agencies. [72]

In '*Stichting Kinderopvang Enschede*'[73] the exemption was again handled concerning non-profit organisations. As a foundation, Stichting Kinderopvang Enschede was running a non-profit organisation that provided help for children outside school hours. This was done partly through acting as an intermediary, helping kids meet host parents who could assist the families in need of help, and making available education for the host parents.[74] It was stated by the CJEU that the services provided by the host parents could be seen as charitable. However, for the exemption to apply to the intermediary services provided by the foundation, the court referred to the same criteria as in '*Ygeia'* and '*Commission V Germany'*.[75] Namely that the service provided needs to be essential to the childcare provided by the host parents. It was in this case left to the member state to assess whether the screening of the parents and the education provided to them was enough to be essential and if a link could be established. As the AG and the court noted the assessment should take into account whether the intermediary services of training and selection of host parents lead to a higher quality of services than if the services were provided without the foundation's involvement. Such services should of course also not be carried out for the basic purpose of

[70] C-141/00 Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften [2002] EU:C:2002:473, para 58

[71] Ibid para 50

[72] C-141/00 Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften [2002], EU:C:2001:498, opinion of AG Tizzano paras 51 & 78

[73] C-415/04 Kinderopvang Enschede [2006], EU:C:2006:95

[74] Ibid para 7

[75] See section 3.1.1 and 3.1.2

attaining additional income. [76]

In '*go fair' Zeitarbeit*' the court narrowed the scope of what can be seen as a 'charitable body' to not include services provided by health care workers rented out by a temporary work agency. This was due to firstly, that the supply of the hired-out care personnel cannot be seen as taxable persons as they are employees of the work agency. [77] Secondly, the supply of the work agency cannot be seen as exempt as the hiring out of workers is not in itself a supply that aims to provide social services in the general interest.[78]

The court later elaborated on the judgment in '*Go fair Zeitarbait'* in the case '*E'*[79] where they clarified that the former judgment was not to be interpreted as precluding exemption of services that were not given directly to the person in need of care. In the case, the court found that the preparation of reports of independent experts to a support and insurance fund is 'closely linked' to the care based on these reports, in so far as they are essential to the care provided. [80]

To conclude this section is the case '*EQ'*[81]. EQ was a lawyer from Luxembourg who was representing adults as an agent, curator, and guardianship manager. This representation was regulated by different protection schemes and a guardian was selected by a competent court. [82] As the service is provided in protection of persons with mental disabilities and a need for assistance in civil matters, the court held that the service is in principle closely linked to welfare and social security work.[83] They are also essential, as they protect individuals from jeopardising themselves in everyday life. [84]

[76] C-415/04 Kinderopvang Enschede [2006] EU:C:2006:95. paras 27 and 30, Stichting Kinderopvang Enschede and AG Opinion of the same case, paras 55 & 57

[77] As the services are not carried out independently, see Case C-594/13 'go fair' Zeitarbeit [2015], EU:C:2015:1643, para 3

[78] Ibid, para 28

[79] Case C-846/19, Administration de l'Enregistrement, des Domaines and de la TVA [2021] EU:C:2021:277

[80] Ibid, para 54

[81] Ibid

[82] Para 18

[83] Para 63

[84] Para 64

4.1.2 Article 132(1)(l) – Subscription Services

The exemption in Article 132(1)(l) is an exemption for the supplies of services, and of the supply of goods closely linked thereto, to the members of different types of non-profit organisations, for example, political organisations or trade unions.

A further definition as to what is regarded as a trade union, but that can also be interpreted to extend to other types of organisations with non-profit incentives can be found in the case '*Institute of the Motor Industry',* where the following definition was provided.

"*Thus, a non-profit-making organisation whose main object is to defend and represent the collective interests of its members satisfies the criterion of exercising an activity in the public interest, which is the basis of the exemptions set out in Article 13A(1)(l) of the Directive, in so far as it provides its members with a representative voice and strength in negotiations with third parties."*[85]

These supplies of goods must be regarded as closely linked be essential to the transactions exempted, and they must also not have the basic purpose of obtaining additional income for the body in question. This follows from article 134 in the VAT directive. Depending on the Member State they will also have to fulfill the optional criteria laid down by that specific Member State as a result of its choice to implement certain parts of Article 133, which lies down optional criteria. For this exemption, there exist no other cases than the case already mentioned, and therefore it is still unclear where the line is drawn specifically as to what is regarded closely linked or not. As the Article also clearly points out the supplies are restricted to the members of the organisation.

[85] Case C-114/97 The Institute of the Motor Industry v Commissioners of Customs and Excise [1998] EU:C:1998:536, para 21

5.1.3 Article 132(1)(m) – Sport or Physical Education

The exemption for the supply of certain services closely linked to sport or physical education by non-profit organisations to persons taking part in sport or physical education can be found in Article 132(1)(m). Whereas the jurisprudence in the previous article did not give a lot of guidance on the notion of 'closely linked' this article has been widely covered in case law.

In *Commission v Spain*[86] the court held that limiting the exemption based on the membership fee of the organisation was not in line with the purpose. As the AG and the court noted, this could lead to non profit bodies being excluded as well as profit-making bodies services being closely linked.[87]

In *Canterbury Hockey Club*[88], the question was posed whether the term "persons taking part in sport" extended to corporate persons or unincorporated associations, or if it was limited only to individuals. The court concludes that sport within organisational and administrative structures entails that not the person himself, but the club or organisation he belongs to, organises the services. Such services could for example include a football pitch rented or owned by a football club, which then provides it to the individuals playing the sport. The supply of the pitch from the club to the person would in the case of a limitation to individuals, be subject to VAT. Excluding this kind of transaction from being exempt for this reason, the CJEU reasoned, would lead to a large number of services closely linked to sport being taxed. This would according to the court run counter to the cost-reducing purposes of the exemption, even if the true beneficiary of the services in this case could be the clubs who are organising the game. Therefore the term persons, CJEU ruled, also includes organisations or clubs organising sporting activities for its members. [89] However, the services linked to sport clubs and to their operations as such, for example, marketing advice and obtaining sponsors, could not benefit from the exemption and is not closely linked to sport or physical education. [90]

[86] Case C-124/96 Commission v Spain [1998], EU:C:1998:204

[87] Ibid para 17

[88] Case C-253/07 Canterbury Hockey Club and Canterbury Ladies Hockey Club [2008], EU:C:2008:571

[89] Ibid para 29

[90] Ibid para 32

The court also concluded that it is not in line with the principle of fiscal neutrality that persons participating in sport or physical education be treated differently solely because they participate through the structure of a club.[91]
Further guidance on the term closely linked was given in '*Město Žamberk'*[92]. In the case a municipal aquatic park, containing sporting venues such as a multi-laned swimming pool, table tennis areas, and other sporting services, was made available to the public for consideration. There were two questions referred to by the national court, the second one was if the provision of a park in which people in addition to sport also could take part in leisure activities such as amusement is a service closely linked to sport.

The court noted that to decide whether the service could be closely linked, it first need to be decided whether the service constituted a single indivisible supply, with elements which it would be artificial to split. Two or more separate supplies. Or a single supply with one principal and one ancillary supply. [93] This leaves three different scenarios. In the first scenario, a single indivisible supply would be exempt if the elements are so closely linked to the customer that it would be artificial to split. Secondly, one principal supply, and one or several ancillary supplies would share the tax treatment of the principal supply. [94] And thirdly, two or more supplies that are divisible, where each service would be judged separately to determine if it is closely linked to sport or not.

In a case that is not readily available in English, *'Commission V Netherlands'*[95]the court judged that the hiring out of berths and sites for the storage of boats can be exempt, where the hiring out is essential for the practice of sport performed with those boats. [96]

[91] Ibid para 30
[92] Case C-18/12 - Město Žamberk, [2013], EU:C:2013:95
[93] Ibid para 27
[94] Ibid para 28
[95] Case C-22/15, Commission v Netherlands, [2016], Operative part of Judgment, EU:C:2016:118
[96] Ibid

5. Analysis

5.1 The interpretation of 'Closely Related Activities'

i) *Strict interpretation of closely related activities?*

As will be established later, the case law on closely related activities points in different directions. However, what is most clear when it comes to 'closely related' activities is its relationship to the principle of strict interpretation.

It is clear that the directive does not include a definition of closely related activities. In all cases on closely related activities included in this thesis, it has been held that even if exemptions are to be interpreted strictly, this concept does not call for an especially narrow interpretation. As it is designed to ensure that the benefits from supplies closely related to medical care or education are not hindered by the cost of taxation. [97] Even though it can be seen as a recent trend in other subparagraphs of the VAT exemptions that exemptions should not be construed in a way that deprives them of their intended effect[98], as we can see from the cases quoted this stance is neither new nor questioned when it comes to closely related activities.

ii) The importance of fiscal neutrality to 'Closely related activities'?

The two different principles key to interpreting the exemptions are the principle of strict interpretation, but also the principle of neutrality. It would then make sense in

[97] Case C-76/99, Commission v France [2001], EU:C:2001:12, para 23, Case C-287/00, Commission v Federal Republic of Germany, [2002], EU:C:2002:388, para 47, and Case C-394/04, Ygeia, [2005], EU:C:2005:734, Case C-45/01, Dornier, [2003], EU:C:2003:595, para 31 Case C-45/01, Dornier, [2003], EU:C:2003:595, para 40, Case C-434/05, Horizon College, [2007], EU:C:2007:343, para 16

[98] See Schulyok, "Schulyok, F., The ECJ's interpretation of VAT exemptions, International VAT Monitor", p 1 and de la Feria R. (2015) "EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox", SSRN, p. 4

accordance with the existing doctrine that the interpretation, if not strict, would be based on the need for neutrality. [99]

First of all, it has been established that the exemptions as such are inherently non-neutral.[100] What is being analysed in this section is not the neutrality of exemptions overall but rather; the similar treatment of supplies of goods and services which are for medical treatment or education, supplied by public bodies or other duly recognised establishments".

The principle of fiscal neutrality for 'closely related' activities was first mentioned in *Dornier.* The Court held that the service of qualified psychologists performing services in a hospital as having the '*purpose of diagnosis, treatment and, in so far possible, the cure of diseases and health disorders*' was in keeping with the principle of fiscal neutrality.[101] The Court does not evolve on this statement, but it could be argued that the shared purpose of different services can be a powerful sign that they are indeed similar services, which should be treated the same for tax purposes.

In *Ygeia* the case was a bit different, namely that e.g. the telephone services could be in competition with the services of telephone providers. As the supply of telephone services is not exempt, they should as a general rule be seen as not 'closely related'. But here the Court left a very important reservation to the ruling, namely that if the services are essential to the therapeutic objectives of the hospital and the objectives of which is not to obtain additional income for the supplier. These are, of course, the criteria set out in Article 134 of the VAT directive which arguably aims to ensure neutrality for the exemptions. Furthermore, two important things can be derived from this statement from a neutrality standpoint. Firstly, if the supply is essential and does not have the purpose to obtain additional income, it takes precedence when deciding the nature of the service over the incidental competition with the telephone companies. Secondly, even in the cases where a service is not generally associated with the provision of medical care, such as the telephone

[99]4 De la Feria R. (2015) "EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox", SSRN

[100] See Case C-378/02, Waterschap Zeeuws Vlaanderen [2005], Opinion of AG Jacobs, EU:C:2004:726, para 38 and De la Feria R. (2015) "EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox", SSRN

[101] Case C-434/05, Horizon College, [2007], EU:C:2007:343, para 49

services, this test applies as a decider on if the services are closely related or not.[102]

Horizon College is another case that makes specific mention of these two criteria, and it is the first case analysed where the Court specifically made the connection between the principle of neutrality and article 134. It is of noteworthy importance that the Court held that the education services supplied by Horizon College to the host establishment could also be supplied by independent agencies and that if such supply of the agency could hold the same level of quality of teaching, the services could not be essential.[103] This is a confusing conclusion. If an analogy to *Ygeia* is to be made, it could be argued that the incidental competition with commercial educational agencies which are subject to VAT should not matter for the purposes of a service being essential, any more than the incidental competition with television providers in the above case.[104] Attempting to answer this conundrum, it seems fitting to look at the differences between the cases. The main difference is that in *Ygeia* the supplies were made by the hospital to its own patients, meanwhile, the services of Horizon College were provided to the 'host establishment'. This is unlikely to be the answer searched for, as another conclusion of the court was that it is not necessary for the students to enjoy the service that is provided directly by the 'host establishment'.[105] The most convincing argument is in the other major difference between the cases, that the supplies in Ygeia are supplies that would likely not distort the competition of the television or telephone service market in any significant way. The supply of teachers can be said to be a much more integral part of the supply of education and allowing an exemption could likely distort competition in the education market. As the court did not make substantially clear its reason for this it is inappropriate to draw far-reaching conclusions at this point. Nonetheless, it is noteworthy that the criterion 'likely to distort competition' is not part of the criteria in article 134. While it is clear it is not desirable from a view of competition neutrality to exempt the services provided by Horizon College, it should, as was clearly stated in *Ygeia*, not have an impact on whether a service is essential. Furthermore, the imposition of VAT on such services, if services of the

[102] Ibid para 53

[103] Ibid para 40, 44

[105] Ibid para 32

same quality could not be found at the 'host establishment', would clearly increase the cost of education. Some guidance as to the overarching reasoning in the *Horizon College* case can be found in the reasoned opinion of AG Sharpston. Her opinion was that the effects of exempting services on the costs for public and private actors is not systematically predictable, and that the rules therefore call for circumvention. Furthermore, in line with the judgement she also held that the intention to alleviate the fiscal burden of socially beneficial services cannot be decisive in regards their definition. [106] If the Court indeed had kept these factors in mind i.e. that it is not systematically predictable how a case such as this, where colleges would be put in direct competition with independent agencies for the purposes of hiring out of staff, would affect the private pocket. There would be more clarity to the judgment. Even so, it is hard to see how the reasoning of AG Sharpston and the conclusions reached about incidental competition is consistent with the established stance of the CJEU that the principle of neutrality is not a rule of primary law, and that it cannot condition the validity of an exemption.[107]

There are many more peculiarities with the *Horizon College* case which will be handled in later parts of this analysis.[108] In sticking with this part of the analysis, as comes to fiscal neutrality, there is one more mention of importance in this case. That is that the Court in the case makes specific mention of article 134 and its importance to fiscal neutrality, by stating that the exclusion of services 'with basic purpose to obtain additional income' is a specific expression of the principle of fiscal neutrality.[109] They do not explicitly make such mention when it comes to the criteria of essentiality.

The Court's judgment in *Brockenhurst College* is as previously mentioned largely based in *Horizon College*, as such it gives clues to answer the previously mentioned questions. In reference to *Horizon College* and the essentiality of the services, the Court mentions that there should be no such education of equivalent value at the college, as the education provided by the practical experience of working at the

[106] Case C-434/06, Horizon College, [2007], Opinion of AG Sharpston, EU:C:2007:149, para 33

[107] Case C-366/12, Klinikum Dortmund, [2014], EU:C:2014:143, para 40, and C-334/14, De Fruytier, [2015], EU:C:2015:437 para 37

[108] See part iii) of analysis on closely related activities

[109] Case C-434/05, Horizon College, [2007], EU:C:2007:343, para 43

restaurant.[110] On the one hand, this is mentioned in the judgment and conclusion in *Horizon College.* On the other hand, *Horizon College* mentions the independent education agencies, while *Brockenhurst College* does not consider if regular restaurants could provide a similar level of education in the essentiality judgment. The important finding is rather, that in *Brockenhurst College* the neutrality aspect is shifted from the essentiality of the service to the other criteria, the basic purpose to obtain additional income. In keeping with *Horizon College*, they mention again that this criterion is a specific enunciation of the principle of fiscal neutrality. After this statement, the Court goes on to compare the supply of restaurants with the one provided by the college. Concluding, after the neutrality considerations, partly due to that the services provided by Brockenhurst do not share similarities with the ones provided by restaurants. [111] From the reasoning above, it is clear that, at least concerning the exemption of education, the principle of fiscal neutrality and in particular competition neutrality is a substantially integral part of the Court's interpretation of if a service can be closely related or not. It is also clear that the criteria of the service not being to obtain additional income is an expression of fiscal neutrality. It is however unclear what connection it may have to the essentiality of the service provided.

The above consideration is one of the two main neutrality aspects when it comes to closely related activities and the similar treatment of similar supplies. The second consideration has a close connection with the purpose of the exemptions and the essentiality criterion.

The second consideration can be deduced from two different, very clear, conclusions made by the CJEU. Firstly, the purpose of the exemptions is to reduce the costs of care or education, thereby ensuring that benefits from these services flow freely. Secondly, to be regarded as closely related, the service needs to either constitute an indispensable stage in medical care provided or be essential to education provided. [112] These two frequently occurring findings together mean that a closely related service, in essence, is so closely related to the services provided

[110] C-699/15, Brockenhurst College, [2017], EU:C:2017:344, para 28

[111] C-699/15, Brockenhurst College, [2017], EU:C:2017:344 , paras 36-42

[112] See Case C-287/00, Commission v Federal Republic of Germany, [2002], EU:C:2002:388, para 48, and Case C-394/04, Ygeia, [2005], EU:C:2005:734, para 25, and Case C-513/20, Termas Sulfurosas de Alcafache, [2022], EU:C:2022:18, para 31

that it is part of that care and that education. This limitation of closely related activities ensures firstly, that the services, as part of the care or education, have a neutral treatment in so far as they are treated the same as other goods which are supplied for the same purpose. Secondly, it ensures that supplies which do not have the purpose of care or education can not be exempt as closely related activities, either due to having the purpose of attaining additional income, or due to not being essential to the service provided. Thus, the goods or services which are closely related are not in competition with commercial enterprises providing similar services, as they essentially do not have the purpose of competing in any market, but merely providing the best care or education possible to the recipients of the activities. The caveat to this is of course the possible incidental competition as described in the earlier analysis of *Horizon College*. This incidental competition is, in a wider scope, as has been described by de la Feria[113] and also by the Commission already in the year 2000[114] a growing concern due to the changed, globalised economy and the privatisation of services which were traditionally provided by the public sector.

As a final note on the supply itself and the principle of fiscal neutrality, the judgments in *Horizon College* and *Brockenhurst College* clearly speak to that, at least in the educational sector, taking into account competition neutrality and distortions of competition is an essential part of deciding whether the services are closely related or not. However, it is still not clear how these considerations speak to the purpose of reducing the cost of education, and where in the wording in the conditions of article 134 this can be justified. Especially since the principle of neutrality, according to the court itself, is not a rule of primary law that can condition the validity of an exemption.[115]

So far, the analysis has dealt with the relationship between fiscal neutrality in terms of the supply made, this is not the only relationship, as there is also neutrality aspects when comes to the supplier.

[113] See part ii) of the analysis

[114] COM(2000)348 final Annex 2.1

[115] Case C-366/12, Klinikum Dortmund, [2014], EU:C:2014:143, para 40, and C-334/14, De Fruytier, [2015], EU:C:2015:437 para 37

As we know from the provisions themselves and article 133, Member States may also extend the exemptions to supply made by bodies not recognised by public law. In this regard, a delimitation has been made. It is of course of importance to neutrality that the suppliers supplying similar types of goods should not be treated different for tax purposes. [116] The national court should also consider factors such as the public interest of the activities of the taxable person, the occurrence of other taxable persons performing similar services who are exempt, and if the costs incurred can be largely met by social security.[117]

When it comes to the analysis of closely related activities, it seems hard to establish any implications without delving into national law, other than the fact that a closely related activity needs to be supplied either by a body governed by public law or recognised by the Member State as such. Keeping in mind that it is up to the discretion of the member state to acknowledge a body as such. It can also be noted that this discretion in nature will lead to the diverging application of the exemptions and closely related activities in different countries, and is therefore likely to implicate the external neutrality negatively.

iii) The essentiality criteria, closely related activities and its relationship to composite supplies

In the thesis, in article 134 and especially in the previous section of this analysis, the essential nature of the services has been established as a crucial aspect. An in-depth analysis has, however, by design been left out of the previous section.

The interpretation of closely related is not about strict interpretation, as the purpose of the exemption does not call for an especially narrow interpretation. [118] Instead, the purposes of the supply should be analysed, to see if the supply shares the purpose of the exempt activity. That is, in the case of medical care, having the purpose of diagnosis, treatment, and in so far possible cure of diseases and health disorders. [119] In order for a service to be essential to medical care, it needs to be '*logically part of the provision of hospital and medical care services and /.../*

[116] Case C-262/08, CopyGene [2010], EU:C:2010:328, para 64, Case C-45/01, Dornier, [2003], EU:C:2003:595, para 42

[117] Ibid para 72

[118] Case C-76/99, Commission v France [2001], EU:C:2001:12, para 23

[119] Case C-513/20, Termas Sulfurosas de Alcafache, [2022], EU:C:2022:18, para 26

constitute an indispensable stage in the process of the supply /…/ to achieve their therapeutic objectives'. [120] It is also clear that it does not include medical services which are not at the very least envisaged.[121] For education, the Court has held that '*the concept of 'school or university education' for the purposes of the VAT system refers generally to an integrated system for the transfer of knowledge and skills covering a wide and diversified set of subjects, and to the furthering and development of that knowledge and those skills by the pupils and students in the course of their progress and their specialisation in the various constituent stages of that system.*'.[122]

This does not appear particularly unclear when it comes to the medical exemptions, as the therapeutic aim was established already in *Commission v France* and has been since developed in further cases.[123] However, in the education exemptions, this definition of education can be found first in the case of *A & G Fahrschul*. And this definition has not been existent in the interpretation of closely related activities when it comes to education. This is as closely related activities to education have focused on the purpose of education focused on a different doctrine established by the Court, namely the need for a closely related supply to be an ancillary supply to be essential to the education provided.

As has been explained the occurrence of a principal and ancillary supply is not only occurrent in closely related activities, but has its origins in the exemptions in the financial services exemption in paragraph 135.[124] The status as ancillary is given to a product if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. If the supply is deemed ancillary, this will result in an absorption by the ancillary supply of the VAT treatment of the principal supply. [125] The other distinguishing factor of an ancillary supply is that the value of the ancillary supply is of a smaller proportion to the customer, such as

[120]Case C-394/04, Ygeia, [2005], EU:C:2005:734,para 25 Case C-513/20, Termas Sulfurosas de Alcafache, [2022], EU:C:2022:18, para 32

[121] Case C-262/08, CopyGene [2010], EU:C:2010:32, paras 45, 46 and 50

[122]Case C-449/17, A & G Fahrschul-Akademie, [2019], EU:C:2019:202, para 26

[123] See Case C-394/04, Ygeia, [2005], EU:C:2005:734, para 25 and Case C-513/20, Termas Sulfurosas de Alcafache, [2022], EU:C:2022:18, para 32

[124] See Section 2.3.X on composite supplies and CPP para 30

[125] Ibid

for example hoteliers who provide minor services through third parties, which only consists of a small part of the supply.[126]

It is important for the analysis to also take note of the judgment in *KPC Herning*, where the Court argued that the occurrence of two different parties in the supply of property and services carried out by different contractors were held to constitute legally distinct transactions. In the ruling in this case the occurrence of two different parties was held to be a determining factor to the supplies not being principal and ancillary. [127]

In the case of *Commission v France*, the transport of a sample between two different suppliers were held to be the supply of a principal service and an ancillary service. It was held that, since the taker of the sample is responsible to the patient and obliged by law to transport the supply to a specialised lab, the service was to be deemed as ancillary. The Court also considered that the patient was indifferent to if the analysis was subcontracted or not. [128] This case, while it clearly has multiple suppliers involved in one service, focuses on the supply made by the taker of the sample, and the obligation it has by law to transport the sample to fulfill its therapeutic purpose.

The principal and ancillary supplies where again mentioned in *Dornier*, where the services provided were made by an outpatient psychotherapy organisation. Due to the nature of out-patient care, it was held that it was covered by the exemption in subparagraph c of article 132. Therefore, such services, albeit constituting medical care, could only be seen as closely related if they were supplied as ancillary services to the principal services of hospitals. This is due to the exclusion of closely related activities from article 132(c).[129] What this implies is that Dornier could perform ancillary services to in-hospital patients in its out-patient facilities, and this would be regarded as closely related to the principal supply of that hospital.

In *Ygeia* the essentiality criterion was introduced into the case law of closely related objectives. Here, it was connected with the essentiality criteria, noting that the

[126] Joined Cases C-308/96 and C-94/97, Madgett and Baldwin, [1998] EU:C:1998:496, para 24

[127] Case C-71/18, KPC Hearning, EU:C:2019:660, para 44

[128] Ibid para 28

[129] Case C-45/01, Dornier, [2003], EU:C:2003:595, para 47-51

condition of a service being essential means that it needs to be an indispensable stage in the process of the supply of those services, and the other considerations already established in the start of this section. [130] In doing so, it also connected the consideration of ancillary supplies to the indispensable character of the supply, by stating that only services that are of an ancillary character can be regarded as closely related activities.[131] In the case, it is not spelled out what the service is to be regarded as ancillary to, but it is clear from the reference of the court to *D'Ambrumenil* that the supply does not need to be ancillary to the principal supply, but rather be ancillary to the main purpose of the service.[132]

Horizon College was the case that by analogy brought the ancillary character of the supply to the exemption of education.[133] Again holding that a service is ancillary to the principal service if it does not constitute an end, but a means of better enjoying the service. [134] The court as previously stated held that it was irrelevant to the interpretation of closely related activities and for the students of the host establishment that the supply was made by a different entity than the 'host establishment'.[135]

In *Copygene* the supply was held to be not ancillary to the purpose of healthcare since they would only be provided if certain eventualities came to pass, and that the services in large were not at the very least envisaged.[136]

Furthermore, and interestingly, in *Brockenhurst College* the Court, instead of referring to the purpose, connected the term ancillary supplies to the specific principal supply provided by the establishment. It was held that to be 'closely related' the supply needed to be ancillary to the principal supply of the educational establishment.[137]

In the case *Frenetikexito* the term closely related did not apply to the case itself, as it concerned a service not performed in a hospital setting. However, AG Kokott in

[130] Case C-394/04, Ygeia, [2005], EU:C:2005:734, para 25

[131] Ibid para 31

[132] See Case C-307/01 d'Ambrumenil and Dispute Resolution Services, [2003], EU:C:2003:627, para 48

[133] See Case C-434/05, Horizon College, [2007], EU:C:2007:343, para 28

[134] Ibid para 29

[135] Ibid para 32

[136] Case C-262/08, CopyGene [2010], EU:C:2010:328, para 47

[137] Case C-699/15, Brockenhurst College, [2017], EU:C:2017:344, para 24

her opinion made a difference between closely related supplies and other ancillary supplies, such as for example the ones in *Mapfre* and *CPP*. In her opinion she noted that the closely related activities constitute supplies which are distinct from pure medical or hospital care, but may still be necessary in order to supply that care, together with the cost-reducing purpose of the exemption. In her opinion, she also held that the notion of 'principal and ancillary' supplies in connection to closely related supplies is problematic, as if the supplies are truly ancillary they would already be exempt as such. The closely related services are according to Kokott, rather auxiliary to the supply i.e. that they are not of a dependent nature and can be supplied by taxable persons other than the person who makes the exempt supply itself.[138]

If one is to analyse AG Kokott's opinion together with the above case law cited, it is unavoidable to share her hesitance to the term of ancillary and principal supplies in connection with closely related activities. As was held in *D'Ambrumenil,* and can be derived from the differing nature of interpretation when comes to *Horizon College* and *KPC Hearning* the closely related activities are not to be ancillary to the principal supply of the supplier, but rather the main purpose of the service.[139]

The confusing difference in terms of closely related activities and other composite supplies is likely has to do with the different objectives of bodies governed by public law and duly recognised establishments, and other organisations providing composite supplies. For a company, it is driven by profitability, as such it has customers. An ancillary supply in the terms of *CPP* is to be analysed through how it is perceived by the customer and how the service is provided to those customers.[140] In contrast, a supply made by an organisation or public body in the terms of article 132(1)(b, i) is not made with the purpose not to make a profit, but rather a shared purpose of ensuring that healthcare and education are as beneficial as possible for the population. Therefore, any activity provided by a body that

[138] Case C-581/19, Frenetikexito, [2021], opinion of AG Kokott :EU:C:2020:855, para 44-47

[139] Case C-307/01 - d'Ambrumenil and Dispute Resolution Services, [2003], EU:C:2003:627, para 48, Case C-434/05, Horizon College, [2007], EU:C:2007:34, para 32, Case C-71/18, KPC Hearning, EU:C:2019:660, para 44

[140] Case C-349/96, Card Protection Plan, [1999], EU:C:1999:93, paras 30,31

primarily pursues a therapeutical or educational aim in the sense of the directive could be seen as closely related if the auxiliary service pursues the same aim.

A final remark in this part of the analysis is that it is still unclear the necessity of bringing in the ancillary nature of the service to solve the legal problem at hand. After all, if a service is essential to the nature of the exemption and shares the purpose of a therapeutic aim or is regarded as having the purpose of education, it is by definition ancillary to the purpose of healthcare or education in the sense of article 132 (b) and (i). It is therefore most welcome that the court managed in *Termas Sulfrorosas* to solve the complicated issue of closely related activities based on the criteria in article 134 together with the purposeful analysis of the supply, without even once mentioning the need for the supply to be of an ancillary nature.[141]

5.2 Is 'Closely Linked' Supplies the same as Closely Related Activities?

Closely related activities, albeit referring to two different exemptions, seems in many ways to share the same meaning and include the same considerations when it comes to the interpretation.[142] The same is not to be said of closely related activities. And for this reason, the subparagraphs containing closely linked will be analysed separately as comes to their similarities to the closely related activities.

i) Exemption of supplies and services closely linked to social welfare

The cases in this exemption share both similarities and differences from that of closely related activities. In interpreting the supplies of goods closely linked to welfare and social security work, in *Kügler, 'go fair' Zeitarbeit* and *EQ* it was held that the provision of general care provided and the supply of legal services to inadequate adults was in principle linked to social assistance.[143] This is different from the analysis made of closely related activities as it considers if entire categories of services are linked to the provision, rather than if the supplies ancillary to the purpose made by an exempt actor are closely related to article 132(b).

[141] Case C-513/20, Termas Sulfurosas de Alcafache, [2022], EU:C:2022:18

[142] See section 5.1

[143] C-141/00 Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften [2002] , EU:C:2002:473, para 44

The *Kinderopvang Enschede* undoubtedly shares some similarities to *Horizon College*[144]. Here, when it comes to closely linked, the Court states that to be exempt under article 132(1)(g) the intermediary services must be closely linked to one of the activities set out therein. After concluding that the services of the host parents are indeed exempt. The analysis of the link is then based on whether the service, comprising of amongst other things listing people known to offer childcare, could be considered essential to the exempt service of childcare, and if the basic purpose is to obtain additional income.[145] In its essentiality assessment, the Court provides similar reasoning to the one in *Horizon College*[146], namely that the services to be regarded essential need to improve the childcare that they could not obtain the same quality of services without the intermediary services. [147]

This case, however, does not add clarity to the *Horizon College* case when it comes to incidental competition. As it merely supports the statement in *Horizon College* that there could be no assurance that education provided independently by the '*host establishment'* cannot have equivalent value and not the conclusion made about independent agencies.[148]

From these cases can be concluded that the interpretation of closely linked concerning the subparagraph 132(1)(g) does not follow the logic of closely related activities. This is as closely linked activities in the meaning of this subparagraph rather examines whether the entire supply of an establishment is exempt, instead of analysing closely related activities of organisations who primarily supply exempt supplies.[149]

ii) *Exemption of services closely linked to sport or physical education*

For the exemption of services closely linked to sport or physical education, the above considerations are also applicable these cases. In *Cantebury Hockey Club*, what was interpreted as being closely linked was not the ancillary supplies of

[144] Case C-434/05, Horizon College, [2007], EU:C:2007:343, paras 36, 38 and 39

[145] Case C-415/04, Kinderopvang Enschede, [2006], EU:C:2006:95, para 27

[146] See section 5.1, part ii) "*The importance of fiscal neutrality to 'Closely related activities'*

[147] Case C-415/04, Kinderopvang Enschede, [2006], EU:C:2006:95, para 27

[148] Case C-434/05, Horizon College, [2007], EU:C:2007:343, paras 38, 39

suppliers providing primarily exempt supplies, but rather if the services themselves were closely linked to sport. [150]

In *Město Žamberk*, the case was similar when comes to the first question, where it was considered that non-organised and unsystematic sporting activities may be categorised as taking part in sport. [151] The second question posed by the court was if the aquatic park could be regarded as 'closely linked to sport' introduced composite supply considerations also to the 'closely linked' activities. As regards to this, the Court considered whether the services consisting of a combination of leisure in sport where so closely linked that they could form a single indivisible supply which it would be artificial to split. In order to be seen as an exempt and closely linked service, this single indivisible supply would need to be seen by the typical consumer as being a supply which had the predominant character of sporting activities. [152] On this is sufficient to say that this case does not bear a resemblance to closely related activities, it is rather an interpretation in line with that of composite supplies which are not closely related.[153]

iii) The supplies of services and goods covered by Article 132(1)(h, l & n)

When it comes to the exemptions for services and of good closely linked to the protection of children and young persons in article 132(1)(h), this was also dealt with in *Stichting Kinderopvang Enschede.* The analysis of both these articles in the case followed the same considerations for both subparagraphs (h) and (g). As no other relevant case can be found, it is appropriate to refer to that analysis when it comes to closely linked activities in the case of article 132(1)(h).

For subparagraph 132(1)(n), exempting supplies of goods closely linked to certain cultural services, there is case law concerning what constitutes certain cultural services[154] .However, as the closely linked supplies can only be goods, it can be said to not be similar to the closely related case law, which primarily deals with the

[150] Case C-253/07, Canterbury Hockey Club and Canterbury Ladies Hockey Club, [2008], EU:C:2008:571

[151] Case C-18/12, Město Žamberk, [2013], EU:C:2013:95, para 25

[152] Case C-18/12, Město Žamberk, [2013], EU:C:2013:95, para 33

[153] See for example Case C-432/15, Baštová, [2016] EU:C:2016:855

[154] Case C-144/00, Hoffmann, [2003], EU:C:2003:192, and C-592/15, British Film Institute, [2017], EU:C:2016:733

supply of services. The same can be said for article 132(1)(l), that exempts goods supplied that are closely linked to the subscription services of e.g. trade unions.

iv) Are closely linked supplies the same as closely related activities

The conclusive answer to this question is that closely linked supplies in the sense of article 132(1)(g)(h)(l)(m) and (n) are not the same as closely related activities. This is as it considers if entire categories of services are linked to the provision, rather than if the supplies ancillary to the purpose made by an exempt actor are closely related to article 132(b).

6. Conclusion

This thesis aimed to examine how case law on closely related activities has developed in the CJEU, it aimed to do so by three primary research questions. Firstly, what is the relationship between closely related activities and the principle of neutrality. Secondly, what is the meaning of the term ancillary in the case law of the closely related activities and how does in relate to other ancillary supplies. Thirdly it aimed to see if closely linked activities were interpreted similarly to the closely related activities, as they share the same corollary articles in 133 and 134.

In attempting to answer this research question, a few important findings have been made.

First of all, closely related supplies do not need to be interpreted narrowly, they should instead be interpreted in the light of the purpose of the exemption of closely related activities. Which is to ensure that the benefits from such care flows freely and that access to care or education in the terms of the exemptions is not hindered by the increased costs that would follow if it was subject to VAT.

This interpretation should furthermore be done with the aim of the exemptions in mind. For the medical exemption, it does not envisage services which are unrelated to the hospital care, and as such only activities which are logically part of the provision of hospital care and constitute an indispensable stage in the process of the supply can be regarded as closely related. As these are the only services which could affect the cost of medical services. Furthermore, these services need to be essential to the care provided and not be for the basic purpose of obtaining additional income.

These last considerations constitute the neutrality aspect of closely related activities, and in theory works to alleviate intentional distortions of the market. However, there can still occur incidental competition as in the *Ygeia* case. This incidental competition could in the *Ygeia* case allowed, if the telephone services were to be essential and not to obtain additional income. However, in the case of the educational exemption and *Horizon College* and *Brockenhurst College*, there was neutrality considerations made by the court. As has been discussed in the analysis, this neutrality consideration was made in the essentiality criteria in *Horizon College,* while it was made by an extension of the ‘additional income’

criteria in *Brockenhurst College*. This is in line with de la Ferias observation that fiscal neutrality is gaining additional value as an interpretative tool to the court, and also speaks to that, despite the criteria in article 134, services closely related to education is not safe from other elements of fiscal neutrality having importance in the interpretation.

On the research question of whether principal and ancillary supplies is the same in the composite supply doctrine as it is in closely related activities, the clear answer is no. This is as they, as argued by AG Kokott, do not constitute dependent services, but rather services auxiliary to the common purpose of the exemption. While it is clear that they can be supplied by the same taxable person and be dependent services to the principal service in certain cases such as in the *Ygeia* case, it is in the *Horizon* equally clear that it is not deciding factor on whether a service is regarded a closely related activity or not. A far clearer description of the term closely related in the sense of closely related activities would be the one of the Court in *D'Ambrumenil* that these services are ancillary to the purpose of the exemption.

In response to the last posed research question, closely linked activities, even though subject to the criteria in article 134, is not to be interpreted the same as closely related activities, as the interpretation in these cases only considers if entire categories of services are closely linked to their respective subparagraph.

Lastly, as the final conclusion, it is still unclear what effect principal and ancillary activities have after the Court's recent judgment in *Termas Sulfuras* where the criteria was not once mentioned. It is also unclear what effect the occurrence of incidental competition has on competition neutrality in regard to services closely related to education. To this one can only hope that there is some clarity in the horizon.

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