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of the exemption for educational services in Swe-
dish law

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Summary

This thesis aims to investigate how educational services are regulated for tax purposes under EU Law. Further, this thesis will analyse the case law considering educational services from the CJEU and consider how the Court's interpretation relates to the principle of neutrality. With the regulation and case law as a basis, the thesis will then consider how the regulation of educational services for VAT purposes has been implemented into Swedish national law. The interpretations made by the Swedish courts and the Swedish Tax agency's compliance with the EU regulation and the principle of neutrality will also be discussed. The principle of neutrality is explained using doctrine and will be exemplified by case law from the CJEU.

The thesis concludes that the supply of educational services is exempted from VAT taxation under article 132 in the EU VAT Directive. The CJEU has interpreted the exemption of educational services strictly and has developed the concept of education as an independent concept under EU law by their case law. The interpretations made by the CJEU and their relationship with the principle of neutrality vary. The principle of neutrality sometimes has been deprioritised against other interests, which are also important in relation to EU VAT law. It should, however, be mentioned that no interpretation made by the court is entirely incompatible with the principle of neutrality. The system of VAT within the union generally meets the requirement of a neutral VAT system.

The Swedish implementation of the regulation of educational services in the EU VAT Directive is largely compatible with the regulation in the directive. The same can be said regarding the implementation's relation to the case law from the CJEU. However, an interesting aspect is that the Swedish courts have focused on whether the educational services are supplied independently, which is not discussed in the case law from the CJEU. The Swedish Tax Agency has also focused on a criterion of independence which is rather far-reaching in relation to the case law from the Swedish courts. Such a criterion negatively affects the relationship between the Swedish regulation and the principle of neutrality.

Sammanfattning

Syftet med denna uppsats är att undersöka hur utbildning behandlas i förhållande till EU:s mervärdesskattelagstiftning. Vidare kommer denna uppsats att analysera rättsfall från EU-domstolen och hur domstolens tolkningar av begreppet utbildning relaterar till principen om neutralitet. Med detta som bakgrund kommer uppsatsen gå vidare och titta på hur Sverige har implementerat reglerna för denna typ av verksamhet i nationell rätt. Hur svenska domstolar och Skatteverket har tolkat denna implementering kommer sedan att jämföras med den EU-rättsliga regleringen och principen om neutralitet. Vad neutralitetsprincipen innebär kommer att förklaras med hjälp av doktrin och rättsfall från EU-domstolen.

Slutsatserna som denna uppsats kommer fram till är att tillhandahållandet av utbildningstjänster är undantaget från mervärdesbeskattning i den mån den faller in under undantaget i artikel 132 i EU:s mervärdesskattedirektiv. EU-domstolen har tolkat undantaget för utbildningstjänster restriktivt och har genom sin praxis utvecklat begreppet utbildning som ett självständigt koncept under EU-rätten. Tolkningarna från EU-domstolens förhållande till neutralitet varierar, där principen om neutralitet i vissa fall har fått stå tillbaka till förmån för andra intressen som också är viktiga i förhållande till mervärdesskatterätten. Det ska dock tilläggas att ingen av de tolkningar som presenteras i uppsatsen är helt inkompatibla med neutralitetsprincipen, systemet för mervärdesskatt inom unionen uppfyller generellt kravet på ett neutralt mervärdesskattesystem.

Den svenska implementeringen av regleringen av utbildningstjänster i mervärdesskattedirektivet stämmer generellt sett väl överens med den EU-rättsliga regleringen av det samma. Samma sak kan i stort sett sägas om implementeringens förhållande till EU-domstolens praxis. Något som dock är intressant är att i svenska domstolar har prövningen ofta kommit att handla om ifall den skatteskyldige har tillhandahållit utbildningen på ett självständigt sätt, något som inte alls diskuteras i rättsfallen från EU-domstolen. Skatteverket har också tagit fasta på ett krav om självständighet som är ganska långtgående i förhållande till de svenska domstolarnas praxis. Ett sådant krav får en negativ påverkan på den svenska regleringens förhållande till neutralitet.

Abbreviations

CJEU	The Court of Justice of the European Union
VAT	Value-Added Tax
HFD	Högsta Förvaltningsdomstolen
GST	General Sales Tax
EU	European Union

1 Introduction

1.1 Background

Consumption taxation rose as a concept during the after-war period, and a fundamental principle of such a system is that all types of consumption should be taxed. However, that principle has had a more significant impact on what is referred to as GST systems¹, which exist outside of the EU, than on the VAT system enforced within the European Union. Despite this general principle of all consumption transactions being liable for consumption taxation, several types of transactions have been exempted from VAT. One specific kind of exemption is connected to consumption related to public spending and services that historically have been provided by the public or financed by public funds. Transactions regarding those types of transactions have been considered to be of such a unique nature that they justify an exemption from VAT. An example of such a service that has been exempted from VAT is the provision of education services.²

Education has in Europe since the mid-19th century been provided by the public, with some private exceptions often directed at the children of the upper class. However, since the 1990s, politics in Western Europe has been greatly influenced by the neoliberalism movement. As such, the demand for privately owned and operated alternatives in markets traditionally dominated by public-owned and operated options has increased. The supply of education is not an exception to this increase in demand, but with it comes difficult legal questions, specifically regarding neutrality between private and publicly owned and operated educational institutions.³

One of the most fundamental EU legal principles is the principle of neutrality, which is central to the function of the free EU market.⁴ Exemption from VAT taxation is a competitive advantage and creating and applying the VAT legal system in a way which is neutral is therefore vital. The transactions which are exempted from VAT will affect the neutrality in the market, which is especially true in markets where we have both public and private operators. In such markets, the question of which body and transactions are liable for VAT is fundamental.⁵

¹ General Sales Tax systems

² Terra Ben, Kajus Julie *A guide to the European VAT directives, Introduction to European VAT 2021 volume 1*, IBFD, 2021. p. 905 ff.

³ Blomquist Erik, *Momskostnad motarbetar yrkeshögskolan*, Svenskt Näringsliv, 2021, https://www.svensktnaringsliv.se/blogg/fokus-pa-skatterna/momskostnad-motarbetar-yrkeshogskolan_1177143.html, accessed 2022-12-03.

⁴ Terra & Kajus (2021) p. 262 ff.

⁵ Blomquist Erik (2021)

Within the VAT regulation in the EU, the Union has left a vast space open for the Member States on how to implement the exemptions, including determining which bodies can perform tax-exempt transactions. As a result, the implementation of the exemptions varies from Member State to Member State. This, together with the obligation for the courts in the Member States to interpret national law in conformity with EU law, makes for an interesting clash of legislation. These differences makes it difficult for individual entities to navigate the different systems, especially in cases when trying to establish a business in other Member States.⁶

The Swedish educational system is the most liberal education system in the world,⁷ where private entities have great opportunities to establish educational institutions at all levels of education. The municipalities have minimal possibilities to deny an entity from establishing an educational institution within the municipality, and even private educational institutions will be financed to the same extent and amount as the public schools owned and operated by the municipality. There is also no limitation to what form of association can own and operate an educational institution; even limited liability companies are authorised to own and manage educational institutions. Another vital aspect is that almost every school in Sweden is free of charge for the student, even at the university level. On the primary- and high school levels, there are only a handful of schools with fees; on the university level, there are a few more, but all state-owned and operated higher education institutions are free of charge for Swedish citizens.⁸

1.2 Purpose and research questions

This thesis aims to consider the concept of education from an EU VAT perspective. The thesis will look at how the provision of educational services is regulated from the VAT perspective within the Union and then consider how Sweden, as a Member State, has chosen to implement the EU regulation regarding the area.

To shed some light on how the rules regarding the VAT exemption for education should be applied, this thesis will give an account of how the CJEU has interpreted the exemptions for education and how it has been implemented and interpreted in Sweden. The implementation of the exemption of education from VAT liability in a Member State with such a high degree of private actors and so deregulated will be very interesting to analyse.

⁶ Næss-Schmidt Sigurd et al. *VAT in the Public Sector and Exemptions in the Public Interest Final Report for TAXAUD/2009/DE/316*. 2011. p. 12 ff.

⁷ Fält Mats, *Valfrihetens gränser, friskolors vilkor i Danmark, Finalnd och Nederländerna.*, 2011. <http://www.timbro.se/innehall/?isbn=9175668611>

⁸ Ibid.

The research questions will therefore be as follows:

- How is the provision of educational services regulated by the EU VAT Directive⁹ as interpreted by the CJEU, and how does this interpretation relate to the principle of neutrality?
- How is the provision of educational services regulated in Swedish VAT law, and how is the Swedish Administrative Supreme Court interpreting the regulation?
- Is the Swedish regulation of educational services for VAT purposes compliant with EU VAT law and the principle of neutrality?

1.3 Method

1.3.1 Legal dogmatic method

A dogmatic legal method is the most suitable to answer the research questions presented above, especially when answering how the provision of educational services is considered for VAT purposes within EU law and Swedish law. The traditional legal dogmatic method is well-used for answering legal questions of a *de lege lata* nature. The method involves determining applicable law by analysing legal sources considering their hierarchy against each other. Often some critical approach against relevant standards and the materials or legal sources used in the analysis is applied.¹⁰

Smith describes the method as including systematising the rules, principles, and concepts that constitute a legal area and their relationship and expresses the goal of using the method as solving gaps or unclarity in the existing law.¹¹ Further, Smith presents legal dogmatic research with three objectives: description, prescription, and justification.¹²

Kleineman refers to the legal dogmatic method as finding the solution to a legal problem by applying the law and the sources of law.¹³ Further on, Kleineman sees three steps in the actual process of using a legal dogmatic

⁹ Council Directive 2006/112/EC of November 2006 on the common system of value-added tax, henceforth referred to as the EU VAT Directive.

¹⁰ Smits, Jan M., What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research (September 1, 2015). Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, New York [Cambridge University Press] 2017, pp. 207-228, Maastricht European Private Law Institute Working Paper No. 2015/06, <http://dx.doi.org/10.2139/ssrn.2644088>

¹¹ Ibid.

¹² Ibid, p. 8.

¹³ Kleineman Jan. In *Juridisk Metodlära*, Nääv Maria & Zamboni Mauro (ed.) Lund: Studentlitteratur, 2013. p. 21

method which consists firstly of establishing a general rule, secondly of defining the relevant rule and its relevance concerning the question researched, and thirdly of applying it to the problem studied.¹⁴

The legal dogmatic method is flexible in that it describes what type of sources should be considered in the process of using the method and does not proclaim any set hierarchy between the sources, even though these questions are vital in concluding legal questions.¹⁵

1.3.2 EU Legal Method

The first research question this thesis will attempt to answer is how the provision of education is regulated in EU VAT law. When determining the answer to that question, the analysis will be based on EU Legal source material; therefore, an EU legal method is the most appropriate.

The main sources to be considered when using the EU legal method are EU primary law, secondary law, and other subsidiary sources of law¹⁶. The primary law of the EU is generally considered to include the original treaties, such as the Treaty of the European Union and the Treaty on the Functioning of the European Union, together with all amendments and modifications.¹⁷

The secondary law consists of legal documents, which are implemented through the power provided by the primary law. In other words, decisions are made by the different institutions within the union.¹⁸ The sources that are considered secondary law are often divided into subgroups of binding and non-binding legal documents. The binding secondary EU law category includes directives, regulations, and decisions.¹⁹ The non-binding secondary sources consist of recommendations and opinions by different union authorities.²⁰

Regulations are characterised by their general validity, as they do not require any incorporation by the Member States before being applicable.²¹ This contrasts with directives, which must be incorporated with the Member States' national legislation.²² Decisions are binding relative to whom the decision is regarding, although a decision can be regarding all Member States.²³

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Neergaard, Nielsen & Roseberry p.12

¹⁷ Terra Ben, Kajus Julie *A guide to the European VAT directives, Introduction to European VAT 2021 volume 1*, IBFD, 2021. p. 3 ff.

¹⁸ Ibid.

¹⁹ Ibid, p. 96 ff.

²⁰ Ibid, p. 105 ff.

²¹ Ibid, p. 89.

²² Ibid, p. 96.

²³ Ibid, p 97.

As we can see, the EU legal method is a specific version of the more general legal dogmatic method where the difference lays in what sources that are considered. The basis for this essay will accordingly be a legal dogmatic method. Still, it will consider the EU legal sources and the principles of interpreting EU law and solving EU legal problems, which the CJEU has established.

1.3.3 Applying legal dogmatic and EU Legal methods to the chosen research questions

As established, when answering the first question, an EU legal dogmatic method will be used with the EU VAT Directive as a baseline. By examining the CJEU's case law, the purpose of this thesis is to consider further how the provision of educational services is regulated in EU VAT law.

When analysing how the CJEU has interpreted the exemption for education from EU VAT, the thesis will first account for some of the principles of interpreting the exemption for certain activities in the public interest, and when illustrating those principles, a few cases from the CJEU has been chosen for that purpose. The analysis will then be based on how the CJEU has interpreted the exemption for education and how that interpretation relates to the principle of neutrality.

A legal dogmatic method is the most suitable when establishing what constitutes Swedish law regarding the exemption of education from VAT liability. The sources analysed, however, will naturally be different than when using an EU legal method. When contrasting the EU legal method with the legal dogmatic method used when studying Swedish law, we can see that one of the main differences is that in a Swedish legal dogmatic method, there is a greater emphasis on the legal document's preparatory acts. Such acts does not have much value when establishing relevant EU law as legal documents. Something particular for Sweden is the Council for Advance Tax Rulings, where taxpayers can apply for an advanced tax ruling regarding specific provisions, which binds the Swedish Tax Agency for those specific provisions for that taxpayer. However, the advanced rulings' value as a legal source for general interpretation guidance is relatively low. Nonetheless, it can have some value, depending on the logical structure of the arguments in the Council's reasoning.²⁴ As such, some caution must be observed when concluding the Council's preliminary tax rulings as a reflection of applicable law.²⁵

²⁴ Lodin, Lindencrona, Melz, Silverberg & Simon-Almendal; *Inkomstskatt- en läro-och handbok i skatterätt*: 18 ed. Lund, Studentlitteratur, 2021. p. 18 ff.

²⁵ Ibid.

After determining what constitutes applicable Swedish law of the provision of educational services, the implementation will be analysed in relation to the CJEU case law. The principle selected for this consideration is the principle of neutrality, as it is a vital principle regarding the implementation and interpretation of EU law, tax law in general, and VAT tax law. The principle and the aspects of it which will be used in the analysis of the implementation will be further defined in section 2.4 of this thesis.

1.4 Materials and delimitations

Generally, there is not much written regarding the exemption for education in the EU VAT Directive or the Swedish VAT Act and its implementation. Of course, the implementation of the exemption has been considered in the Swedish preparatory works published before the Swedish VAT Act was revised to comply with EU law when Sweden joined the EU in the 1990s.²⁶

The cases are selected as they clearly explain the relevant principles and when the Court has used them. A deeper analysis of those cases and their material outcome is not relevant in answering the research questions in section 1.2. However, when determining how the CJEU has interpreted the exemption for education specifically, the cases which have been chosen will be described and analysed in greater detail as they are highly relevant in answering the research questions, much so about the cases which deal with the interpretation of all exemptions for activities performed in the public interest.

The cases chosen to illustrate the Swedish implementation and interpretation of the Directive have been selected due to several factors. Firstly, only the cases judged by the Swedish Administrative Court have been selected, and cases judged by the lower courts have been left out of the scope of the thesis. The reason for not analysing the case law from the lower courts is the limitations due to the length of this essay. The cases investigated are from the Swedish Administrative Supreme Court. Because the Court has tried only a limited number of cases regarding the VAT exemption of education, all cases will be analysed in this thesis. One of the cases from the Swedish Administrative Supreme Court is what is called a notice case, a case that the Court has not deemed relevant for setting precedence; their value as a source of law is, therefore, limited.²⁷ In addition to the cases from the Swedish Administrative Supreme Court, a few cases that the Swedish Council for Advance Tax Rulings²⁸ has tried will be considered. The cases from the Council which have been chosen to have been so as the principles which the Council believes in their judgement can be seen being followed and are relevant as examples of

²⁶ See for example Prop. 1993/94:99 Om ny mervärdesskattelag and Prop. 1996/97:10 Mervärdesskatt inom kultur-, utbildnings och idrottsområdet.

²⁷ Ibid.

²⁸ This is the translation for “Skatterättsnämnden” which will be used in this thesis. Further on, they will be referred to as the Swedish Tax Council

how the VAT exemption for education has been interpreted in lower instances to give a picture of how the regulation in the EU VAT Directive has been implemented in Swedish law.

The Swedish Tax Agency has published a policy statement²⁹ regarding how the Agency thinks the VAT exemption for education should be applied. Policy statements from the Swedish Tax agency are not considered a source of law in Sweden; hence, their importance in determining applicable law is limited.³⁰ Generally, the position paper from the Agency has a solid base in sources of law and should be considered a legal investigation performed by the Agency.³¹ Still, it is necessary to consider it to be published by the Agency, which has a particular point of view as it is a party to the case and, as mentioned, is not considered a source of law.³² It is, however, relevant to account for the Swedish Tax Agency's position as it accounts for how the Agency applies for the exemption in all cases, which is especially important as many cases do not get tried in court.³³

As will be accounted for further on, there is some overlapping between the exemption of public bodies and the exemption for the provision of educational services.³⁴ In line with the research questions in this essay, a deeper analysis regarding the regulation and implementation of what constitutes public bodies will not be accounted for. A brief explanation regarding the exemption of public bodies in the EU VAT Directive and in what way that exemption differentiates from the exemption of educational services will, however, be included.

It should also be mentioned that several more principles are important for implementing and interpreting EU directives. Still, due to limitations in the scope of this essay, only the principle of neutrality has been chosen for the investigation.

1.5 Research Overview

The research that exists regarding the subject of this thesis is quite limited. However, some research has been performed on other exemptions for activities performed in the public interest and their relation to Swedish law. One example is the book "Momsfri Sjukvård", published by Robert Pålsson, in which he accounts for how the exemption for hospital care has been implemented and interpreted in Swedish law. Similarly, Oscar Henkow published

²⁹ This is the translation which will be used in this thesis of Skatteverkets ställningstagande.

³⁰ Lodin et al. (2021 p. 21 ff.

³¹ Tjernberg (2018) p. 111

³² Tjernberg (2018) p. 111

³³ Lodin et al. (2021 p. 21 ff.

³⁴ Terra & Kajus (2021) p. 905.

a book where he analysed the treatment of public bodies within the EU VAT system, comparing it to the treatment of public bodies in New Zealand's GST system, published in 2013. Similarly, Marta Papis-Almansa published her dissertation "Insurance in European VAT- on the Current and preferred treatment in the light of the New Zealand and Australian GST System" from the Department of Business Law School of Economics and Management at Lund University in 2016 on the exemption in the EU VAT Directive for insurance services.

1.6 Outline

This thesis will start by giving a brief overview of the VAT system within the EU, with a particular focus on the exemptions for activities performed in the public interest and the exemption for education within the EU VAT Directive in sections 2.1 to 2.3. Following these sections will be an account of the principle of neutrality in section 2.4, which will be used for analysing the regulation and interpretation in this thesis.

After that, in section 3, the thesis will cover how the CJEU has interpreted the exemptions for activities performed in the public interest and what principles for interpreting those exemptions the Court has applied. This section will first, in section 3.1, focus on the principles that the CJEU has established regarding all the exemptions for activities in the public interest. Section 3.2 will then focus on some of the cases where the CJEU has interpreted the specific exemption for education in the EU VAT Directive and how this interpretation relates to the principle of neutrality.

Section 4.1 will then briefly consider how Sweden has implemented the EU VAT Directive into their national legislation to investigate further, in section 4.2, how they have implemented and interpreted the exemption for education from the same directive.

Lastly, in section 5, an attempt to summarise the conclusions made throughout the thesis will be made.

2 EU regulation of value-added tax

2.1 The general scope of EU VAT

The main legal framework regulating value-added tax within the European Union is the EU VAT Directive.

The EU system of value-added tax is a system where the tax liability is decided on a few factors and can be summarised as a system that applies to goods and services, where a general tax on consumption which is precisely proportional to the price of the good or service, no matter how many transactions that have taken place in the production and distribution before the stage at which the tax is charged.³⁵ VAT is calculated on the price of each transaction and is chargeable after deducting the amount of VAT borne directly by the various cost components.³⁶

The basic principle of VAT calculation is based on a system where the taxable persons are liable for paying the tax to the relevant tax authority. Still, the tax burden is put on the consumer by allowing for deductions for input VAT. This possibility for deduction is a fundamental principle for all transactions covered under the VAT Directive's scope. However, when dealing with transactions that are not taxable within the scope of the Directive due to being exempted, we have to divide the exemptions into two groups. The first group consists of qualified exemptions, which are transactions exempted from VAT taxation but still covered by the right to deduct input VAT. The other group is non-qualified exemptions, which are transactions exempted from tax in the VAT Directive and also not covered by the right to deduct input VAT.³⁷

When determining taxability according to the VAT Directive, there are three main factors to consider. Firstly, the supply of goods and services by a taxable person acting as such, together with the intra-community acquisition of goods for consideration and importation, are subjected to VAT³⁸. Secondly, the taxable person must perform a taxable transaction within the Directive's scope. Thirdly you must determine where the taxable transaction should be taxed, and fourthly the rate of taxation must be determined.³⁹

³⁵ Van Doesum, Kesteren, Cornielje, Nellen, *Fundamentals of EU VAT Law*, United Kingdom: Kluwer Law International B.V. 2020. p. 7

³⁶ Article 2 of the VAT Directive

³⁷ Van Doesum, Kesteren, Cornielje, Nellen, (2020) p. 306

³⁸ Article 2(1) of the VAT Directive

³⁹ Van Doesum, Kesteren, Cornielje, Nellen, (2020) p. 7 ff.

2.1.1 Taxable person

Vital for determining VAT liability is that a taxable person performs the supply of goods or services. What constitutes a taxable person under the VAT Directive is regulated in article 9 as “any person who independently carries out in any place any economic activity whatever the purpose or result of that activity”. There are also no criteria for the economic activity to have business or profit-making purposes. The fact that economic activity does not render a profit does not exclude it from the scope of article 9.⁴⁰

What constitutes an economic activity is crucial for determining VAT liability. Economic activity is further explained, and the key elements are that any activity performed by producers, traders, or persons supplying services can fall within its scope. Another critical factor is that the exploitation of tangible and intangible property to earn income from the relevant property on an ongoing basis should fall within the definition of economic activity. Noticeably, even occasional activities and preparatory acts can be included within the scope of economic activity within the VAT Directive, according to article 9(2).⁴¹

Further, a person needs to act independently to be a taxable person. Article 10 of the VAT Directive defines what constitutes acting independently with three criteria. Firstly, the person cannot be integrated into an undertaking or an administration. Secondly, the person must have some organisational freedom regarding material and human resources; thirdly, the person must stand the economic risk of the activity.⁴²

In conclusion, to deem someone a taxable person in the scope of the EU VAT Directive, the person must perform an economic activity independently. The two concepts of independence and economic activities are further explained in the Directive and are essential for determining the tax liability of VAT.

2.1.2 Taxable transactions

As mentioned above, only certain types of transactions are liable for VAT, called taxable transactions. The taxable transactions are the supply of goods, certain intra-Community acquisitions, the supply of services and the importation of goods. The different types of transactions are regulated in the articles 14-30 of the Directive. The differentiation between the various transactions will be relevant further in determining the place of taxable transactions, in other words, where the transaction will be taxed.⁴³ However, due to the

⁴⁰ Terra & Kajus (2021) p. 306 ff.

⁴¹ Ibid, p. 386 ff.

⁴² Terra, Kajus (2021) p. 306. ff.

⁴³ Terra, Kajus (2021) p. 457 ff.

limited relevance of answering the chosen research question, the type of taxable transactions will not be considered in any greater detail.

2.1.3 Place of taxable transactions

Naturally, determining the place of taxable transactions is irrelevant when the transaction occurs in only one jurisdiction or one Member State. However, in cross-border situations, it will be necessary to determine the location of the taxable transaction to determine in which country the transaction will be taxed.⁴⁴

As mentioned in the previous section, where a transaction is taxed depends on the type of transaction. For the supply of goods for example, it differs depending on whether it's supplied with transport or without. For the supply of goods without transport, the place of supply shall, according to article 31 of the EU VAT Directive, be where the goods are located when the supply takes place. When the supply of goods is combined with transport, the place of supply is where the transportation commences, as stated in article 32 of the EU VAT Directive. For the supply of goods, there are also special regulations, for example, for sales by connected contract, distance sales, and interests, which will need to be installed or assembled.⁴⁵

When supplying services, the principal rule regarding business-to-business sales is that the place of taxable transactions is considered to be where the taxable person (the customer) has established his business or has a fixed establishment. For business to consumer sales, the place of taxable transaction is where the supplier has established his business or has a fixed establishment.⁴⁶

The Directive also contains rules for specific types of transactions where the place of supply is not determined according to the general rules.⁴⁷ However, it falls outside the scope of this thesis to account for those rules.

2.1.4 Exemptions in the EU VAT Directive

In the fourth section of the Directive, we find the exemptions from VAT, which are transactions which are taxable according to the criteria mentioned above but have, for different reasons, been excluded from VAT liability. There are two types of exemptions, exemptions with the right to deduct input VAT and exemptions without the right to deduct input VAT. Examples of exemptions from VAT which do not include the right to deduct input VAT are activities exempted in the public interest, the exemptions for insurance,

⁴⁴ Ibid, p. 559 ff.

⁴⁵ Ibid, p. 559 ff.

⁴⁶ Article 45 of the VAT Directive.

⁴⁷ Terra, Kajus (2021) p. 559 ff.

financial transactions, postage stamps, betting and lotteries, immovable property, and goods used wholly for an exempt transaction⁴⁸. Aside from these two categories, there are exemptions with zero ratings, which are technical exemptions related to cross-border transactions.⁴⁹

2.2 The exemption of public bodies from VAT liability

EU VAT is, as mentioned, based on the principle that a transaction is taxable if a taxable person performs it. An exemption from this principal rule is the exemption from VAT for public bodies in article 13 of the VAT directive. The article does not exempt all types of transactions performed by public bodies from VAT. Instead, it only exempts transactions where a public body engages in activities and transactions as public authorities. Their status as a non-taxable person does not cause a significant distortion in competition. Public bodies are, however, as a principal rule, always considered taxable persons when they provide specific services mentioned in Annex I, for example, when providing telecommunication services, passenger transport or supply of new goods manufactured for sale.⁵⁰

Article 13 also allows the Member States to regard activities which are exempted in, for example, article 132 engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.⁵¹

The exemption from VAT for public bodies reflects the idea that the final consumer of the services provided by public bodies is considered to be the public bodies themselves. As the concept of VAT is deemed to be taxation of consumption, an exemption from VAT for public bodies, as described in article 13, will align with that idea.⁵²

2.3 Exemptions for certain activities in the public interest

This thesis will focus on the exemption for certain activities performed in the public interest, which is regulated in Article 132 of the VAT Directive. The article states that the Member States shall exempt several types of transactions from VAT liability. The types of transactions that are mentioned in the article

⁴⁸ Article 132-137 of the EU VAT Directive

⁴⁹ Articles 138 to 166 of the EU VAT Directive

⁵⁰ Article 13(1) third paragraph of the EU VAT Directive.

⁵¹ Article 13(2) of the EU VAT Directive

⁵² Van Doesum, Van Kesteren, Cornielje, Nellen, (2020) p. 107 and Michel Aujean, Peter Jenkins and Satya Poddar in "A new approach to public sector bodies" 10 *International VAT Monitor* (1999) pp. 144-149.

are closely linked to the kind of services that are typically provided by public bodies, such as the supply of public postal services in 132(1)(a) and the provision of medical care in 132(1)(c). The regulation of the exemptions for certain activities performed in the public interest is not a system where the bodies as such are exempted. Instead, some economic activities are exempted; it is, therefore, important to differentiate the regulation of the exemptions in article 132 from the exemption for public bodies in article 13. Even though the two articles overlap each other in many ways, activities performed in public interest in many cases are performed by such public bodies, which are regulated in article 13. Except for medical care and postal services, article 132 also exempts the provision of educational services, trade unions and social security work, etc.

One thing that distinguishes the exemptions regulated in this article is, as the title says that the activities are deemed to be performed in the public interest; as the examples mentioned in the previous paragraph show, many of the transactions mentioned in the article related to different types of health services, such as healthcare and dentistry, together with other kinds of public services such as postal services, children's education, and social work. Some of the transactions mentioned are exempted with no regard to who provides the service. In contrast, others require a body governed by public law to provide the service for the exemption to be applicable.

The following article, article 133, allows the Member States to grant exemptions to bodies other than those governed by public law when providing some exempted services in article 132. The exemption may be granted only if certain conditions are fulfilled, where the bodies granted the exemption must have specific characteristics. The first option is that the bodies must not systematically aim to make a profit and that any surpluses must not be distributed but must be assigned to the continuance or improvement of the services supplied. Another alternative to be included in the exemption is that the bodies must be managed and administrated on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned. The third option is that the bodies must charge prices approved by the public authorities or which are within such agreed costs or, concerning those services not subject to approval, prices lower than those set for similar services by commercial enterprises subject to VAT. Also, the exemptions must not be likely to distort competition to the disadvantage of commercial enterprises subject to VAT.

Exemptions should, however, not be made for the supplying of goods or services in the case where the supply is not essential to the transactions exempted or where the primary purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.

The fact that the heading of the chapter is exemptions for activities in the public interest does not mean that the exemptions are limited to the cases in which the exercises are performed in the public interest.⁵³ The activities can be provided for primarily commercial purposes and still be exempted from VAT.⁵⁴

The main reason for exempting the type of transactions exempted by articles 132 and 133 is to keep the price of those kinds of activities by not adding a VAT on top of the price for the consumer. This goal is achieved when an exemption applies to the last transaction in a supply chain, the supplier-final consumer. However, when the application of an exemption takes place earlier in the supply chain, it may, under some circumstances, lead to tax cascading. CJEU has laid down some interpretation principles for not extending the exemptions for activities performed in the public interest application to minimise the occurrence of tax cascading.⁵⁵

2.3.1 Exemption for education in the directive

As mentioned above, the exemption for certain activities performed in the public interest includes an exemption for providing educational services. The exemption consists of “the provision of children or young people’s education, school or university education, vocational training or retaining, including the supply of goods or services closely related to the same, that is performed by bodies that are governed by public law, having such as their aim or by other organisations recognised by the Member State concerned as having similar objects”.⁵⁶ What can be concluded regarding the nature of the activity of education is that a critical factor is the transferring of knowledge and skills between a teacher and a student.⁵⁷ Apart from those factors relating to the student-teacher relationship, relevant factors concern the appropriate organisation's organisational framework. Supply closely related to the provision of education is also included in the scope of the article and is exempted from VAT. A prerequisite to being regarded as a supply closely related to an exempt service is that the supply is essential in itself for the exempt service.⁵⁸ An example of such a critical supply is the sale and lease of schoolbooks; an example that has not been considered as essential for the exemptions service is research projects performed by state universities against consideration as it

⁵³ Van Doesum, Van Kesteren, Cornielje, Nellen (2020) p. 309

⁵⁴ Van Doesum, Van Kesteren, Cornielje, Nellen (2020) p. 309 ff.

⁵⁵ Ibid.

⁵⁶ It is regulated in article 132(1) (i) in the EU VAT Directive.

⁵⁷ See for example, Judgement of the Court of the 14 June 2007 Case c-434/05 Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën, ECLI: EU:C:2007:3433

⁵⁸ See for example, Judgement of the Court of the 1 December 2005 Cases C-394/04 and C-395/04 Diagnostika Therapeutiko Kentro Athinon-Ygeria AE v Ipourgou Ikononikon, ECLI:EU:C:2005:734 and CJEU 9 February 2006, Case C-415/04 Staatssecretariats van Financiën v Stichting Kinderopvang Enshede, ECLI:EU:C:2006:95

is not regarded as amounting to hindering access to the benefits of education.⁵⁹

As for the supply of other goods or services in article 132 of the VAT Directive, the Member States have been given some capacity to choose how to implement the exemption of educational services into national law. This discretion given to the Member States consequently leads to a discrepancy in the implementation of the exemptions, as the legal text is quite non-descriptive. Therefore, much of what is exempted by article 132(i) follows the case law from the CJEU and their interpretation principles for interpretation. These different implementations are also an exception from a harmonised VAT system with both positive and negative aspects essential to analyse.⁶⁰

2.4 The principle of neutrality

A vital concept within EU taxation, in general, and EU VAT law specifically, is the principle of neutrality. The principle is fundamental for the construction and application of EU VAT law and is systematically used by the European Court of Justice when interpreting the EU VAT Directive.⁶¹ The principle of neutrality has many aspects and is relevant to EU tax law and many other areas of EU law, such as competition law.⁶²

This thesis will use the concept of tax neutrality to consider the CJEU's interpretation of the exemption for education and its implementation into Swedish law. The neutrality aspect is vital for understanding EU tax law in general but also for understanding EU VAT law as it applies to indirect and direct taxation. Neutrality is often divided into two subgroups, internal and external neutrality, to highlight the different elements that constitute the neutrality principle.⁶³

⁵⁹ See for example Judgement of the Court of the 20 June 2002 Case C-2087/00 Commission of the European Communities v Federal Republic of Germany ECLI:EU:C:2002:388

⁶⁰ Van Doesum, Van Kesteren, Cornielje, Nellen (2020) p. 322

⁶¹ See for example Judgement of the Court of the 20 June 2002 Case C-287/00 Commission of the European Communities v Federal Republic of Germany ECLI:EU:C:2002:388, Judgement of the Court of the 14 June 2007 Case C-445/05 Werner Haderer mot Finanzamt Wilmersdorf ECLI:EU:C:2007:344 and Judgement of the Court of the 28 November 2013 Case C-319/12 Minister Finansów v. MDDP sp. z o.o. Akademia Biznesu, sp. Komandytowa ECLI:EU:C:2013:778.

⁶² Terra & Kajus (2021) p. 259 ff.

⁶³ Ibid.

2.4.1 Internal neutrality

Internal tax neutrality can further be divided into legal, competition, and economic neutrality.

Legal neutrality can be defined as treating equals equally. Typically, this type of neutrality is closely related to the turnover tax's legal character.⁶⁴ Consequently, the law is designed in a way where there is a correlation between the amount spent by the taxpayer and the tax burden. It also means that as a lower limit for upholding legal neutrality for tax purposes, the tax amount payable is measurable per individual taxpayer. Another way that the VAT Directive upholds legal neutrality is that VAT is expressed as a fixed percentage of the retail price.⁶⁵

When upholding legal neutrality, as described above, you often create a system that also upholds competition neutrality. The components that make up a legally neutral system often create a system that will not be distorted. Competition neutrality is not only an economic question but also has legal implications. A situation in which the European VAT system cannot be considered competition neutral is when identical products are burdened with different tax amounts. This is when the business cannot shift the tax burden forward as a whole but must bear a part or all of the load itself. Another example of distortion of competition within EU VAT is when the same rules are interpreted differently by the tax authorities within a single jurisdiction".⁶⁶

A tax system upholds economic neutrality when the tax does not interfere with the optimal allocation of the means of production. This, in practice, means that levying a tax should not lead to any damages to economic interests. In other words, interference with the existing market mechanism should be kept to a minimum. Economic neutrality is a common argument in favour of a VAT system of uniformity. However, it does not automatically mean that a system of differentiated VAT rates is entirely not coherent with the principle of economic neutrality.⁶⁷ This is because VAT is a regressive tax, and the average propensity to consume falls when moving up the income scale together with the ratio of the tax burden to income.⁶⁸

⁶⁴ Terra & Kajus (2021) p. 260

⁶⁵ Ibid p. 261.

⁶⁶ Ibid p. 262.

⁶⁷ Ibid p. 259 ff.

⁶⁸ Ibid.

2.4.2 External neutrality

External neutrality refers to international questions concerning neutrality, in contrast to internal neutrality, which primarily deals with national aspects of neutrality. Such international issues that arise and are highly relevant regarding EU VAT are the issue of when a product is made in one country but consumed within another. VAT questions arise with importation and exportation.⁶⁹

For the part of this thesis which will investigate the implementation of the regulation of the provision of educational services in the VAT Directive into Swedish law, the aspect of internal neutrality will be exclusively used. As external neutrality only is relevant for international purposes regarding the importation of goods and such questions fall without the scope of this thesis, this aspect of neutrality is not suitable for answering the research questions chosen to be analysed in this essay.

Sometimes, references are made to fiscal neutrality, which sometimes is considered a different type of neutrality. The principle of fiscal neutrality is derived from the EU VAT Directive and is used by the CJEU in their interpretation of the Directive⁷⁰. This principle of interpretation should not be mistaken as an expression of the CJEU, taking the principle of neutrality as expressed above into account. Instead, it should be regarded as a vocalisation of the fiscal neutrality purpose of the VAT Directive⁷¹. Consequently, this principle is not a factor that will be part of the analysis of the interpretation of the CJEU's case law.

⁶⁹ Ibid.

⁷⁰ See for example the Judgement of the Court of the 29 October 2009 Case C-174/08 NCC Construction Danmark A/S v Skatteministeriet ECLI:EU:C:2009:669

⁷¹ Terra & Kajus p. 259 ff.

3 The CJEU case law on the exemption of education

3.1 The main principles of interpretation of the exemptions

As a basis for analysis of the case law from CJEU, we will start by considering some of the principles the Court has established in its case law regarding the general interpretation of the exemptions for services supplied in the public interest.

When analysing the case law established by the CJEU when interpreting the exemptions for activities performed in the public interest, it is clear that the Court bases its judgement on certain principles, where especially two principles are regularly, in almost every case, referred to as a basis for the Court's judgement. Firstly, the Court often states that the concepts in the exemptions for activities performed in the public interest have their own independent meanings under union law. Secondly, the CJEU often refers to that the exemptions should be interpreted strictly.

3.1.1 Their own independent meaning

An essential principle for interpreting the exemptions from VAT for activities performed in the public interest is that the different concepts in the exemption have their own independent meaning within the community law. This means that the wording within the regulations of the exemptions needs to be interpreted in a way that reflects how the CJEU has previously interpreted them. Another consequence of the concepts having their own independent meaning is that parallels to wordings used in other EU regulations cannot always be made when interpreting the concepts. This view that the exemption for activities performed in the public interest has their own independent meaning is frequently referenced by the CJEU, and the reason behind this principle is explained as “since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person”⁷². Giving the exemptions independent meaning as a concept of Union Law also minimises the divergences of applying exemptions between Member States.⁷³

⁷² See for example the Case C-434/05 Horizon College.

⁷³ Terra & Kajus (2021) p. 949

The court has also explained that having an independent meaning applies to the exemption regulation and the specific conditions in those exemptions. This reasoning is, for example, behind the CJEU's statement that the exemptions do not apply in cases where a service provider is a natural person.⁷⁴

The same reasoning can be found when the Court establishes that the application of the exemptions should not consider the legal form of the association which provides the service.⁷⁵

3.1.2 A strict interpretation

Another vital principle laid down by the CJEU when interpreting exemptions, not only those for activities performed in the public interest but all exemptions from VAT, is that they should be interpreted strictly. Applying a strict interpretation on the exemptions does not necessarily mean that the interpretation should be restrictive, as the terms which have been ambiguously laid down for an exemption do not call for a particularly narrow interpretation. The exemptions from VAT should be strictly interpreted but should not be whittled away by interpretation. They should, in conclusion, not be interpreted in such a way that they go beyond their meanings but not be interpreted too narrowly, either. Instead, they should be applied in such a way that they apply to only what they were intended to apply to.⁷⁶ The exemptions should not be interpreted to deprive them of their intended effect.⁷⁷

The principle of a strict interpretation of exemptions from VAT is regularly referred to by the CJEU when deciding in cases regarding exemptions from VAT and, in particular, regarding the exemption for activities performed in the public interest.⁷⁸

⁷⁴ See for example the Judgement of the Court in the Case C-453/93 *W. Bulthuis-Griffioen v. Inspecteur der Omzetbelasting*, ECLI:EU:C:1995:265.

⁷⁵ See for example the Judgement of the Court of the 10 September 2002 Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v. Finanzamt für Körperschaften I in Berlin* ECLI:EU:C:2002:473

⁷⁶ This is a conclusion regarding the previous interpretations made by the CJEU which was made by Advocate General Jacobs in the Advocate Generals Opinion in the Case of C-267/00 *Zoological Society*.

⁷⁷ See for example Judgement of the Court of the 25 April 2013 Case C-74/11 *Commission of the European Communities v. the Republic of Finland* ECLI:EU:C:2013:266 paragraph 2 and case-law cited.

⁷⁸ See for example the Cases of C-287/00 *The Commission v. Germany* and C-434/05 *Horizon College*.

3.2 The interpretation of the exemption for education

As mentioned before, the exemption from VAT for providing educational services is a part of the exemptions for activities performed in the public interest. As such, the principles accounted for above will be used by the CJEU to interpret education regulations. In this section, however, the analysis will be more in-depth regarding each case with an account of the circumstances and the CJEU's reasoning behind its judgement.

3.2.1 Case C-287/00 The Commission v. Germany⁷⁹

The commission filed suit against Germany for failure to fulfil its obligation to implement the exemption for educational services provided for in the EU VAT Directive correctly into German national law.

The German Law on Turnover Taxes exempted research activities performed against consideration by public-sector higher education from VAT. The Commission claimed that exempting such activity from VAT was not coherent with the regulation in the EU VAT Directive, dealing with the exemption for education performed in the public interest.

In the present case, a German State University had employed a private contracting body to do a research project against consideration. The CJEU had to answer if exempting research activities carried out for consideration by public sector higher education from VAT can be considered a correct implementation of the EU VAT Directive.

In its reasoning, the CJEU emphasises some of the basic principles of interpreting the exemption, which has been accounted for above. The CJEU starts by referring to the principle of strictly interpreting the exemptions from VAT and ensures that the relevant article does not explicitly cover this type of transaction. However, the supply of goods or services directly essential for education falls within the scope of the exemption. Nonetheless, research activities that are an advantage for private persons do not constitute satisfactory evidence of a legal relationship between the provision of such research and education.

⁷⁹ Judgement of the Court of the 20 June 2002 Case C-287/00 Commission of the European Communities v Federal Republic of Germany ECLI:EU:C: 2002:388, henceforth referred to as the Commission v. Germany.

The German government argues that exempting such activities from VAT includes the benefit of fiscal simplification and lower administrative costs. This argument is nothing that the Court attaches any importance to but a certainty that such content, which is laid down by the Member states, cannot define the range of the exemptions.

The main question that the CJEU answered was whether the type of supply provided should be considered so closely related to university education that the provision would fall within the scope of the exemption of education. The Court concludes that if the exemption is not provided for a specific category, exempting such a category is a derogation from the general rule that all economic activities performed by a taxable person should be liable for VAT taxation. Such a derogation is only compliant with Community law if the Directive's provisions authorise it. As such, national law which exempts transactions from VAT that are not covered by an exemption in the VAT Directive or permitted by conditions in the Directive constitutes a breach of community law. Regarding this question, the Court also argues from the previously established principles that the exemptions should be interpreted strictly and that they are separate, independent concepts of community law and should be interpreted as such. Thirdly, the Court bases its argument on the aim of the exemption for certain activities performed in the public interest, which is to exempt certain activities from VAT, not to exempt all actions performed by public bodies but only those listed in the article.

On interpreting the concept of activities closely related to education, the CJEU explains that the Directive does not provide any guidance to how this notion should be interpreted. The Court further explains that the concept is intended to “ensure that the access to the benefits of such education is not hindered by the increased cost of providing it that would follow if it or the supply of services and goods closely related to it were subjected to VAT”⁸⁰ and states that the supply of research for consideration by a State University does not increase the cost of university education. Such provision is also not essential for obtaining the objective of education, which the Court refers to as “the teaching of students to enable them to pursue a professional activity”⁸¹. As such, the provision cannot be considered closely related to education in such a way that it is to be exempted from VAT. The German government has thus failed to fulfil its obligation to implement the Directive faithfully.

3.2.1.1 Commentaries

The CJEU makes it clear that exempting research for consideration is not in line with the purpose of the exemption for the provision of university

⁸⁰ Paragraph 47 in the judgement of the Court.

⁸¹ Paragraph 48 in the judgement of the Court.

educational services from VAT.⁸² It is, however, also laid down by the CJEU that there is no specific definition of what kinds of services fall within the scope of services that are closely related to education and, as such, are exempt from VAT. When interpreting the concept of education, it is not necessary to make a strict interpretation.⁸³ The Swedish implementation of the VAT Directive does not contain any exemption for research services provided for consideration. Quite the opposite, such provision has been considered liable for VAT in the Swedish VAT Act.⁸⁴ But what most can be taken away from this judgement is that a research contract between a State University and a private entity for consideration is entirely subjected to VAT.⁸⁵

When deciding if the German implementation of the exemption for education is compliant with the EU regulation, the CJEU uses the principles mentioned in section 3.1. The Court references that the exemptions should be interpreted strictly; however, it is questionable if this interpretation should be considered strict. It is not a clear extensive interpretation, but it is not that strict either; we can see that by not allowing the provision of research against consideration, which must be seen as a consequence of the CJEU's verdict, it is not an extensive interpretation of the exemption. It is also interesting that the CJEU bases its reasoning on the fact that the purpose of excluding education from VAT is to avoid increased prices hindering access to education. This must be seen as an expression of justice or equality regarding education. Another interesting aspect is that the Commission, in their reasoning, argues for a stricter interpretation, where they want public agencies who act in a capacity of a private entity to fall within the scope of the same rules as a private entity would.

The Court also refers to, in the beginning of their reasoning, that the exemptions constitute their own concepts within EU law and, therefore, must be interpreted as having their own independent meaning. The CJEU, however, does not explain further what this means for their interpretation. Despite this, the CJEU considers the purpose of the exemption and what constitutes essential for that purpose.

Putting the CJEU's reasoning in the perspective of neutrality will mean, as previously mentioned, that we will look at the judgement regarding legal, economic and competition neutrality. Legal neutrality has been defined as

⁸² See for example Swinkels S.J.P., European Union- The Exemption for Education Under EU VAT, *International VAT Monitor*, vol.21, no 5, 2010. And Ståhl Kristina Skattemytt Internationellt, *Skattemytt*, 2002: 523.

⁸³ Höglund Mats & Sahlén Karl-Magnus, Underentreprenörers utbildningstjänster, *Svensk Skattetidning*, Vol. 5, 2012: 419.

⁸⁴ Dryselius Eva, Rättsfall angående mervärdesskatt från EG domstolen, *Svensk skattetidning*, Vol. 6, 2002: 471.

⁸⁵ Álvares Suso Marcos, European Union/ Spain -VAT and the Activity of Research and Development- Recent Approaches by the Spanish Courts and the ECJ. *International VAT Monitor*, Vol. 27, no 6, 2016,

applying the law in a similar way in similar cases. With that definition, it cannot be seen as relevant for analysing this verdict. The aspect of economic neutrality means looking at the interpretation from the point of view that the tax system should not lead to any damage to economic interest. Usually, this means that the VAT system should be uniform. Nothing explicit in the CJEU's verdict or reasoning interferes with the uniformity of the VAT system. The Court interprets the exemption strictly and applies the same principles to all exemptions in the public interest.

When deciding how this interpretation of the exemption for education relates to competition neutrality, it is interesting to briefly discuss the Commission's argument that when a public entity acts in the same capacity as a private actor, the same rules should apply. Thus, such activities by public actors should not be exempted from VAT. This argument is entirely in line with a VAT system which wants to uphold competition neutrality between private and public actors in the educational market, as exemption from VAT for public bodies will be a competitive advantage for those types of actors.

3.2.2 Case C-434/05 *Horizon College* ⁸⁶

The Case of Horizon College regarded the secondment of teaching staff from an educational institution (Horizon College) to another educational institution for consideration. The main question that the CJEU considered was if such provisions should be considered to be education or service so closely related to education and therefore exempted from VAT.

The Court starts off by referring to the fact that the exemption for certain activities in the public interest does not exempt every act performed by a public body. Further on, the Court refers to the principle of interpretation established by the Court that the terms used in the exemptions are independent concepts within EU law and explains that the purpose of this is to avoid divergences in the implementation of the VAT Directive between Member States. Lastly, the Court refers to the principle of interpreting the exemptions strictly as they are a deviation from the principle that all transactions performed by taxable persons should be liable for VAT. However, the Court also references that an interpretation of the terms in the regulation of the exemptions needs to consider and coherent with the principle of fiscal neutrality as it is inherent in the common system of VAT.⁸⁷ The Court then continues by

⁸⁶ Judgement of the Court of the 14 June 2007 Case c-434/05 Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) V Staatssecretaris van Financiën, ECLI: EU:C:2007:3433, Henceforth referred to as Horizon College.

⁸⁷ See for example the Judgement of the Court in Judgement of the Court of the 6 November 2003 Case C-45/01 Christoph-Dornier-Stiftung für Klinische Psychologie v. Finanzamt Gießen ECLI:EU:C:2003:595 paragraph 42; Judgement of the Court of 18 November 2004 Case C-284/03 Belgian State v Temco Europe SA.

establishing that when interpreting the exemption, the provision of a strict interpretation does not mean that the intended effect of the exemptions should be deprived.⁸⁸

When judging the relevant case, the Court establishes that there is no definition in the article of what types of education fall within its scope of it. But what must be essential in determining what kind of education is covered by the exemption and what constitutes the critical element of educational activity is the transfer of knowledge between the teacher and student. Such a transfer is, however, not a sufficient activity for only supplying a teacher to an educational establishment to carry out teaching duties under the responsibility of that establishment to fall within the scope of the exemption. Instead, to be considered, such provision of educational services exempted from VAT requires a combination of elements, including those concerning the organisational framework of the educational establishment.

The Court notes that in the current matter, according to the contracts between Horizon College and the host establishment, it was up to the host establishment to define the duties of the seconded teacher, and it was their responsibility to ensure the teacher during their placement.

Hence, the Court concludes that the supply of teaching staff to another educational establishment is not such a supply of an educational service covered by the exemption for education in the VAT Directive. The Court also establishes that this conclusion is not affected by which type of body makes the teacher available. This is because if the service itself does not fulfil the criteria of education in the article, it does not matter if the body supplying the service is a body that is governed by public law with an educational aim; it needs to perform an educational service that falls within the scope of the article.

The Court continues by considering if the provision could be a supply of services closely related to education and therefore be exempted from VAT. Initially, the Court established that there is also no definition in the VAT Directive regarding services closely related to education. Still, they express that the supply of goods and services unrelated to children or young people's education, school or university education, vocational training, or retention naturally falls outside the scope of the exemption. One criterion to fall within the scope closely related to education and thus be exempted from VAT liability

ECLI:EU:C:2004:730 , paragraph 29; and the Judgement of the Court in Case C-106/05 L.u.P. [2006] ECR I-5123, paragraph 24

⁸⁸ See for example the Judgement of the Court of 18 November 2004 Case C-284/03 Belgian State v Temco Europe SA. ECLI:EU:C:2004:730

is that the supply should be supplied as services ancillary to education, which constitutes the principal service.⁸⁹

What may constitute an ancillary supply to a principal educational service is a service that is insufficient to constitute an end in itself but can constitute a means to enjoy the top service better. Hence, the CJEU establishes that supplying a teacher in the way of the present case could be an ancillary service to a principal education service. That is the case when for example, there is a temporary shortage of teachers in some educational establishments. Suppose the provider is making qualified teachers attached to other establishments available to those experiencing the shortage. This provision will enable students to enjoy the education provided by the host establishments. It could be considered such an ancillary supply of service. The fact that the host establishment may benefit from the supply of teachers without any relationship between the two educational establishments does not affect the judgment. Neither does the circumstance of the education supplied to the student directly nor the relationship between the educational establishments. The CJEU also express that to fall within the scope of being a supply closely related to education, you need to fulfil the requirement of being a body governed by public law or another organisation that the Member States have defined as having similar objects as well. In addition, transactions may be exempted if they are essential for providing the principal service⁹⁰.

Finally, the CJEU establishes that such a provision can constitute such a service closely related to education that it can be exempted from VAT and provides three criteria for the national courts to verify that it is a provision covered by the exemption:

1. That the principal supply and the supply which is closely related to it are provided by such bodies which are referred to in the article,
2. That the supply is of a nature and quality such that with resources to such a service, there could be no assurance that the education provided by the host establishment and, consequently, the education from which its students benefit would have an equivalent value
3. The primary purpose of such a supply is not to obtain additional income by carrying out a transaction in direct competition with commercial enterprises liable for VAT.

3.2.2.1 Commentaries

⁸⁹ See for example Judgement of the Court of the 11 January 2001 Case C-76/99 Commission of the European Communities v. the Republic of France ECLI:EU:C:2001:12 , paragraphs 27 to 30; *Dornier*, paragraphs 34 and 35; and also *Ygeia*, paragraphs 17 and 18

⁹⁰ See for example the Case C-287/00 *Commission V. Germany*

The case has been heavily referenced when considering the question of the possibility for subcontractors to get their provision of educational services exempted from VAT. It can be concluded that the CJEU, in this case, has established that lending personnel to another educational institution is not in itself sufficient for such a provision to be exempted from VAT. It is also relevant that the CJEU explained that the exemptions should be interpreted strictly because they depart from the principle that all transactions should be taxed. The CJEU also highlighted that the recipient institution decided the teacher's task assignments as a reason for their judgement. Thus, the purpose of the deal could, at most, be regarded as facilitating the education provided by the recipient institution, which is not enough to be considered education under the VAT Directive.⁹¹ It has also been mentioned in the doctrine that even though the CJEU, in their reasoning, references the principle that the exemption should be interpreted strictly, their reasoning instead leaves greater scope for the Member States to also exempt services closely related to education.⁹² An interesting aspect of the case, which is highlighted by J.Swinkles is that the national court, in their interpretation of this case, focused on the CJEU's expression of interpreting the exemption broadly and purposive, which he does not find to be compliant with the Directive or previous CJEU case law.⁹³

In this case, the CJEU states that the purpose of an act cannot be to obtain additional income for the relevant body. If such supply by a public body were exempted, that would give an unfair economic advantage for the public body compared to a private body. This can be seen as a reflection that the exemptions should be interpreted strictly; exempting such services for both public and private actors would be a clear divergence from the vital principle that all transactions should be taxed, which the VAT Directive is based on. However, the most unambiguous indication of the use of a strict interpretation is when the Court establishes that the provision of teachers to another educational institution does not constitute education; this must be seen as a strict interpretation of the exemption as providing teachers is vital for being able to supply education. The Court's definition of educational services as the transfer of knowledge between the teacher and student is also a formulation in which the CJEU gives the concept of education in the exemption as an independent concept, which as a principle, is also referenced by the Court.

As in the previous case, the principle of legal neutrality is not that apparent in this verdict from the CJEU and is not that relevant. However, the aspect of competition neutrality is very interesting in this verdict. The three criteria that the CJEU establishes to determine if the supply of a teacher is exempted from

⁹¹ Frennberg & Agrell, Mervärdesskatt vid tillhandahållandet av lärarvikarier, *Skattenytt*, 2012: 552. And, Höglund & Sahlén (2012) p. 419 ff.

⁹² Kirchev, European Union – Onus of proof in EU Infringement Procedures in VAT Matter, *International VAT Monitor*, Vol. 23, no. 3, 2012.

⁹³ Swinkles J, Hiring-out Staff under the Sixth Directive, *International VAT Monitor*, September/October Issue, 2006:322.

VAT refer that it must be such a body which is governed by public law, which is mentioned in the EU VAT Directive, the education on the other institution would be of equal value and that the primary purpose must not be to obtain additional income. This aligns with the ambition to uphold competition neutrality between public and private actors, as it creates similar objectives for both actors regarding VAT liability. However, its conformity with the principle of economic neutrality is less apparent. It does affect the economic institution which wants to provide a teacher or to keep the teacher in their own organisation as the second option will be exempted from VAT, but the first would be taxed. This cannot be considered in line with a system that wants to uphold economic neutrality.

3.2.3 The Case C-699/15 *Brockenhurst College*⁹⁴

The case regarded a higher education establishment that provided education in hospitality and catering with courses in the performing arts. As a part of the curriculum, to provide an opportunity for the students to gain some practical skills, the College, through the students and their supervisors, run a restaurant open to a limited public. The public was kept on a list and was informed that the restaurant is part of the student's education and, as such, is presented at a reduced price, covering 80 % of the cost. There needed to be at least 30 meals served. Otherwise, the event would be cancelled.

The question that the CJEU had to answer was if such provision of services mentioned above was considered a supply closely related to education and therefore exempted from VAT. In their decision, the CJEU references the principle of strictly interpreting the exemptions from VAT but also mentions that only the exemptions listed are exempted. Another note that the CJEU finds important is that the Directive does not define the concept of services that are closely related to education but should be closely linked, which means that they need to be ancillary to the education provided, which is considered the principal supply.⁹⁵

⁹⁴ Judgement of the Court of the 4 May 2017 Case C-699/15 Commissioners for Her Majesty's Revenue & Customs v. Brockenhurst College ECLI:EU:C:2017:344, Henceforth referred to as Brockenhurst College.

⁹⁵ See for example Judgement of the Court of the 25 Mars 2010 Case C-79/09 Commission of the European Communities v the Kingdom of the Netherlands ECLI:EU:C:2010:171.

The Court finds three criteria for supply closely related to education.

- 1- The principal supply and the supply of services closely related to it must be provided by bodies covered in article 132 (1)(i) of the Directive,
- 2- Those supply of services must be essential to the exempt activities, and
- 3- The primary purpose of those supplies of services must not be to obtain additional income for those bodies by carrying out transactions that are in direct competition with those of commercial enterprises liable for VAT.

The Court also refers to when considering the second question, for a supply to be essential to the exempt activity, it must be of a nature and quality such as that, without resources to them, there could be no assurance that the education provided by the body, the education from that the student should benefit, would have an equivalent value.

The Court then highlights some of the circumstances in the present case, such as that the practical training was an integrated part of the curriculum, and both catering and performing arts students used the opportunity to gain practical experience. They further highlighted that the restaurant was only available by reservation and that the condition was that it had to be fully booked, unlike a commercial restaurant where reservations are, in principle, unconditionally honoured. Lastly, the Court explained that the events are organised, carried out, and supplied by students enrolled at the College, which is not the same as undertaking an internship in a commercial entity. Therefore, the services offered by the College meaning that as a part of the courses taught to its students by a limited number of third parties, are substantially different from those habitually offered by a commercial theatre or restaurant and are aimed at another public, in that they do not meet the exact needs of the consumer.

Another essential aspect brought up by the Court is that the prices charged only cover around 80 per cent of the cost of the meals and, as such, are not intended to generate any additional income for the college.

The Court, therefore, draws the conclusion that the service provided by the College appears to be different from those offered by commercial restaurants. Thus, an exemption from VAT liability does not lead to differences in tax treatment.

The Court also establishes that it is apparent that the supply of services, even though in direct competition with commercial enterprises, does not have the primary purpose of obtaining additional income.

3.2.3.1 Commentaries

The CJEU has, in this case, clarified what constitutes such services which are closely related to education in such a way as they should be considered exempt from VAT. Considering that what constitutes such a supply is not regulated in the Directive, they explain that it must be ancillary to the provision of education. It should include a means to enjoy the primary educational service better. However, the Court's three criteria for the supply to be exempted from VAT is the most crucial precedence in this case. Firstly, such bodies must provide both supplies, referenced in article 132(1)(i) in the VAT Directive. Secondly, the ancillary supply must be essential for the primary supplied service. Third, the essential purpose of the ancillary supply cannot be to obtain additional income in competition with commercial enterprises liable for VAT.⁹⁶

The CJEU made some interesting interpretations in this case, and as in the two previous cases, the Court references that the exemptions should be interpreted strictly. There is no reference in the verdict to the principle that the concepts in the exemptions constitute concepts under EU law with their own independent meaning. Still, we can see that the Court has based its verdict and reasoning on that principle. The CJEU bases its reasoning on the two principles for determining if ancillary supply to education is exempted from VAT. By not considering the services as actual education but instead as ancillary services, that is a strict interpretation of the concept of education. The fact that the Court applies the same criteria established by the CJEU in *Horizon College* shows the concept's status as independent concepts under EU law.

The CJEU states that the supply of the service does not create a difference in tax treatments as it is not comparable with those of a regular restaurant. This statement is quite radical, and even though it does not seem to provide any additional income and appears to fulfil the other criteria, allowing such service, which is clearly in competition with private restaurants, cannot be considered to be compliant with economic or competition neutrality.

3.2.4 Case C-319/12 *MDDP*⁹⁷

This case regarded a preliminary ruling, where a Polish company organised courses and conferences in different fields of education, such as taxation,

⁹⁶ Terra Ben & Kajus Julie, *Exemption under article 132(1)(i) of the VAT directive- Services closely related to education – Restaurant and theatre services to paying third parties through an educational establishment as part of training*, IBDF, 2017. https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/linkresolver/static/ecji_c_699_15%23ecji_c_699_15,

⁹⁷ Judgement of the Court of the 28 November 2013 Case C-319/12 *Minister Finansów v. MDDP sp. z o.o. Akademia Biznesu, sp. Komandytowa* ECLI:EU:C:2013:778, Hereforth referred to as MDDP.

accountancy finance etc. as a part of the company's business to generate regular profit. The company was not registered as a school, per Polish law, and the question was if the provision of such education was subjected to VAT taxation. Hence, the national court asked the CJEU if the education provided by private organisations, which are not governed by public law, for commercial purposes could be exempted from VAT by article 132(1)(i). The Court explains that case law regarding the exemptions says that the exemptions should be interpreted strictly, but not so strictly that they are deprived of their intended meaning, and that the concepts should be interpreted in a way where they comply with the principle of fiscal neutrality. The Court also points out that excluding certain kinds of education from VAT taxation facilitates access to those services by avoiding increased costs if the services were subjected to VAT. The CJEU also refers to the independent meaning of the concept of organisation in article 132(1)(i) allows for private profit-making entities to fall within the scope of the exemption.

Further on, the Court also states that it follows from case law that article 133(a) constitutes an option for Member States to exempt other bodies than those governed by public law from VAT. The provision authorises the Member States to restrict entitlement to the exemptions to other than public-law organisations if they do not systematically seek to make a profit. The Court also states that article 134 does not exclude the possibility of applying for the exemption in 132(1)(i) to private organisations not governed by public law who provide educational services for commercial purposes. However, the educational service provider must be, by the relevant Member State, considered to have similar objects to those of a public body governed by public law. The private entity must therefore fulfil the condition of pursuing objects similar to those of bodies governed by public law. As such, the Member States cannot grant exemption to all private entities providing educational services. Thus, the CJEU establishes that a general exemption of all supplies of educational services provided by the body not governed by public law is not compliant with the regulation of the provision of educational services within the EU VAT Directive.

3.2.4.1 Commentaries

What has been pointed out as interesting in the case is that the CJEU does not put a firm foot down and clearly states that the Polish exemption was unlawful. Instead, the CJEU explains that this is because the EU VAT Directive does not explicitly prohibit exempting educational services provided by a private body for commercial purposes by VAT. However, the Court then makes it clear that the CJEU does not consider a generic exemption for all educational services compliant with the regulation in the EU VAT Directive. The CJEU also explains that the applicant cannot have an asymmetrical reliance on EU law, even though the national implementation of the exemption is unlawful. One interesting aspect of this case is that the applicant did not want the education supplied to be exempted from education. Therefore, it argued

that the Polish implementation of the exemption was unlawful. The applicant wants the supply to be liable for VAT because the exemption for education is a non-qualified exemption, and the company could, therefore, not deduct input VAT.⁹⁸

In contrast to the case of Brockenhurst College, the CJEU makes an apparent reference to both principles of interpretation mentioned in section 3.1. Interestingly, the Court mentions that article 132 in the EU VAT Directive, as an independent concept, allows profit-making entities to be exempted from VAT. The CJEU's judgement that the regulation of the exemption does not include the space of an implementation where all private bodies fall within the exemption in article 132 does not limit the interpretation of the regulation; it is an obvious consequence of the wording and purpose of the exemption. It can, therefore, not be seen as a very strict interpretation of the exemption.

Some caution must be considered when determining the verdict and interpretation by the CJEU's compatibility with neutrality. The legal questions the Court answered in their judgement are slightly different than the cases previously accounted for in this thesis. Although the central questions are of a principal character and maybe has more relevance in relation to the implementation of the EU VAT Directive rather than the interpretation of it by the CJEU, its relation to neutrality is still interesting in the research question laid down in this thesis. The question of the interpretations related to economic neutrality must consider that the delimitation of the application of the exemption for education which the CJEU establishes in their judgement, also results in an application which is less neutral, both regarding economic and competition neutrality. However, considering the precise wording of the exemption in article 132 of the EU VAT Directive, the judgement from the Court must be regarded as inevitable. Nonetheless, the fact that the CJEU's interpretation means a less neutral system does not mean that the interpretation is incompatible with the principle of neutrality. Law, implementation and interpretation is always a question of balancing different interests. The principle of neutrality is not the only principle which is relevant for interpreting VAT law and has, in this case, been de-prioritized in favour of other principles, such as that exemptions should be interpreted strictly as they are a departure from the principle that all transactions should be taxed.

3.2.5 Case C-445/05 Haderer⁹⁹

This case regarded a private person who, as a freelancer, had provided assistance with schoolwork at an adult education institute and ran ceramics and pottery classes at another adult education institute. In the contracts between

⁹⁸ Lasiński-Sulecki, Poland- Exemption for Educational Services in Poland, *International VAT Monitor*, Vol. 25, no. 6, 2014.

⁹⁹ Judgement of the Court of the 14 June 2007 Case C-445/05 Werner Haderer mot Finanzamt Wilmersdorf ECLI:EU:C:2007:344 , Henceforth referred to as Haderer.

the private person and the two educational institutions, it was stated in the agreement that there was no employment relationship established.

The question that the national court referred to the CJEU was, in essence, if such a provision by a freelancer should be exempted from VAT under the exemption for educational services. Specifically, if there must be a direct link between the teacher and the pupil regarding consideration. The CJEU starts by referencing its previously established case law regarding the interpretation of the exemptions of activities performed in the public interest and, as such, to the principle that the exemptions should be interpreted strictly, together with the concepts in the exemptions constituting independent concepts under Union law. However, the CJEU also explains that this does not mean that the interpretation of the exemptions should be construed so that they are deprived of their intended effect.

Further, the CJEU establishes that there is no definition of what constitutes education in the EU VAT Directive. It needs to be found if such provisions in the relevant case include tuition given privately by teachers and covering school or university education and thus are exempted from VAT. The Court also reasons that a particularly narrow interpretation of what constitutes school or university education would risk creating divergences in the application of the VAT system between Member States. However, the CJEU finishes by concluding their reasoning by stating that such provisions can be exempted from VAT if they consist of tuition given by a teacher on his account and at his own risk and covering school or university education.

3.2.5.1 Commentaries

What has been taken away from this case is that the provision of tuition given privately by teachers can only be exempted if it covers school or university education.¹⁰⁰ You can also see that the CJEU rejected the concept that the provision of such tuition required by such a body referenced to in article 132(1)(i) of the Directive. The criteria laid down by the CJEU, providing that the tuition must consist of consists of tuition given by a teacher on his account and at his own risk and covering school or university education, has been interpreted as that the tuition otherwise will be regarded as making himself available in such a way considered by the CJEU as not exempted by the CJEU in the case of Horizon College.¹⁰¹

The interpretation of the exemption, including a freelancer as someone who can fall within the exemption for education, may not be considered such a strict interpretation when interpreting the exemptions. However, it is compatible with the principle of economic neutrality as VAT liability will not affect the decision to provide services as a private or legal person. It also creates

¹⁰⁰ Lasiński-Sulecki, (2014)

¹⁰¹ Swinkles.(2010).

equal conditions regarding competition for different actors on the market and, therefore m, must be seen as compatible with the principle of neutrality.

4 The exemption of education in Swedish national law

4.1 The Swedish regulation of the provision of educational services

Sweden has implemented the EU VAT Directive into national law in the form of the Swedish VAT Act, which came into force on the 1 of July 1994, accompanying multiple changes in legislation due to Sweden joining the EU. The Swedish VAT Act from 1994 is based on an older Swedish regulation of consumer tax from 1968 but had to change when entering the EU to harmonise it with the EU VAT regulation system.¹⁰²

In the national law, Sweden has exempted the supply of education services in primary school, high school, and higher education levels supplied by the public or a recognised education coordinator. The public refers to the state and municipalities, and recognised education coordinators refer to an agent who, by their own responsibility, provides such education, which is covered by the exemption. Education which gives the right to student grants from the Swedish state and certain other types of allowances for studying granted by the Swedish state is also exempted from VAT. The exemption also covers services supplied as a part of education. The same goes for education that educators provide against consideration from a client when the educators choose the students. The education supplied as part of the client's education fulfils the above criteria.¹⁰³

The regulation regarding the exemption for education in the Swedish VAT Act corresponds to the relevant regulation of the exemption for education in the EU VAT Directive. However, the EU VAT Directive includes a regulation of a specific exemption for education provided privately by a teacher. An exemption which does not have a corresponding regulation in the Swedish Tax Act.¹⁰⁴

In the old regulation from before Sweden was a part of the EU, education, in general, was exempted from tax. Only the supply of education that the

¹⁰² Mervärdesskattelag (1994:200)

¹⁰³ This also follows by the regulation in The Swedish VAT Act.

¹⁰⁴ Prop. 1996/97:10 p. 18 ff.

supplier and the consumer provided as a part of a taxable supply was liable for VAT.¹⁰⁵

As mentioned, after Sweden joined the EU in 1995, Sweden changed their regulation of the exemption for education from VAT to match the EU regulation of the same, including the CJEU's interpretation of it.¹⁰⁶

4.2 The interpretation of the exemption for education

4.2.1 The Preparatory work of the exemption for education in Swedish law

4.2.1.1 The view on the rules in Sweden which were applicable at the time and the rules in the EU VAT Directive in the preparatory works

When Sweden joined the EU and the Swedish VAT Act was revised, the preparatory acts established that the concept of educational services in the EU VAT Directive only referred to the provision of education of its actual meaning.¹⁰⁷ The concept of education is defined as a service that should consist of teaching and systematic presentation of a subject that should not be too general. The highlighted relationships cannot consist of isolated events but should make up an integrated part of a study program. Those participating in the service must participate actively in the education to obtain specific qualifications.¹⁰⁸

It is established in the preparatory works that the type of education that primarily falls within the scope of that definition is education at primary- and high school levels, with higher education and vocational education and goods supplied as a part of such education. It is also mentioned that difficulties may arise when drawing boundaries regarding consultancy and providing information, which is liable for VAT and educational services exempted from VAT. Issues may also arise when determining how education is supplied. Education will be tax exempted when provided directly to the student but liable for VAT when supplied to the client. It is further explained that the education that non-profit organisations supply typically is not liable for VAT as their

¹⁰⁵ Prop. 1996/97:10 p. 18 ff.

¹⁰⁶ Ibid.

¹⁰⁷ Prop. 1996/97:10 p. 18 ff.

¹⁰⁸ Prop. 1989/90:111 Om reformerad mervärdesskattelag p. 110

operations do not fulfil the criteria of professionalism if performed within the scope of the non-profit process.¹⁰⁹

The exemption from VAT for education in the then-applied EU VAT Directive and how it relates to the Swedish regulation is described as follows. Firstly, the exemption covers only ordinary education at primary, high school and higher-level education for children and adults, with vocational training and retraining. Secondly, it is concluded that the EU regulation does exempt such material that the school supply, such as pencils, papers, etcetera, and other supplies that have a close connection to education, but not supplies that the school provides to the public. Further on, a criterion is defined as that education must be provided by a body governed by public law with the goal of providing the education or other subjects which the Member State has determined as having the same purpose. Education provided privately by a teacher is also exempted from VAT.¹¹⁰

The general rule is defined as meaning that education, which is not provided privately by a teacher, cannot be exempted from VAT if the exemption is not essential for the provision of the relevant transactions or if such an exemption foremost would lead to an opportunity for the body to obtain additional incomes in direct competition with commercial entities whose operation is liable for VAT. This general rule is interpreted as a possibility to limit exemption from VAT if such a limitation can be motivated from a competition neutrality point of view. It is further mentioned that the Member States have an opportunity to put up criteria for private entities to fall within the scope of the exemption, such as demanding that the entity cannot have the goal of making a profit. However, the investigator mentions that Member States cannot exempt such educational activities which are liable for VAT within the scope of the EU VAT Directive or apply a reduced VAT rate.¹¹¹

4.2.1.2 The proposition of implementation and the reasoning behind it

Firstly, the discretion given to the Member States to define education more closely by the scope of the EU VAT Directive is referred to. As such, the purpose of the Swedish implementation is described as creating a competition-neutral and simple system within the framework provided by the EU VAT Directive. Further on, it is established that the Swedish VAT rules before the implementation of the Directive, regarding the exemption for education, were more extensive in exempting transactions from VAT. As such, when implementing the Directive, the scope of the exemption from VAT for educational services has been narrowed so that only education with appropriate content that corresponds to ordinary schooling will be exempted from VAT liability. It is also proclaimed that to be exempted from VAT, the

¹⁰⁹ Prop. 1996/97:10 p. 19 ff

¹¹⁰ Prop. 1996/97:10 p. 19 ff

¹¹¹ Ibid.

education must be provided by a body governed by public law, as the EU regulations are based on the principle that all education provided with the objective of earning profits will not be exempted from VAT. It must therefore be clear that the education is provided by the public or with the support of the public for the education to be exempted from VAT.¹¹²

The definition of the traditional educational system or education provided by the public should cover education, which is ordinary primary, high school and higher education for children and adults. It is also expressed that VAT liability should not be determined on the basis that the education is provided by the public or by a private school approved by the government. However, regarding higher education, only such education which is governed by the public or under the public's supervision should be exempted from VAT liability.¹¹³

When implementing the exemption for education, education which grants the right to student assistance was also included in the implementation. This exemption provides a broader scope than an exemption for traditional educational institutions. However, education that grants student assistance, which is regulated in the Swedish Study Assistance Act¹¹⁴, still holds criteria that the education provider needs to be recognised by the public. Hence it needs to be owned and operated by the public, be funded by public funds, be permitted by the government to issue certain degrees, or in other ways, be deemed college-related by the government.¹¹⁵

The Swedish VAT act had previously to Sweden joining the EU included a demand in which goods and services provided by the educational institution should only be exempted from VAT if it is directly supplied to the one who takes part in the education. A consequence of such a provision is that the educational supply from a subcontractor cannot be exempted from VAT. The investigators account for the importance from a competition point of view that educational services are treated in the same way, no matter if the service is provided by an educational institution that otherwise is exempted from VAT or if another body offers the service. This criterion was removed when the Swedish VAT Act was adjusted to match the EU regulation of VAT. The removal was considered to be compliant with the EU VAT Directive even though it meant that purely commercial educators would be able to provide education tax-free as the Directive makes it possible for the Member States to grant exemptions for other bodies than those governed by public law if they are deemed to have the same purpose as those bodies. When commercial providers of education supply education as subcontractors, the investigators point out that they should be considered to have the same purpose as a body governed by public law. A potential disadvantage of removing the criteria of

¹¹² Prop. 1996/97:10 p. 19 ff

¹¹³ Ibid.

¹¹⁴ This is a translation of the Swedish act Studiestödslagen (1973:349).

¹¹⁵ Prop. 1996/97:10 p. 19 ff

direct supply for subcontractors having a mixed business providing tax-exempt and tax-liable education was discussed in the preparatory works. However, the principles of competitive neutrality and uniformity were prioritised higher.¹¹⁶

Vocational training is exempted from the EU VAT Directive, and it was suggested that such education would be exempted from VAT regardless of if a public body or a commercial entity provided it. However, this suggestion faced criticism from many referral bodies as it would create problems, inserting tax-free markets within a market liable for VAT. It was therefore decided that the limited exemption for vocational training in the VAT Directive would only be extended to cover some types of provisions. It was also pointed out that designing the implementation in such a way would not comply with the wording of the EU VAT Directive t, together with multiple other reasons for narrowing the exemption for vocational training.¹¹⁷

The statements and reasoning behind the implementation of the exemption for education mainly compare to how the exemption is regulated in the EU VAT Directive. In conclusion, there are three vital parts to the implementation of the exemption for education into Swedish law; the definition was changed in a narrower direction to be more in line with the EU regulation, a criterion was introduced which demanded that only bodies governed by public law could provide exempted educational services, and the criteria of ancillary supply needing to be provided directly by the educational institution were removed. As we can see from the judgement of the case MDDP, a general exemption for all providers supplying education with no limitation regarding what private entities can provide exempted educational services is not compatible with the EU regulation. Hence, implementing a more limited definition with demands regarding the body providing the education must be considered in line with EU law and the CJEU's case law. However, the statement that education must be provided by the public or by the economic support of the public is interesting; this does not follow the CJEU's case law but must be regarded as falling within the Member States' competence of determining the implementation of the EU VAT Directive. Removing the requirement of direct supply of ancillary services is also significant in making the Swedish VAT regulation compatible with EU law, as such a requirement probably would be incompatible with union law. Removing such a criterion also increases the degree of neutrality within the system as it increases the competitiveness of the educational market and equality between different actors regarding VAT liability. It was, however, decided that the rule should be constructed in a way where VAT liability would not be determined only on the factor of the provider was publicly and privately owned, which must be considered to be compliant with the principle of neutrality as it does not interfere with the choice of what entity to use for conducting business. It does

¹¹⁶ Prop. 1996/97:10 p. 19 ff

¹¹⁷ Ibid.

not discriminate between the different types of entities which is in line with the principle of competition neutrality.

Another interesting aspect of the comments regarding the implementation in the preparatory works of the Swedish VAT Act is that it was suggested that vocational training should be exempted from VAT regardless of which body provided the education. As mentioned above regarding the regulation of education, such construction of the exemption would fall well in line with the principle of neutrality. However, that suggestion received criticism from several of the referral bodies and was therefore reconstructed. The final implementation of the exemption of vocational training must therefore be considered less compatible with the principle of neutrality. Lastly, the Swedish implementation mostly succeeds with its goal of creating a neutral system regarding the different providers on the market.

4.2.2 Case law regarding the exemption for education in Swedish law

4.2.2.1 HFD 2011 not 30

The Swedish Administrative Supreme Court tried a case which was an appeal of a preliminary ruling by the Council for Advance Tax Rulings¹¹⁸. The case concerned whether the exemption for education covered a service supplied by an entity for education in the Swedish VAT law. The Swedish Tax Council concluded that the service was covered by the exemption from education because the service provided did not aim to make it easier for the education coordinator but instead to make it possible for the education coordinator to fulfil their assignment towards the client. The Swedish Tax Council, therefore, explained that the entity relevant is to be considered a subcontractor to the educational institution to which it provides its services rather than an employment agency. Thus, the CJEU's reasoning in Case C-434/05, *Horizon College*, does not constitute any obstacle to treating the service provided in this case as exempted from VAT. The Council's decision was appealed by the Swedish Tax Agency and tried by the Swedish Administrative Supreme Court. The Court starts by establishing that the rules regarding the exemption for education in the Swedish VAT Law should be interpreted in line with the EU VAT Directive. Further on, the Court also refers to the CJEU's judgment in Case 434/05, *Horizon College*, where the CJEU tried a similar case where the question regarded how the leasing of a teacher should be treated for VAT purposes. The Court highlights some aspects of the CJEU's judgment in the *Horizon College* case, such as that it was up to the hosting establishment to decide upon the teacher's duties concerning the extent of the period of the secondment and the form of employment the teacher had at the hosting

¹¹⁸ The Council for Advance Tax Rulings will forwardly be referenced to as the Swedish Tax Council

establishment. The Court also establishes that the CJEU did not consider the service in the relevant case to be covered by the exemption for education in the VAT Directive.

The Swedish Administrative Supreme Court establishes that when implementing the EU VAT Directive into Swedish Law, it was prepositioned that the exemption for education included services provided by a subcontractor to an educational establishment. However, following the CJEU decision, the undertaking of a subcontractor must be qualified in some way for such a service to be considered an educational service and exempted from VAT liability. Relevant to such an assessment, the Swedish Administrative Supreme Court describes if the subcontractor under their responsibility provides the educational service or if their responsibility is limited by only making some teaching staff available for an education conducted by someone else. In the latter case, such a provision would not be considered qualified, so it would fall within the Directive's scope.

The Court then concludes that the documentation in the relevant case is not enough for the Court to make a judgment regarding the service provided by the entity, however by later corresponding between the educational institution and the company relevant in this case, the Court thought suggests that the company had a more significant role than what had previously been established. Still, as a whole, the company's position in leasing was unclear. The appeal was therefore rejected, and the advanced ruling from the Council was revoked.

It has been highlighted that the Swedish Administrative Supreme Court, in this case, establishes that when Sweden implemented the EU VAT Directive, it was a prerequisite that the exemption for education also included the exemption of the provision of educational services by a subcontractor. It has also been mentioned that the Court references the case of Haderer and, as such, claims that the commitment of the subcontractor in some way must be qualified. However, the fact that the Swedish Administrative court rejected the appeal due to evidence questions is also mentioned in the doctrine.¹¹⁹

When analysing how the judgement, in this case, relates to EU law and the CJEU's interpretation, it is especially interesting to look at how the ruling from the Swedish Administrative Supreme Court and the Council relates to the principles for determining VAT liability for subcontractors, expressed in both the case of Horizon College and the case of Brockenhurst College. We can see that the Court references these criteria, and they correctly describe them as a restriction of applying a broader Swedish exemption for subcontractors providing educational services. However, there is no reference to how the criteria have been considered for the purpose of the relevant case. We can see that there is no argument regarding the purpose of the supply about

¹¹⁹ Leidhammar, A 15 Processuella frågor, *Skattenytt*, 2012: 374

obtaining an additional income for the company or if the service is considered to be provided by the host establishment and, therefore, the value of the education. However, the Swedish Administrative Supreme Court highlights that the subcontractor must supply the education independently. It is unclear where they derive this criterion from, but they attach great importance to this factor in their verdict.

It is rather difficult to draw any reliable conclusions regarding the judgement in this case because the Swedish Administrative Supreme Court never tries the case but instead disregards it due to questions regarding the evidence. This applies both to the question of how the verdict relates to the CJEU's case law and to the principle of neutrality. What is interesting, however, is that the Court here references an independence criterion which we will see later has been further referenced by the Swedish Administrative Supreme Court and the Swedish Tax Agency.

4.2.2.2 HFD 2012 ref 5

This case was also a preliminary ruling from the Council for Advanced Tax Rulings, which was appealed to the Swedish Administrative Court. A limited liability company that provided substitute teachers mainly consisted of students getting a degree in education at the university and a partner in the company providing the substitute teachers. Consumers of the services offered by the company constitute recognised educational coordinators owned and operated by both public and private entities. The company refers to two cases in which they want to know how they relate to the rule regarding the exemption for education in the Swedish VAT Law. The first scenario is providing a substitute teacher to a high school owned and operated by a private entity where three substitute teachers are supplied during one day for three different subjects. The second case consists of the supply of a substitute teacher to a public primary school during the extent of a semester within the framework agreement between the company and the municipality which owns and operates the school.

The council mentions as a basic outline that a prerequisite for the relevant transactions to be exempted from VAT is that the education services at the host establishments are exempted from VAT. The Council also refers to the previously referenced case by the Swedish Administrative Supreme Court, HFD 2011, not 30. It establishes that an interpretation of the Swedish implementation of the VAT Directive must consider the regulation of the same in the EU VAT Directive. The council also mentions the CJEU Case C-434/05, Horizon College, and the CJEU's conclusions regarding a subcontractor's qualification and the Swedish Administrative Supreme Court's interpretation of the case. The critical aspect is that the parties are responsible for providing education.

The Council concluded that none of the situations the company described would fall within the scope of the exemption from VAT for education and justified its decision with the following reasoning. In the first scenario, there are no circumstances that imply that the company has taken on any responsibility to provide the education; the companies undertaking must instead be considered to cover the provision of the teaching staff at the disposal of the client to, on behalf of the client teach in a, by the client owned and operated educational institution. Therefore, the Council believes that the client does not demand a specific type of education but rather a staff that can teach particular lessons within the education the client supplies. In the second scenario, the Council establishes that the fact that the substitute teacher has a more significant opportunity to form their lesson plan, that the company must provide insurance for the teacher, and that the temporary post last for an entire semester does not mean that the company has been supplying education by themselves by their responsibility. The Council also dismisses that the service provided by the company should be considered a supply closely related to education and that it would be exempted from VAT, referring to the CJEU's reasoning in the case of Horizon College.

The Council's decision was appealed by the company and tried by the Swedish Administrative Supreme Court, which makes the same judgment as the Council. Two of the judges of the Supreme Administrative Court were, however, of a dissenting opinion regarding the reasoning behind the Court's verdict, even if they agreed with the outcome. In a particular statement, Justices Knutsson and Stenman declare the following. They agree with the rest of the Court that the services provided by the Company should not be considered exempt from VAT as an educational service. Such an interpretation would probably align with how the CJEU has come to interpret the concept of education. The judges think that there is much evidence that implies that the type of provision, in this case, would be considered leasing of teaching staff, which does not fall within the scope of the exemption for education according to the CJEU's case law, referring to the CJEU's reasoning in Horizon College. They establish three different criteria which they have derived from the CJEU's ruling in that case, which is:

1. The primary and ancillary service needs to be provided by such a body which is referenced in article 132(1)(i)
2. The leasing must be of such a kind or such quality that the hosting establishment cannot offer the students education of equal value without this service.
3. The primary purpose of the leasing must not be to obtain additional income for the operation by being in direct competition with the commercial entities liable for VAT.

The justices say that the body providing the education must be a body governed by public law or anybody with such attainment that the Member State has declared as such. Hence, the company should be considered such a body when providing educational services if the purpose of the company is to provide education which generally would be exempted from tax liability. This statement is something the Justices think finds support in the preparatory works, even if it is not expressed explicitly by the wording of the Swedish VAT Act. The wording in the Swedish VAT Act does instead imply that the concepts of education and educational institution should be applied in a way where only entities who own and operates their educational institution will fall within the scope of the exemption from VAT for services closely connected to education. The Justices believe that such a limitation of the scope of which entities would be considered for the exemption for education would align with the regulation in the EU VAT Directive. The justices conclude their dissenting opinion by establishing that because the company does not provide any educational services by itself and can therefore not be considered to be providing such services closely related to education which is exempted from VAT.

The value of the case as a precedent in Swedish law for a case with a descending opinion is considered lower when determining precedence.¹²⁰ In Swedish doctrine, this case from the Swedish Administrative Supreme court has been viewed as reflecting the change in judgement on what types of educational services a subcontractor provides, which is exempted from VAT. This change in the position of the CJEU is referred to in the cases of *Horizon College* and *Haderer*. It is explained as the service needs to be qualified to be classified as an educational service. It has, however, been questioned if the judgement in this case from the Swedish Administrative Supreme Court is a necessary and direct consequence of the CJEU's case law. This is because the Swedish Administrative Supreme Court's judgement in their reasoning leaves little room for exempting such provisions accounted for in this case from VAT in Swedish law. It has also been criticised for reducing the competition neutrality between private and publicly owned actors, as public actors can receive consideration for non-deductible input VAT.¹²¹ It has also been mentioned that the demarcation of hiring of personnel liable for VAT and the same provision exempted from VAT liability may be interpreted in light of this verdict and case law from the CJEU as that if the person is under the contractor's responsibility, it is regarded as a VAT liable service. If the contractor instead provides the service by their responsibility, it might constitute such a service exempted from VAT.¹²²

¹²⁰ Tjernberg (2018) p.80

¹²¹ Frennberg & Agrell, Mervärdesskatt vid tillhandahållandet av lärarvikarier, *Skattenytt*, 2012: 552.

¹²² Fri & Kleerup, E Mervärdesskatt, *Skattenytt*, 2013: 389

In conclusion, we can see that the Swedish Administrative Supreme Court, in its judgement, also references the cases of Horizon College and the previously accounted-for cases from the Swedish Administrative Supreme Court, HFD 2011, not 30. The Court also establishes that the critical aspect is if the parties are responsible for providing the education. This statement cannot be considered based on any principal statements from the CJEU but must be viewed as an expression of the Court's assessment of the circumstances in the present case. The verdict is interesting as it excludes almost all provisions of substitute teachers from the exemption for education which cannot be considered compliant with the CJEU's ruling in the case of Horizon College. It is a very strict interpretation of the exemption, which also decreases the level of neutrality within the Swedish VAT system. The dissenting opinion also reduces the value assigned to this case as precedence. However, the dissenting opinion is more clearly tied to the CJEU's case law and leaves room for a more extensive interpretation of the exemption, which is more in line with the CJEU's case law.

4.2.2.3 Cases from the Swedish Council for Advanced Tax Rulings

Shortly after Sweden joined the EU and the changes in the Swedish VAT Act were implemented, the Council for Advanced Tax Rulings judged some cases where taxpayers applied for an advanced ruling of questions regarding the new Swedish VAT Act, specifically the provision of educational services. As mentioned in section 1.3.3, Rulings from the Council for Advanced Tax Rulings have a limited contribution to the precedence regarding the interpretation of tax law. However, the cases have not been tried by the Swedish Administrative Supreme Court, and the judgements have had some effect on how the Swedish Tax Agency has interpreted the exemption. As the Swedish Administrative Supreme Court has not tried many cases, some guidance may be found in the Council for Advanced Tax Rulings judgements. However, they will only be briefly discussed due to their limited value as a legal source.

The first case, which will be accounted for, considers if the provision of two different courses fell within the exemption for education in the Swedish VAT Act. One of the courses was aimed at people who wanted to learn more about addiction and included 30 hours of lectures. The other course was an aftercare program for relatives of alcoholics, which had 20 hours of classes.¹²³

The Swedish Tax Council commented that what constitutes education was not defined in the Swedish Tax Act; the comments in the preparatory acts should instead determine it.¹²⁴ As such, the Swedish Tax Council thereby found that the relevant courses did not fulfil the criteria upheld in the preparatory acts for educational services being exempted from VAT. Hence, the

¹²³ Skatterättsnämndens förhandsbesked meddelat 1996-08-30.

¹²⁴ Prop. 1989/90:111 p. 110 and prop 1993/94:99 Om ny mervärdesskattelag p. 152

classes were liable for VAT. The Swedish Tax Councils' verdict was neither appealed by the Swedish Tax Agency nor the taxpayer.¹²⁵

Further on, the Swedish Tax Council tried a case the following year which also regarded the exemption of education from VAT taxation. In this case, the Taxpayer provided courses in medical and professional rehabilitation where the participants contributed to selecting patients to participate in treatment at a company-operated facility.¹²⁶

The Swedish Tax council explained that with the change in the Swedish VAT Act, such a provision of education did not fall within the definition of education exempted from VAT. The courses had more of a character to provide information to the participants than to educate them; the Swedish Tax Council, therefore, determined that the studies did not fall within the scope of the old regulation either and were not exempted from VAT. This verdict was also not appealed.¹²⁷

In the same year, 1997, the Swedish Tax Council tried a case where the question regarding flight training was included in the exemption for education.¹²⁸ The course consisted of teaching private pilots for which they had a permit and were divided into different groups depending on the flyer's experience and knowledge. The company, an adult educational association, or an aero club provided the service.¹²⁹

The Swedish Tax Council expressed that the education provided by the taxpayer was not such education organised by the public or granted a right to support according to the Student Support Act.¹³⁰

Further on, the Swedish Tax Council determines that similarly to training for retaining a driving license, education for retaining a pilot's licence is not such education which is exempted from VAT and is therefore liable for taxation under the Swedish VAT Act.¹³¹

In 2011, the Swedish Tax Council tried a case where the question regarded the provision of a course in study technique to primary- and high schools. The

¹²⁵ Remstam Maj-Britt, *Förhandsbesked avseende mervärdesskatt under andra halvåret 1996*, *Skattenytt*, 1997: 85.

¹²⁶ Skatterättsnämndens förhandsbesked meddelat 1997-02-24.

¹²⁷ Remstam Maj-Britt, *Förhandsbesked avseende mervärdesskatt under första halvåret 1997*, *Skattenytt*, 1997: 732.

¹²⁸ The Swedish Tax Council also tried the question if the provision of such service fell within the exemption for sporting activities but as this fall without the scope of this thesis, the Swedish Tax Council's reasoning and verdict regarding this question will not be accounted for.

¹²⁹ Skatterättsnämndens förhandsbesked meddelat 1997-10-21.

¹³⁰ Remstam Maj-Britt, *Förhandsbesked avseende mervärdesskatt under andra halvåret 1997*, *Skattenytt*, 1998: 198,

¹³¹ Skatterättsnämndens förhandsbesked meddelat 1997-10-21.

schools were owned and operated by a private company, and the service was provided to the students as a way of developing the student's ability to learn. Hence, the question was whether such a provision fell within the exemption from education in the Swedish VAT act. The Swedish Tax Council refers to the case previously accounted for in this essay, HFD 2011 not. 30, and explains that The Swedish Administrative Supreme Court, in this case, has established that for the provision of subcontractors to fall within the scope of the exemption for education, the provision needs, in some way, to be qualified. This criterion is by the Swedish Administrative Supreme Court references to the CJEU case of Horizon College, which has previously been accounted for in this thesis. Further on, the Swedish Tax Council references that the Swedish Administrative Supreme Court thought it relevant for such a judgement if the subcontractor provided the education under their responsibility.¹³²

The Council assumed in their judgement that the company to which the applicant provided the course in study technique was such a primary- and high school education exempted by the Swedish VAT Act, which is a prerequisite for the relevant provision to be exempted from VAT. The Swedish Tax Council explains what constitutes schooling, and university education in the corresponding article in the EU VAT Directive does not only cover education which leads to a degree or to exercise a professional activity. The regulation in the Directive also includes other types of education provided to such students to develop their knowledge or skills, provided that it is not only an extracurricular activity.¹³³

In the relevant case, the service provided constituted a stand-alone concept performed during scheduled sessions on school premises. The course was, however, not part of the school curriculum. As such, the provision does not constitute the provision of staff towards education supplied by the company owning and operating the schools. Thus, the provision by the applicant should be considered the provision of education by their capacity and responsibility. As the applicant was considered such a body which, by the Member State, was considered exempted from education according to article 133 in the VAT Directive, the Swedish Tax Council judged that the provision was to be exempted from VAT.¹³⁴

Generally, what can be said regarding all cases that are accounted for above is that the reasoning behind the advanced tax rulings is vague and very limited. It is, therefore, difficult to analyse the Swedish Tax Councils' arguments in the different cases. In the first case, the Council establishes that the education supplied in the relevant case does not constitute the type of education

¹³² Skatterättsnämndens förhandsbesked meddelat 2011-09-16 (diarienummer 47-10/I)

¹³³ Svanberg Marianne, Förhandsbesked indirekt skatt andra halvåret 2011, *Skattenytt*, (2012):182.

¹³⁴ Skatterättsnämndens förhandsbesked meddelat 2011-09-16 (diarienummer 47-10/I)

exempted in the Swedish VAT act. However, they do not express why. From the description regarding the type of education, it can be concluded without difficulty that it is not the type of education exempted in the Swedish VAT Act. The Member States have a wide discrepancy for implementing and defining education for purposes of article 132 in the EU VAT Directive, and excluding this type of education falls within that competence. This type of education is only sometimes provided by private and public actors in the same market. Its relevance for upholding a neutrality-based system must therefore be considered limited. The same applies to the second and third cases, where the arguments and reasoning are minimal.

In contrast, the Swedish Tax Council has instead clearly referenced their reasoning regarding the advanced tax ruling in the fourth case. The Council explicitly refers to the CJEU's judgement in the case of Horizon College and also to the case tried by the Swedish Administrative Supreme Court in HFD 2011 not. 30. The Council's focus on whether the subcontractor provides the education under their responsibility must align with how the Swedish courts have interpreted the exemption for education. When considering case law from the CJEU, it is unclear if this criteria of providing education under own responsibility should be viewed as the most vital for determining VAT liability under the exemption. It could be considered to fall under the second criterion developed by the CJEU; for example, Horizon College refers to the quality of the education provided. However, it is not an outspoken part of the criteria set up by the CJEU. It can, therefore, not be considered the most vital for determining such a service in relation to VAT liability.

The Council does, however, in the end, make a decision which must be considered to be in line with the criteria developed by the CJEU and the Swedish Administrative Supreme Court's judgement in HFD 2011 not. 30. When considering how the Swedish Tax Councils' decision relates to the principle of neutrality, the same reasoning has been accounted for under the section regarding the case law from the Swedish Administrative Supreme Court.

4.2.3 The Swedish Tax Agency's interpretation of the exemption

As mentioned in section 1.4, the Swedish Tax Agency publishes policy statements¹³⁵, and such a statement regarding the VAT treatment of educational

¹³⁵ This is the English translation which will be used for "Skatteverkets ställningstagande".

services was published in 2021.¹³⁶ The policy statement accounts for the Swedish Tax Agency's position on when the provision of educational services should be exempted from VAT. The paper starts by referring to the applicable law in the Swedish VAT Act and in the EU VAT Directive. Further on, the position paper describes how the CJEU and the Swedish Administrative Supreme Court have interpreted the exemption with an account of the cases in which the VAT exemption for education has been tried. Finally, the Swedish Tax Agency describes how the exemption has been interpreted and the current legal situation.

The Agency describes the scope of the educational services exempted from VAT as such education, which leads to a degree to ascertain specific qualifications or to pursue certain vocational activities. Other types of education to develop particular skillsets or knowledge within the ordinary educational provision of schools and universities are also exempted. Generally, education should be considered a system of integrated transferring of knowledge and skill sets which generates a more profound knowledge at a pace considered appropriate about the student's progress and specialisation through the stages of this process. They also determine that the education must be regarded as primary, high school or university level education and that the education that falls within the VAT exemption must be education provided in the interest of the public, which is regulated by law, regulation, or official permission. Other educational services are not exempted from VAT.

Secondly, the Agency describes whom they think can perform educational services within the VAT exemption's scope specifically, that they interpret the criteria that the provider must be the public or an educational organiser, which the public has recognised as anyone who provides such education which is exempted if they perform it independently.

To determine what constitutes providing education independently, the Agency describes four criteria which will need to be fulfilled,

- 1- The provider supplies the education from their organisational structure, which means that the provider conducts the teaching on their premises or by their digital platform, with their equipment and personnel,
- 2- It is the provider who has the overall responsibility for the education provided,

¹³⁶ Skatteverkets Ställningstagande; Undantaget för Skatteplikt för Utbildning, Mervärdesskatt, Dnr 8-1170163 (2021-08-25), Further on this will be referred to as The Policy Statement Regarding VAT and Education.

- 3- The provider may determine when in time the education may be provided,
- 4- The provider determines which students will participate in the education.

As such, education provided by a subcontractor will generally not fall within the scope of VAT exemption, but it will be up to the individual subcontractors to prove that they provide the education independently according to the criteria above. All requirements must be fulfilled to be considered by the publicly recognised educational organiser that education provided will be exempted from VAT. The Agency also explains that leasing personnel is not considered as providing education independently as it does not fulfil the criteria set up by the agency. Therefore, leasing personnel does not fall within the scope of the VAT exemption. The Agency is of the opinion that this includes the situation where the leased staff will work as teachers in the client's educational activity. This is not affected by what degree of freedom the teacher has to arrange the education or if the teacher is imposed to perform specific tasks adjacent to teaching with the client.¹³⁷

The Swedish Tax agency also establishes that they consider services performed as a part of education also fall within the scope of the VAT exemption for education if three criteria are fulfilled.

- 1- The goods or services supplied should be provided by an educational organiser who also supplies services that fall within the scope of the VAT exemption for education.
- 2- The goods or services are essential for the exempted educational services being provided, and
- 3- The primary purpose of the educational service cannot be to obtain additional income in competition with commercial entities,¹³⁸

The agency points out that it is the provider who needs to prove that they fulfil the third criteria and that the Agency thinks that leasing of personnel is typically performed with such a primary purpose and hence only in exceptional cases has a different purpose and therefore can be exempted from VAT.¹³⁹

As examples of what may constitute such activities that are exempted as part of the educational service, the Agency sells compendiums and provides housing for students attending boarding schools. However, supplying students with accommodation in other circumstances is not considered to fall within

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

the exemption of such provisions. Neither does operating a restaurant open to the public by a school providing restaurant education as it is provided in competition with commercial entities.¹⁴⁰

The regulation is based on the principle that all education supplied outside the scope of ordinary school education and does not give a right to Swedish study grants should be taxed. To fall within the scope of the exemption, education needs to be supplied by the public or with the support of the public.¹⁴¹

An interesting aspect of the policy statement regarding education and VAT, which the Swedish Tax Agency published, is their definition of education. The definition cannot be found in the preparatory works, the case law from CJEU or the Swedish Administrative Supreme Court. Their definition, however, does compare reasonably well with how the concept is used in Case law and must be considered to be in line with the concept of neutrality as it does not only cover public or private education providers. Regarding the definition of what constitutes public bodies, the Swedish Tax Agency's definition must be in line with what is mentioned in the preparatory works and the CJEU case law. As mentioned in the section regarding the Swedish preparatory works, such a definition must be considered compatible from the perspective of neutrality.

As previously stated, the Swedish Courts have singled out the question of whether the subcontractor has provided the education independently, which cannot be found in the case law from the CJEU. The Swedish Tax Agency has also singled out this question and has, from the case law of the Swedish courts, found criteria they consider to be fulfilled. Therefore, it is different from the criteria for ancillary supply that the CJEU has established in, for example, *Horizon College*. Precisely where these criteria derive from and their legal basis needs to be clarified. Still, their conclusion implies that services provided by subcontractors usually would not be exempted from VAT is in line with the case law provided by the Swedish Courts. The Swedish Tax Agency further explains that their view is that the provision of personnel for consideration is not considered independently providing educational services by their criteria and will, therefore, not be exempted from VAT. This is a much more aggressive stance than that provided by the CJEU in their case law and what can be derived from the case law of the Swedish Courts. The interpretation of the exemption and its appliance to such services has been strict, and the possibility of such services getting exempted has been limited. Still, it has yet to be excluded entirely from being exempted.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

5 Concluding analysis

5.1 The case law from CJEU and neutrality

When reviewing the case law from the CJEU regarding the exemption for education, we can see that the same principles of interpretation, which are accounted for in section 3.1, that the Court has applied on exemptions of all activities performed in the public interest are also used in cases considering the exemption for education.

The idea of interpretation that the concepts in the exemptions for activities performed in the public interest have their own independent meaning is not as clearly recognised in the case law from the CJEU as the principle of interpreting the exemptions strictly. The Court cites it in several cases that have been accounted for in section 3.2. For example, in the case of the Commission v. Germany, the Court makes a reference to this principle and to its importance for interpreting the exemptions. Still, they do not explain further what consequences this principle has on their judgement. We can recognise this in all cases accounted for in this thesis. However, right after referring to the principle, the Court presents reasoning regarding the purpose of the exemption for education and what they consider to be essential for that purpose. The conclusion that when considering education as an individual concept under union law, the purpose of that particular exemption must be regarded as is plausible.

In the case of Horizon College, the provision in question regarded the secondment of teachers, and the own independent meaning of the exemptions for activities performed in the public interest is referred to also in this case. The Court further develops the reason behind the principle to avoid divergences in the interpretation in the Member States. In this case, the Court defines education as the transfer of knowledge between teacher and student, providing the concept with its own independent meaning.

Unlike the two previously mentioned cases, the CJEU does not say that the concepts have their own independent meaning under Union law in the case of Brockenhurst College. However, in this case, much of the Court's reasoning is based on their reasoning in the case of Horizon College, especially regarding the definition of education. As such, the independent meaning of the concept of education is also relevant in the case of Brockenhurst College.

The Court again refers to the concepts as having their own independent meaning in the case of MDDP, but again, no explanation or reasoning for what this means for the Court's arguments and the verdict is given. Therefore, the

independent meaning of the concept of education does not seem important to the interpretation of the exemption in the case. In *Haderer*, the Court again does not refer to the independent meaning of the concepts in the exemption.

In all the cases that the CJEU has judged, which is accounted for under section 3.1, the Court mentions or refers to the principle that the exemption for education should be interpreted strictly.

In the case of the *Commission v. Germany*, the Court refers to the principle and pairs the reference with the conclusion that the exemption does not explicitly cover the provision in the relevant case. Not considering a research project provided against consideration by a private entity as covered by the exemption for education cannot be viewed as that strict interpretation. Education as a concept is often constructed as needing an element of transferring knowledge between a teacher and a student, which the provision, in this case, lacks. When considering if the provision instead should be regarded as an activity closely related to education, the Court also refers to the fact that such provision is not explicitly exempted in the Directive. However, the CJEU also refers to the purpose of the exemption for education which suggests a more extensive interpretation.

The formulation of the criteria for ancillary supply by the CJEU in the case of *Horizon college* is also an example of the Court interpreting the exemptions strictly. The fact that the Court concludes that the provision of teachers is not exempted as educational services are also a strict interpretation of the exemption. The CJEU uses the same criteria in the case of *Brockenhurst College*, and it is therefore clear that the Court also, in this case, makes a strict interpretation of the exemption. Another example of a strict interpretation of the exemption is when the Court, in the same case, does not consider the provision of the restaurant and theatre as part of the student's education but instead as an ancillary supply.

Even though the CJEU concludes that the Polish implementation of the exemption for education is not in line with EU law, it cannot be considered that strict interpretation; it is clearly stated in the EU VAT Directive that only certain types of bodies may perform exempted supply. As such, an implementation where all bodies can perform exempted supply is way too extensive, which cannot be considered a strict interpretation. Neither can the Court's verdict in the case of *Haderer*, as the conclusion reached by the Court includes private persons as bodies being able to perform exempted supply of educational services.

Analysing the case of the *Commission v. Germany's* relation to the principle of neutrality, it should be mentioned that the verdict does not lead to any differences affecting the economic neutrality of the EU VAT regulations. The uniformity of the EU VAT system is intact, which is the main factor to

consider when determining compliance with the concept of economic neutrality. One of the main points made by the CJEU to think when observing the relation to competition neutrality is the statement that public actors, when acting as private actors should fall within the same rules as private actors. As this means that the same rules should be applied in similar cases, it must be considered in line with the principle of competition neutrality.

The judgement in the CJEU's case of Horizon College contains the three criteria for determining the VAT liability for ancillary services. Especially the third criterion, that the goal of the service provided should not be to obtain additional income in direct competition with commercial entities, is interesting regarding neutrality. This criterion aims at only exempting the activities performed by public bodies when acting as such, not to distort private and public actors on the market. It must therefore be considered to comply with the principle of competition neutrality. However, such a strict interpretation of the criteria constitutes a disadvantage for leasing out teachers, affecting the educational institution's economic decision-making. This is not in line with the principle of economic neutrality. The distortion in the competition created by the CJEU's verdict in the case of Brockenhurst College when excluding such a supply from VAT is not in line with the idea of competition neutrality.

As mentioned in section 3.2.4, the case of MDDP differs from the other cases in that it considers the implementation of the exemption and analysing the case from the perspective of neutrality will be different. When comparing the Polish implementation to the CJEU's interpretation, the interpretation must be considered less neutral than the implementation. However, it is not incompatible with the principle of neutrality; neutrality has simply been de-prioritised in favour of other interests, which must be considered in all cases of creating law. In the case of Haderer, the CJEU instead makes a somewhat more extensive interpretation where they allow for private persons to fall within the scope of the exemption. As such, this interpretation is more in line with economic and competition neutrality.

In conclusion, the supply of educational services has been exempted from VAT in the EU VAT Directive, and the CJEU has, in many cases, interpreted this exemption strictly. However, when interpreting, they have also considered other factors, such as financial neutrality and the reasoning behind implementing such an exemption. This has created a concept of education, together with ancillary supply, as their own concept under EU law, which also has impacted the CJEU's interpretation. For neutrality purposes, the case law from CJEU both favours and disfavours neutrality, as they sometimes prioritise other interests in their interpretation. Solving conflicting interests is an inherent quality in legislation and interpretation, and different situations require different solutions. It may therefore be fully necessary to prioritise other interests, even if that means a less neutral VAT system.

5.2 The implementation and interpretation in Sweden

As mentioned, the Swedish implementation of the EU VAT Directive is done in the form of the Swedish VAT Act and is where the exemption for education is found. Swedish VAT law exempts education at the primary- and high school level and higher education as long as the provider is the state, municipalities or a recognised education coordinator. A specific exemption regarding education which grants the right to study assistance is also part of the Swedish implementation of the exemption for education. Services supplied as a part of the education supply are also exempted from the Swedish VAT Act.

The concept of education is defined in the preparatory works to the Swedish VAT Act as a service that should consist of teaching and systematic presentation of a subject, which should not be too general. This definition is much more detailed than the definition in the EU VAT Directive or the case law from the CJEU. The general idea of what constitutes education that it considers should be in line with the definition of education in EU law.

When implementing the EU VAT Directive, the criteria in Swedish law that ancillary supply to the supply of education must be supplied directly to the one taking part in the education was removed as it was not considered compliant with EU law. This must be considered to be a correct interpretation of the EU regulation and the Swedish regulation. In other areas, the Swedish exemption for education from VAT was considered more extensive than the EU regulation, and the Swedish VAT Act was revised to better comply with the EU VAT Directive; this must also be deemed a correct assessment of the relationship between the two regulations. A very extensive exemption for vocational training was almost implemented into the Swedish VAT Act, where all provisions of such education would be exempted from VAT. However, such an extensive exemption was considered too vast to comply with the EU VAT Directive, which considering the CJEU's verdict in the case MDDP, seems like a correct assessment.

Many of these changes are interesting from the perspective of neutrality; for example, removing the criteria of direct supply of ancillary services increases neutrality within the system. The fact that the exemption also includes private entities must also be considered to be in line with the idea of neutrality. The construction of the exemption for vocational training is also interesting from a neutrality perspective. The original idea of exempting all provisions of vocational training would be the best alternative to fulfilling a criterion of neutrality. However, due to needing to be compatible with the EU VAT Directive and causing difficulties for companies providing both exempted and non-

exempted education that such a construction would cause, a less neutral implementation was made instead.

The question of the VAT liability of the provision of educational services by subcontractors is an interesting question from the Swedish perspective. In the case of HFD 2011, not. 30, the question was tried by the Swedish Administrative Supreme Court, and references were made to, for example, the case of Horizon college and the three criteria that the CJEU developed. However, the requirements are not tried by the Swedish Administrative Supreme Court, which instead focuses on the question if the subcontractor is supplying the education independently. Independent provision of a service is an essential requirement to fall within the scope of the EU VAT Directive, which is discussed in section 2.1.1 in this thesis. It is something other than what the CJEU has discussed in either Horizon College or Brockenhurst College. However, the implication of the case as a precedent is limited as it is a notary case. The question was then tried by the Swedish Administrative Supreme Court again in HFD 2012 ref. 5, where the Court (or the Swedish Tax Council) again attaches great importance to the question of independence and references the previous case. The case of Horizon college is likewise referred to, and in the dissenting opinion, the three criteria are referenced and tried. However, this is not done by the majority and is therefore not considered part of the case's value as precedence. Unfortunately, the dissenting opinion is more in line with the case law from the CJEU as it is not as strict as the majority.

The first three cases from the Swedish Council for Advanced Tax Rulings are three cases where the type of education quite clearly does not fall under the Swedish exemption for education and must be seen in the light of just implementing a stricter exemption and having to adjust the interpretation. The fourth case from 2011 also dealt with the question of the provision of education through subcontractors, and the Council referred to the case HFD 2011 not. 30. Generally, the reasoning in all the cases from the Swedish Council for Advanced Tax Rulings is very limited, and it is, therefore, difficult to draw any reliable conclusions; however, what can be said is that the Swedish Administrative Supreme Court's reasoning has had importance in the application and interpretation of the Swedish regulation of the exemption for education.

When analysing the case law from the Swedish courts in light of how they relate to the principle of neutrality, one interesting aspect is the strict interpretation that the Court makes regarding the provision of education through subcontractors. As mentioned, the focus has been on if the education is supplied independently, and it is unclear where that focus derives from. The verdict in itself is difficult to draw any conclusions regarding education; what is more interesting is how the Swedish Tax Agency interpreted the case. In its published policy statement, the Agency has presented its view on how education should be considered for VAT purposes according to Swedish VAT law. The Agency's definition is more in-depth than the one found in the Case law

from Swedish courts and the CJEU and in the Swedish preparatory works. Though, it must be considered in line with the idea of education represented in those legal sources established as compatible with the principle of neutrality previously in this thesis. The question of independently providing education has, as mentioned, also been the focus of the Swedish Tax Agency. Their conclusion that the provision of personnel for consideration is not independently providing educational services is a very strict interpretation of the exemption, more so than the CJEU's interpretation in, for example, Horizon College.

Deciding how the case law from the Swedish courts and the interpretation of the same by the Swedish Tax Agency relating to the neutrality principle is rather difficult to sort out. One vital difficulty is that the case law from the Courts has a relatively low value as precedence, meaning its value as evidence of interpretation is relatively low. Another issue is the limited reasoning in many cases, leaving the reader to guess how and why the Court has reasoned as it has.

In conclusion, Sweden has implemented the exemption in a way, at least as it is described in the Swedish VAT Act and its preparatory works, which is mostly compliant with the regulation of the same in the EU VAT Directive and the case law from the CJEU. However, in the case law from the Swedish Courts and how it's been interpreted by the Swedish Tax Agency, the focus has been on if education has been supplied independently, and this focus has led to a stricter interpretation of what constitutes ancillary supply to education. This strict interpretation means that the goal of creating a system which is neutral in terms of, for example, competition has been distorted. The principle of neutrality has been deprioritised in this case to make room for other interests, as with all legal matters.

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