OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 December 2016 (1)

Case C-699/15

The Commissioners for Her Majesty's Revenue & Customs
v
Brockenhurst College

(Request for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom))(Value added tax — 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)

I – Introduction

1. In the present case, the Court is asked to rule on the tax exemption provision in Article 132(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). (2)
It is necessary to clarify the scope of the exemption, as it applies not only to precisely listed services, but also exempts the supply of 'closely related' services and goods ('supplies') from value added tax.

2. This technique for extending the exemption to closely related supplies is used by the EU legislature also in connection with other exemptions (for example, Article 132(1)(b) and (n) of the VAT Directive). However, here too there are difficulties in differentiating supplies that are still closely related from supplies that are no longer closely related. There is already some case-law of the Court on that question of differentiation. However, the Court has not yet concerned itself in detail with the question whether the exemption can also apply to supplies to external third parties (that is to say, not to the students to be taught (or patients to be treated) and also not to other training establishments that are exempt from tax). (3)
This concerns cases in which the taxable person (for example the school or the hospital) makes supplies to those third parties that are to some extent related to its exempt supplies (the education or the hospital care). (4)

3. The question of the scope of the exemption of these 'closely related' supplies is raised in the present case on the basis of a 'training restaurant' or 'training theatre' at Brockenhurst College ('the College'). The College provides through trainees, in the course of their practical training, restaurant services or theatre services to third parties in return for payment and would like to have that income treated as consideration for a supply that is exempt from tax under Article 132(1)(i) of the VAT Directive. The question can be raised, in all its variants, in connection with practical training. In Germany, for example, the owner of a hairdressing school attempted to treat the haircuts given by its trainees to customers — who had to pay a reduced price for them — as exempt from tax. (5)

There are almost no limits to the possible cases here. The same question would also arise if — as the Commission stated at the hearing — a baker training establishment allowed its trainees to sell bread and bread rolls in the course of their training or an industrial cleaning academy gave its trainees experience at the premises of paying customers in the course of their training.

II – Legal framework

A – *EU law*

4. The current proceedings concern periods which span the application of both:

a) Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, 'the Sixth Directive') and

b) the VAT Directive,

but the relevant provisions of the two directives are materially identical.

5. Under Article 131 of the VAT Directive (formerly Article 13A(1) of the Sixth Directive):

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

6. Within Chapter 2 of Title IX of the VAT Directive is Article 132(1)(i) (formerly Article 13A(1)(i) of the Sixth VAT Directive) by which Member States are required to exempt specified transactions, including:

'the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;'

7. Under Article 134 of the VAT Directive (formerly Article 13A(2) of the Sixth Directive):

'The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

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

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

B – *National law*

8. According to the information supplied by the referring court, the exemptions found in Article 132 of the VAT Directive have been implemented into UK law by Section 31 of the Value Added Tax Act 1994. That provision provides that a supply of services is an exempt supply if it is of a description specified in Schedule 9 to that Act.

9. Items 1 and 4 in Group 6 of Part II of Schedule 9 to the Value Added Tax Act 1994 include, so far as is relevant, the following:

'1. The provision by an eligible body of

(a) education;

...

(c) vocational training.

...

4. The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided-

(a) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and

(b) where the supply is to the eligible body making the principal supply, it is made by another eligible body.'

10. An 'eligible body' is defined in note (1) to Group 6 of Part II of Schedule 9. The referring court observes that it is well established that the College constitutes an 'eligible body' for those purposes.

III – The main proceedings

11. The dispute in the main proceedings concerns the catering and entertainment services provided by the College (namely the services supplied by the College to members of the public dining in the restaurant or attending a performance).

12. As the referring court has described, the College carries on the business of providing education to its students, including the teaching of courses in (i) catering and hospitality and (ii) the performing arts.

13. For the purpose of enabling the students enrolled in the course related to catering and hospitality to learn skills in a practical context, the College runs a training restaurant. The catering functions of the restaurant are all undertaken by students of the College, under the supervision of their tutors. External third parties (members of the public) dine there and pay around 80% of the cost of their meals.

14. Similarly, for the performing arts course, to give practical experience to the students enrolled on those courses, the College — again through those students — stages concerts and performances for paying members of the public.

15. The training restaurant is required to meet the educational needs of the students taking catering and hospitality courses. The restaurant is tantamount to a classroom for such students.

16. The training restaurant is not open to the public as such. The College operates a database of local groups and individuals who may wish to attend the restaurant. They are informed of events at the College through a newsletter created by the hospitality department.

17. In relation to the training restaurant, the College requires there to be a full restaurant (serving between 30 and 40 people) for two sittings on the same day and two different groups of students to obtain maximum benefit for the students. If not, the meal is cancelled.

18. The performance of concerts and plays within the performing arts courses has, for students on those courses, a similar function to that of the training restaurant.

19. Likewise, for the performances, the audience is limited in the sense that they are usually friends and family of the students or from an established database of people registered with the College.

20. The persons attending the training restaurant or a performance know that they are paying a reduced fee for a meal or performance which is to be prepared or offered as part of the training for the

students.

21. The practical training was designed as part of the courses and was in the contemplation of the students at the time they registered for the respective qualifications. If the practical training, including the serving of food and performances at concerts, were not offered then the students would not fully benefit from the courses. The making of the supplies is facilitated by the students in the course of their education. This is, according to the findings of the referring court, an essential part of their education.

22. It is common ground between the parties that obtaining additional income for the College through transactions in direct competition with commercial enterprises was not the basic purpose of the supplies of restaurant and entertainment services.

23. By a decision dated 5 November 2012, the First-tier Tribunal determined that the supplies of restaurant services and entertainment services by the College to members of the public are exempt from VAT under Article 132(1)(i) of the VAT Directive as supplies of services closely related to education.

24. On appeal by the Commissioners, the Upper Tribunal (Tax and Chancery Chamber) by a decision dated 30 January 2014 upheld the decision of the First-tier Tribunal. On appeal by the Commissioners to the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), the Court of Appeal decided to stay the proceedings and refer questions to the Court of Justice for a preliminary ruling.

IV – Procedure before the Court

25. The Court of Appeal (England & Wales) (Civil Division) therefore referred the following questions to the Court on 24 December 2015 pursuant to Article 267 TFEU:

1. With regard to Article 132(1)(i) of the VAT Directive, are supplies of restaurant services and entertainment services made by an educational establishment to paying members of the public (who are not recipients of the principal supply of education) 'closely related' to the provision of education in circumstances where the making of those supplies is facilitated by the students (who are the recipients of the principal supply of education) in the course of their education and as an essential part of their education?

2. In determining whether the supplies of restaurant services and entertainment services are within the exemption in Article 132(1)(i) as services 'closely related' to the provision of education:

   a) is it relevant that the students benefit from being involved in the making of the supplies in question rather than from the subject matter of those supplies;

   b) is it relevant that those supplies are not received or consumed either directly or indirectly by the students but are received and consumed by those members of the public who pay for them and who are not recipients of the principal supply of education;

   c) is it relevant that, from the point of view of the typical recipients of the services in question (that is to say the members of the public who pay for them), the supplies do not represent a means of better enjoying any other supply but are an end in themselves;

   d) is it relevant that, from the point of view of the students, the supplies in question are not an end in themselves but participating in the making of the supplies represents a means of better enjoying the principal supply of education services;

   e) to what extent should the principle of fiscal neutrality be taken into account?

26. Written observations on those questions have been submitted by the College, the United Kingdom and the Commission. The College, the United Kingdom and the Commission took part in the hearing on 10 November 2016.

V – Assessment

A – *Question 1*

27. By its first question, the referring court ultimately wishes to ascertain how the criterion of ‘closely related’ supplies in Article 132(1)(i) of the VAT Directive is to be interpreted. In particular, it asks whether supplies to third parties through an establishment named in Article 132(1)(i) of the VAT Directive can also fall under it. The referring court raises that question, in particular, because those third parties receive supplies that the trainees provide during and as part of their training.

28. As the Court has already held in relation to Article 13A(1)(i) of the Sixth Directive, the VAT Directive (now Article 132(1)(i)) does not define the concept of supplies ‘closely related’ to education. (6)
Nevertheless, it is clear from the actual wording of the provision that it does not cover the supply of goods or services which are unrelated to ‘children’s or young people’s education, school or university education, vocational training or retraining’.

1. Principal supply, ancillary supply and closely related supply

29. Furthermore, the Court has held that the supply of goods or services can be regarded as ‘closely related’ only where they are also considered to be supplies that are ancillary to the principal supply. (7)
However, a supply may be regarded as ancillary to a principal supply only if it does not constitute an end in itself, but a means of better enjoying the principal supply. (8)
This in turn suggests that the recipients of the principal supply and the ancillary supply must be identical, otherwise there would actually be two independent (principal) supplies.

30. However, that conclusion is not mandatory. The very wording of Article 132(1)(i) and Article 134 of the VAT Directive militates against the idea that closely related supplies must constitute ancillary supplies in that sense. A non-independent ancillary supply shares, by definition, the fate of the principal supply (in this case the tax treatment of the ‘educational services’ for VAT purposes) and is therefore exempt from tax per se. The separate exemption, in a few exemption provisions, of supplies closely related to exempt supplies makes sense only if the EU legislature considered that these supplies are in fact subject to tax according to the general principles but nevertheless should also be treated as exempt from tax.

31. Furthermore, in the *Horizon College* case the Court also extended the exemption in Article 132(1)(i) of the VAT Directive to supplies of one educational establishment to another (and therefore not directly to the students). (9)
Likewise, in the *Canterbury Hockey Club and Canterbury Ladies Hockey Club* case, (10)
the Court ultimately extended the exemption in Article 132(1)(m) of the VAT Directive — which is however worded slightly differently — to supplies to third parties (namely persons not taking part in sport).

32. Article 132(1)(i) of the VAT Directive therefore implies that the ‘closely related’ supply is not merely a dependent ancillary supply, but an independent (principal) supply. However, as that supply remains closely linked to the exempt (principal) supply, it is (exceptionally) also covered by the exemption applicable to that supply. This also explains why it is only for those cases that Article 134 of the VAT Directive explicitly and additionally requires that this in itself, independent principal supply must be essential to the exempt (principal) supply.

33. On this understanding of a ‘closely related’ supply, supplies to external third parties may also more easily fall within the scope of the exemption provision than if they were understood to be a dependent ancillary supply. Nevertheless, such supplies that are still ‘closely related’ must also be distinguished from supplies that are no longer ‘closely related’. In that respect, it depends upon the purpose and objectives of the tax exemption.

2. The purpose and objectives of the tax exemption of transactions that are closely related to the provision of ‘education’

34. The purpose and objective of the exemption in Article 132(1)(i) of the VAT Directive is that access to the provision of education — for the benefit of pupils, students and trainees — does not become more expensive due to VAT. (11)
As the Commission and the United Kingdom stressed at the hearing, this may well relate to the fact that the training of individuals serves not only them but also the public interest (see the title of Chapter 2 of Title IX of the VAT Directive).

35. The exemptions in Article 132 of the VAT Directive preclude the deduction of input tax. Therefore, they only bring about a partial exemption of the recipient of the supply. Their amount depends on the (non-deductible) VAT burden of the provider of the supply. If the supplies of the College were to be subject to tax in the present case, it would be entitled to deduct input tax with regard to the goods purchased, so that the prices to third parties would have to be increased ‘only’ in respect of the difference between the tax liability and the input tax deduction, in order for the College to obtain the same economic outcome. (12)

36. This shows that the purpose of the exemption in Article 132(1)(i) of the VAT Directive is not the favourable treatment of the taxable person concerned (in this case the ‘educational establishments’). Economically, the exemption works only in the favour of the recipient of the supply, who now incurs lower VAT.

37. This is in accordance with the character of VAT as a tax on consumption that must be borne by the final consumer and should burden him alone. (13)
In this context, an exemption of supplies that are consumed directly by third parties and are ‘produced’ only on the occasion of training is difficult to justify.

38. Furthermore, the principle of fiscal neutrality must also be taken into account in the interpretation of the exemptions in the VAT Directive. That principle precludes, in particular, economic operators who effect the same transactions from being treated differently in respect of the levying of VAT. (14)
From the perspective of the end consumer (in this case the third party), a distinction as to whether the food is consumed in a normal restaurant or in a training restaurant is irrelevant to his VAT burden. In both cases, the consumer is served and fed and in both cases he pays money for that consumption. The fact that in a training restaurant there is potentially a higher error rate is — as the United Kingdom also stressed at the hearing — taken into account solely in the amount of consideration (in the present case the charging of only 80% of the meal cost). The quality of the restaurant service does not call into question the existence of such a service.

39. With regard to the principle of neutrality, it cannot be correct that consumers are relieved of VAT only because exempt training of other people is also taking place at the same time. This also applies if the training restaurant or training theatre were in fact available only to a restricted group of people within the public. If there is an economic activity for the purposes of VAT law, a restriction of the consumer base is — as the Commission and the United Kingdom submit — therefore irrelevant to the correct taxation of the consumers. Even catering in so-called ‘Members’ Clubs’ through a restaurateur constitutes an economic activity that falls under the principle of neutrality. The same applies to a restaurant that only serves customers whose name begins with the letter ‘A’. It nevertheless competes with every other restaurant that attaches no importance to the initial letter of a name. The same applies in the present case, in which a customer must be registered beforehand in order to be eligible as a guest.

B – *Question 2(a)-(d)*

40. The main aim of the referring court’s question, subdivided into subparagraphs (a) to (d), is to clarify the differentiation criteria according to which a supply that is still closely related can be distinguished from a supply that is no longer closely related.

41. For that differentiation it must be borne in mind that the exemptions are, in the view of the Court, to be interpreted strictly, and, according to more recent case-law, the interpretation is to orient itself above all by reference to the purpose and objectives of the provision. (15)
As the Court explicitly states: 'nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of fiscal neutrality. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive the exemptions of their intended effect.' (16)

42. In this regard, it is not sufficient that, through the supplies to the third parties, the educational purpose alone is optimised. On the contrary, the supplies must, in accordance with Article 134 of the VAT Directive, be essential to the transactions exempted. Accordingly, the Court held in the judgment in *Commission* v *Germany* that the performance of projects for external third parties in return for payment is not exempt from tax; even though they can be seen as very useful for university education, they are not, however, essential for the purpose of achieving its intended objective. (17)

43. The crucial point is whether taxation of those supplies makes access to exempt supplies more expensive. One example is the cooperation of two enterprises directly for the benefit of the end consumer who is to be exempt from VAT, as in the *Horizon College* judgment. (18)
That concerned the collaboration of two educational establishments concerning supplies on the input side. The Court has held supplies between two exempt educational establishments to be exempt from tax in order to prevent the students for whom it produces a benefit from being burdened with VAT only because the educational service was provided not directly to them but only indirectly through another educational establishment. That is not the situation in this case. Here, education is provided on the output side to the students in return for payment at the same time as restaurant or theatre services are provided to third parties in return for payment.

44. For the assumption of a 'closely related' service, it is simply not sufficient that supplies arise 'only' sometimes as a kind of product in the course of the exempt supply and are provided to third parties. That is because, in this case, the taxation of the products does not increase the cost to the recipients of the supply who are to benefit from it (here, the cost to the students for access to education). (19)
Instead, the taxation of the supplies in the present case 'merely' makes access to the restaurant and theatre services more expensive for the restaurant and theatregoers. (20)
It follows that there is no service closely related to the exempt provision of education.

45. Finally, that conclusion is in line with the nature of VAT as a tax on consumption. If the consumer is to be burdened with VAT on the basis of the assets he expends on the consumption, then it must primarily be asked for what has he expended his assets. In this case, however, the third party pays the amount primarily and directly (that is to say with a direct link) for the food in the restaurant (or the performance in the theatre) and not so that the pupils or students are trained.

VI – Conclusion

46. Therefore I propose the following answers to the questions referred for a preliminary ruling by the Court of Appeal (England & Wales) (Civil Division) (United Kingdom):

(1) Closely related transactions within the meaning of Article 132(1) of the VAT Directive are independent supplies, the taxation of which also increases the cost of access to supplies that as such are exempt from tax. They do not include the supply of restaurant and entertainment services by an educational establishment to paying members of the public who are not recipients of the educational services that are exempt from tax.

(2) For the differentiation it is relevant (and militates against the existence of the exemption) that the persons benefiting from the exemption contribute to what is provided to other consumers. It is also relevant that the third parties pay for their own consumption, that is to say, not for the provision of education to the students. Finally, it is also relevant that the supplies to the third parties — both from the perspective of the third parties and the students — pursue an

independent objective (providing for third parties) that is pursued alongside the educational objective that continues to be exempt from tax.

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1 – Original language: German.

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2 – OJ 2006 L 347, p. 1.

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3 – There is a judgment of the Court on this point — judgment of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343).

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4 – In the judgment of 20 June 2002, *Commission* v *Germany* (C-287/00, EU:C:2002:388), the same question was already touched upon, because Germany treated the research activities of universities for third parties as exempt from tax.

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5 – See BFH, judgment of 26 October 1989 — V R 25/84, BStBl II 1990, p. 98, which refused the exemption because hairdressing services to customers differ from the education services of the hairdresser to the trainees.

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6 – Judgments of 20 June 2002, *Commission* v *Germany* (C-287/00, EU:C:2002:388, paragraph 46), and of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 27).

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7 – Judgments of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 28); of 6 November 2003, *Dornier* (C-45/01, EU:C:2003:595, paragraph 34 et seq.); of 1 December 2005, *Ygeia* (C-394/04 and C-395/04, EU:C:2005:734, paragraph 17 et seq.); and of 11 January 2001, *Commission* v *France* (C-76/99, EU:C:2001:12, paragraph 27 et seq.).

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8 – Judgments of 22 October 1998, *Madgett and Baldwin* (C-308/96 and C-94/97, EU:C:1998:496, paragraph 24 et seq.); of 6 November 2003, *Dornier* (C-45/01, EU:C:2003:595, paragraph 34); and of 1 December 2005, *Ygeia* (C-394/04 and C-395/04, EU:C:2005:734, paragraph 19).

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9 – Judgment of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343).

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10 – Judgment of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571).

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11 – See judgments of 20 June 2002, *Commission* v *Germany* (C-287/00, EU:C:2002:388, paragraph 47); and of 28 November 2013, *MDDP* (C-319/12, EU:C:2013:778, paragraph 26); see, by analogy as regards Article 13A(1)(b) of the Sixth Directive, judgment of 11 January 2001, *Commission* v *France* (C-76/99, EU:C:2001:12, paragraph 23).

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12 – Contrary to the Commission's view, the provision of restaurant services below cost price does not result in an input tax surplus per se, since purchasing is likely very largely to fall within the reduced tax rate, which explains the College's interest in the exemption.

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13 – Judgments of 24 October 1996, *Elida Gibbs* (C-317/94, EU:C:1996:400, paragraph 19); and of 7 November 2013, *Tulică and Plavoşin* (C-249/12 and C-250/12, EU:C:2013:722, paragraph 34); and order of 9 December 2011, *Connoisseur Belgium* (C-69/11, not published, EU:C:2011:825, paragraph 21).

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14 – Judgments of 7 September 1999, *Gregg* (C-216/97, EU:C:1999:390, paragraph 20); of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571, paragraph 30); and of 11 June 1998, *Fischer* (C-283/95, EU:C:1998:276, paragraph 22).

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15 – Judgments of 21 March 2013, *PFC Clinic* (C-91/12, EU:C:2013:198, paragraph 23); of 10 June 2010, *Future Health Technologies* (C-86/09, EU:C:2010:334, paragraph 30); of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 16); of 20 June 2002, *Commission* v *Germany* (C-287/00, EU:C:2002:388, paragraph 47); and of 28 November 2013, *MDDP* (C-319/12, EU:C:2013:778, paragraph 25).

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16 – Judgments of 21 March 2013, *PFC Clinic* (C-91/12, EU:C:2013:198, paragraph 23); of 10 June 2010, *Future Health Technologies* (C-86/09, EU:C:2010:334, paragraph 30); of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 16); of 20 June 2002, *Commission* v *Germany* (C-287/00, EU:C:2002:388, paragraph 47); and of 28 November 2013, *MDDP* (C-319/12, EU:C:2013:778, paragraph 25).

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17 – Judgment of 20 June 2002, *Commission* v *Germany* (C-287/00, EU:C:2002:388, paragraph 48).

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18 – Judgment of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343).

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19 – That could, for example, be assumed if the educational establishment sells self-developed training materials to its own pupils.

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20 – In this respect, there are clear parallels to the judgment of 20 June 2002, *Commission* v *Germany* (C-287/00, EU:C:2002:388).