Conclusions
OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 18 May 2004(1)

Case C-8/03

Banque Bruxelles Lambert SA (BBL)
v
Belgian State

(Reference for a preliminary ruling by the Tribunal de première instance de Bruxelles (Belgium))

(Sixth VAT Directive – Concept of taxable person – Place where services are supplied – Exemption for management of special investment funds – SICAV [open-ended investment companies])

1. The Court of Justice is for the first time requested to give a preliminary ruling concerning the application of the common system of value added tax to undertakings for collective investment in transferable securities. Those undertakings have recently been the subject of Community legislation. Two directives, 2001/107/EC and 2001/108/EC of the European Parliament and of the Council of 21 January 2002, (2) amending Council Directive 85/611/EEC of 20 December 1985, (3) lay down conditions for the operation and management of such undertakings. However, the Court is requested to give a preliminary ruling primarily in the light of the 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 ('Sixth Directive'). (4)

I – The main proceedings and questions submitted for a preliminary ruling

2. The facts of the case are as follows. Banque Bruxelles Lambert SA ('BBL') provided services comprising the giving of assistance and advice and supply of information to open-ended investment companies (sociétés d'investissement à capital variable) ('SICAVs') established in Luxembourg. BBL did not pay value added tax ('VAT') on these services because Luxembourg exempts SICAVs from the application of VAT. Following an inspection in 1998, the Belgian tax authority issued an enforcement notice to BBL in order to recover the VAT due in respect of the services supplied to SICAVs from 1993 to 1997.

3. The tax authority relied, for that purpose, on the Belgian VAT Code. According to Article 21(2) of the Code, 'the place where a service is supplied shall be deemed to be the place where the supplier's economic activity is centred or where he has a fixed establishment from which services are supplied or, in the absence of such a place or fixed establishment, the place where he has his permanent address or usually resides'. This rule nevertheless contains a derogation, in Article 21(3) of the same Code, according to which the place where a service is supplied shall be deemed to be the place where the recipient of the service has established the centre of his

economic activity or where he has a fixed establishment where the following two conditions are satisfied: the recipient of the service is a taxable person established in the Community but not in the same country as the supplier and the service involves work of an intellectual nature supplied by legal advisers or banking, financial and insurance transactions. In accordance with Article 9 of the Sixth Directive, pursuant to Belgian law, it is necessary to verify whether the recipient of a service is a taxable person before the place where the services in question are supplied is determined.

4. It is apparent from the order for reference that the Belgian authority interpreted those provisions as follows. As, in the present case, the SICAVs, recipients of the services, were not liable to pay VAT under Luxembourg law, the derogating rule laid down under Article 21(3) as to the place where services are supplied did not apply. The services provided to the SICAVs consequently were to be treated as supplied in Belgium, the place where the provider of the services was established. The Belgian law applicable at the time of the facts ruled out the possibility of such services qualifying for exemption from VAT. According to the Belgian authority, it follows that BBL must pay the VAT relating to the services provided to the Luxembourg SICAVs.

5. BBL disputes this interpretation as contrary to the Sixth Directive. Consequently, BBL has made an application before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) for a declaration that the enforcement notice issued against it is null and void. BBL contends, first, that SICAVs are taxable persons for the purpose of VAT in accordance with Article 4 of the Sixth Directive, irrespective of their classification under national law, and, second, that the services provided in this case are covered by Article 13 of the same Directive which exempts them from VAT.

6. The two questions referred to the Court by the Tribunal de première instance stem from these claims. By the first question, the national court asks whether SICAVs are taxable persons for value added tax purposes within the meaning of Article 4 of the Sixth Directive so that the services referred to in Article 9(2)(e) of that directive supplied to them are deemed to be provided at the place where such SICAVs have established their business. The second question is submitted in the alternative. If the answer to the first question is in the negative, the referring court asks whether, for the purposes of applying Article 13 of the Sixth Directive, which provides an exemption from VAT for the management of special investment funds, it is necessary to distinguish between services which comprise the giving of assistance and management advice, on the one hand, and management services in the strict sense, on the other, in so far as the latter differ from the former in that they imply a power on the manager’s part to take decisions relating to the administration and disposal of the assets under management.

II – The status of SICAVs as taxable persons

7. Although, before the national court, the parties to the main proceedings disagreed as to whether SICAVs are liable to pay VAT, all the parties which have submitted observations to the Court appear to agree that the answer to the first question is in the positive. BBL, the Commission, the Belgian Government and the Greek Government consider that SICAVs are taxable persons under Community law. The parties differ only as to the manner in which they arrive at this conclusion and as to its consequences.

A – *The classification of SICAVs under Community VAT rules*

8. It will be recalled that Article 4 of the Sixth Directive provides that only economic activities fall within the scope of the common system of value added tax. Under that provision ‘taxable person’ is defined as any person who ‘independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity’. Article 4(2) specifies that the said economic activities shall comprise all activities of producers, traders and persons supplying services and notably the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.

9. In this respect, in the *Polysar* case, the Court distinguished between the mere holding of property or shares in a company, entailing enjoyment of the yield resulting from ownership of the investment, and the concept of economic activity within the meaning of the Sixth Directive. (5) The

Court then stated that concerning financial investments, the mere exercise of the right of ownership by the holder cannot, in itself, be regarded as constituting an economic activity. (6) It follows that investment activity comparable to that of a private investor who manages his own assets, is not, as a matter of principle, classified as an economic activity. In the present case, it is also important to note that the employment of a consultancy undertaking cannot constitute a valid criterion for distinguishing between the activities of a private investor, which fall outside the scope of the Directive, and those of an investor liable to pay tax. (7) Indeed an activity may be considered an economic activity only where it is carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment. (8)

10. According to that judgment, 'economic activity' must therefore be construed as meaning an *activity* likely to be carried out by a private undertaking on a market, *organised* within a professional framework and generally performed in the interest of generating profit. It is to be noted that this interpretation is quite different compared with the interpretation of 'economic activity' in other sectors such as competition law, where it also has the purpose of determining the scope of application of Community law. (9) In the tax field, the concept of economic activity is based on a double criterion, not only a functional criterion relating to activity but also and above all a structural criterion relating to organisation. Such a definition is in accordance with the objective of the common system of VAT, which is to treat, for the purposes of the tax, all active persons established on Community territory equally. (10)

11. In the light of those criteria, there can be no doubt that the transactions carried out by SICAVs must be considered economic activities within the meaning of the Sixth Directive. A SICAV is a statutory collective investment undertaking. Unlike special investment funds, a SICAV has a legal personality distinct from that of its investors. It is so named as its capital may vary on a continuing basis, according to subscriptions and the buying?back of shares, and valuation of its assets. (11)

12. Article 1 of Directive 85/611/EEC defines the object of these undertakings as the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading. The business of these undertakings therefore consists of repeated acts of purchase and sale, performed on a professional basis, with a view to meeting the demands of third parties (the participating investors). (12) Such activity clearly constitutes a regulated and commercial 'exploitation' of capital on the securities market. (13) Taken as a whole, these criteria confer on SICAVs the status of taxable persons within the meaning of the Sixth Directive.

13. This approach cannot be disputed by comparing the activity of a SICAV with that of holding companies, which have been held by the Court generally not to have the status of a taxable person. (14) As a general rule, a holding company merely manages financial holdings in other companies, without seeking to make profit other than that resulting from an ordinary management of its investments. On the other hand, the main function of a SICAV is to make investments for commercial purposes, with a view to generating profit. It matters little that the holding in the capital of a single issuing body is restricted by legislation, with a view to spreading risk prudently. (15) It need only be observed, in this respect, that SICAVs are motivated by the objective of maximising returns on capital investment; accordingly the risk is always taken into account. (16) Nor is it more useful to distinguish between the active and passive management of financial instruments. (17) It is common ground that the ordinary management of assets may require much work on the part of the holder. What distinguishes a SICAV from a holding company is rather the intention which motivates them and their conduct which is peculiar to them: whereas a holding company, in general, conducts itself like an owner, interested only in obtaining the yield from its property, (18) a SICAV conducts itself like a businessman by seeking to obtain the highest yield possible, having regard to the investment policy adopted, from its investments on the financial markets.

14. Must a distinction none the less be made according to whether or not the SICAV is self?managed? In the first case, management of the SICAV is an incorporated function whereas in the second, the SICAV relies on an authorised external company to manage it. The Commission, guided by the way in which the Court has dealt with holding companies in this field, submits in its

written observations that only self?managed SICAVs are liable to pay VAT. The Commission contends that, like a holding company, a SICAV which is not self?managed only holds securities and does not carry out taxable transactions.

15. The Commission did not set out this distinction at the hearing, but merely contrasted the situation of special investment funds, which are not legal persons, with that of SICAVs, which are legal persons. In any event, the distinction apparent from its written observations does not seem to me to be relevant. The main criterion for determining the circumstances in which a SICAV must be considered liable to pay VAT is the nature of its activities and not its legal form. (19) Of course, alternatively, these activities must take place within a legal structure which is likely to be subject to taxation. This is indeed the case for the activities at issue: all SICAVs are legal persons, whatever their internal organisation. (20) They own a portfolio of transferable securities which an external management company will possibly have the task of managing. SICAVs may therefore be considered as taxable persons for the purpose of applying the Sixth Directive, irrespective of the legal form which they choose for the management of their activities.

16. This approach seems to me to meet the requirement of simplicity and structure of the tax system. It is also in accordance with one of the objectives of the Sixth Directive, which is to lay down common rules with a view to approximating the conditions of competition between comparable economic actors. Moreover, the relations existing between a SICAV and its management company are not in any way comparable to those which may develop between a holding company and the companies in which it has acquired shareholdings. Indeed, the management company acts upon delegation from the SICAV. The SICAV remains responsible for the investment activities. However, the decisive criterion for the issue of tax liability is whether the body in question is the actual medium through which the economic activities are performed, and not how the body in question organises the management of those activities.

17. The answer to the first part of the first question referred for a preliminary ruling should therefore be that Article 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977 must be interpreted as meaning that SICAVs established in accordance with Directive 85/611/EEC are taxable persons for the purposes of value added tax. It remains to determine the consequences of this answer as regards determination of the place where services are supplied to SICAVs.

B – *The place where services are supplied to SICAVs*

18. Article 9 of the Sixth Directive lays down the principle that the place of supply of services is the place where the supplier is established. This principle is however subject to exceptions, one of which provides, at Article 9(2)(e), that the place of supply of consultancy services and banking and financial transactions performed for taxable persons established in the Community but not in the same country as the supplier is the place where the customer has established his business.

19. As it has been established that SICAVs are taxable persons, Article 9(2)(e) would indeed seem to apply to the services which are provided to them. None the less, the Kingdom of Belgium disagrees with that conclusion. It considers, in its written observations, that a distinction should be made: only consultancy services, data processing services and the supplying of information to SICAVs fall within the scope of the provision; management services provided to SICAVs are not covered by Article 9(2)(e), where those services involve a power to take decisions.

20. As a basis for this distinction, the Kingdom of Belgium relies on case-law of the Court regarding the conditions of eligibility for an exemption from VAT under Article 13(A) of the Sixth Directive. (21) However, this case-law is not relevant at this stage of the analysis, where it is a question simply of determining the place where services are supplied. It is sufficient to note that Article 9(2)(e), third and fifth indents, covers both consultancy services and banking and financial transactions.

21. It is clear from the foregoing that Article 9(2)(e) of the Sixth Directive also applies to management services, where they fall within the framework of financial operations. Provided that these services were supplied to taxable persons established in the Community but not in the same country as the supplier, they must be deemed to be supplied at the place where the recipient of the services has established his business.

III – The scope of the exemption from VAT under Article 13(B)(d), point 6 of the Sixth Directive

22. Although, according to the national court, an affirmative answer to the first question renders the second irrelevant to resolving the main proceedings, I consider that it is useful to analyse it.

23. Under the scheme set up by the Sixth Directive, Article 13(B)(d), point 6, provides that the Member States shall exempt 'management of special investment funds as defined by Member States'. In that regard, the disputes relate to both the general interpretation of this provision and the specific meaning of the concept of management.

A – *Rules of interpretation*

24. The parties which have submitted observations are in agreement as to the general rule, established by settled case-law, according to which the exemptions under Article 13 of the Sixth Directive must be narrowly construed inasmuch as they provide an exception to the principle that VAT is due each time a service is provided for consideration by a taxable person. (22)

25. It may also be useful to recall, in the light of the considerations in the order for reference, that, like the concept of taxable person, the exemptions constitute independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the Directive. (23) The fact that Article 13(B)(d), point 6, refers to the laws of the Member States does not mean that it is for the different national legislatures to determine the scope of the exemption. First, Member States only have the right to define the status of special investment funds and not determine their situation in the light of the common VAT rules. Second, the definition of special investment funds is now, in part, regulated by Community law, through Directive 85/611/EEC.

26. BBL submits that it is necessary to consider, in the analysis, the *ratio legis* of the provision, that is, the reasons of general policy common to Member States which justify the exemption. It is clear that such reasons existed when Article 13 was drafted. They doubtless reflect, within the framework of Article 13, the overall intention, pointed out by BBL, to promote access by savers to collective investment. However, there is a more practical basis for the exemption, which is to avoid subjecting contract?based funds to a tax burden which self?managed investment undertakings which are legal entities do not have to bear, by reason of the exemption under Article 13(B)(d), point 5. According to this last provision transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding documents establishing title to goods, and the rights or securities referred to in Article 5(3) of the Sixth Directive are exempt from VAT.

27. In that regard, the Belgian Government submits that an exemption restricted to contract?based funds, to the exclusion of statutory funds which have opted to delegate the management of their assets, could affect equality of treatment between the various collective investment undertakings. I am inclined to agree with this last argument. It is legitimate to extend the regime provided for special investment funds to SICAVs, where they are in a similar position. However, this provides no ground for inferring, as BBL claims, that all services supplied to such collective investment undertakings should be exempted. In order to determine the scope of this exemption, the meaning of the concept of management, for the purpose of Article 13, should be defined.

28. This conclusion is not contradicted by the alleged inequality of treatment between collective investment undertakings which, according to BBL, could lead to the exemption being restricted to certain management services for special investment funds. First, a self-managed SICAV which chooses to use a third party to take charge of services which are not directly linked to management of its activities would in this respect be in the same tax position as a special investment fund. The fact that such a SICAV may carry out these tasks itself without being liable to pay VAT, although special investment funds do not have this choice, is irrelevant. In those circumstances, any difference in treatment between SICAVs and special investment funds is, in fact, only the normal consequence of the application of the common system of VAT, under which only activities performed independently, in the context of a relationship between two autonomous

taxable persons, are subject to taxation. (24) Second, if one was to follow BBL's line of argument on this point, it would have to be accepted that many services supplied, concerned broadly with the management of special investment funds, could fall within the scope of the exemption. This manifestly would go beyond the wording of Article 13(B), which must be interpreted narrowly.

B – *The concept of management within the meaning of Article 13(B)(d), point 6 of the Sixth Directive*

29. The Sixth Directive does not define the concept of management, just as it does not define the object of the transactions covered by Article 13(B)(d). In several cases, the Court has had the opportunity to clarify the meaning of some of these transactions. However, the Court has never ruled on the exemption laid down in Article 13(B)(d), point 6.

30. In the absence of a definition, BBL proposes referring to the general meaning given by national civil law doctrine to the concept of management. Although tempting, this suggestion is not acceptable. It is recalled that the case-law of the Court specifically excludes asset management operations from the scope of application of VAT. Therefore, a definition which makes these operations a central feature must be rejected. Such a definition logically cannot determine the scope of a tax exemption which, by definition, implies prior liability to tax. (25)

31. The observations submitted to the Court focus on whether management should be construed as involving a power to take decisions. Indeed this is the interpretation of the Commission and of the Greek Government. In their opinion, management in the terms of this provision corresponds solely to financial management in the strict sense, which includes the power to take decisions concerning investment policy. BBL and the Belgian Government disagree with this interpretation. In their view, the concept of management is broad and covers management advice.

32. Thus framed, the question does not appear to be correct. In order to clarify the meaning of the concept of management, one must consider both its constituent parts and the purpose of the provision of which it is part. That provision requires the exemption to be circumscribed so that it does not affect the principle that VAT should have general application but without rendering the object of the exemption meaningless. (26) On this basis, it is possible to extend the exemption to all transactions directly linked to management of the investment funds. Consequently, the exemption cannot be restricted merely to decision?making. However neither can the exemption be deemed to cover all services provided to collective investment undertakings in the position of special investment funds.

33. In my view, the transactions covered by the exemption must be restricted to those which are closely linked to the exploitation of the funds, that is, to determining policies of investment and acquisition and sale of shares. The exempt transactions, if they do not amount to decision?making, must at least be involved directly in the trade in securities. In order to be able to apply the exemption, it must be established that the services in question are in fact an integral part of the transactions expressly exempted by the Sixth Directive. Services that are easily dissociable from fund management in the narrow sense must on the contrary be considered liable to VAT.

34. Indeed the Court, following a similar reasoning, regarding the exemptions covered by Article 13(B)(d), points 3 to 5, distinguished between exempt transactions and straightforward physical, administrative and technical services which are neither specific to nor essential for the exempt transactions. (27) In my view, the same analysis should apply, *mutatis mutandis*, to the scope of the exemption in Article 13(B)(d), point 6 of the Sixth Directive.

35. It follows from this analysis that, to determine the scope of the exemption in Article 13(B)(d), point 6, it must be considered whether the services in question have an effect directly on the financial position of the fund, so that they have a determining influence on the assessment of financial risks or on the decisions taken as to investments. (28)

36. In the present case, the information provided by the national court concerning the services supplied to the SICAVs does not enable it to be concluded whether those services are transactions which are indissociable from management of the SICAVs. (29) It will be a matter for the national court to rule on the specific nature of the services provided.

37. BBL however adds two textual arguments which, in its opinion, overturn this analysis. The first, put forward at the hearing, makes a connection, within the context of Article 13(B)(d) of the Sixth Directive, between the concept of management at point 5 and the concept of management within the meaning of point 6. Article 13(B)(d), point 5, provides that 'Member States shall exempt transactions, including negotiation, *excluding management and safekeeping*, in shares, interests in companies or associations, debentures and other securities, excluding documents establishing title to goods, [and] the rights or securities referred to in Article 5(3)'. (30) The exemption in point 6 is apparently directly connected to the exclusion from the exemption provided for in point 5. The concept of management in point 6 should therefore be understood in the broad sense in order to reflect the reservation in point 5. It will be recalled that management within the meaning of point 5, according to the case-law of the Court, covers supply of a straightforward physical, technical or administrative service, which does not alter the legal or financial situation. (31)

38. This argument assumes that both concepts of management in Article 13(B)(d) are identical. However, their content is not the same. The concept of management chosen by the legislature, in the context of Article 13(B)(d), point 5, is a restriction of the original formula, proposed by the Commission, which covered all operations relating to debts, shares, debentures and other securities. (32) This concept of management means excluding physical, technical or administrative assistance and executive tasks, not directly linked with trade in securities, from the scope of the exemption. On the other hand, management within the meaning of point 6 of the same Article is a positive concept, which clearly covers the activity of exploiting portfolios of securities allotted to a fund by its subscribers. To that effect, management is one of the two fundamental components of a special investment fund, along with the safekeeping, by the depositary, of the fund assets. This concept of management cannot therefore be construed as covering services supplied to the manager which are not directly related to the exploitation of the fund.

39. BBL's second argument is based on the fact that the scope of the activity of companies which manage investment funds has recently been extended, pursuant to Directive 2001/107/EC. This is a decisive factor of BBL's written arguments. (33) Directive 2001/107/EC clarifies and extends the scope of activities of companies which manage collective investment undertakings, inter alia to giving investment advice. (34) It appears however that this extension does not in any way have the automatic effect of bringing the said activities within the concept of management under Article 13(B)(d), point 6 of the Sixth Directive. First, as the object of both provisions is separate, nothing precludes the concept of management from being treated differently in both cases. Second, it should be recalled that, in Directive 2001/107/EC, the activity of giving investment advice is only intended to be a 'non-core service' as opposed to the principal activity of fund management. (35) Within the context of the common system of VAT it is therefore quite possible to consider such activities as 'ancillary transactions'. According to the case-law of the Court, this classification concerns services which do not constitute the 'direct, permanent and necessary extension' of the taxable activity. (36) Such activities must be considered as separate transactions, producing their own results, and known as such by third parties. On that basis, they cannot be treated as fund management for the purpose of an exemption from VAT.

40. To conclude this analysis, I consider that Article 13(B)(d), point 6 of the Sixth Council Directive 77/388/EEC of 17 May 1977 must be interpreted as meaning that the term 'management' covers not only management services involving a power to take decisions but also transactions likely to have an effect directly on the financial position of undertakings for collective investment in transferable securities in the position of special investment funds, so that they have a determining influence on decisions taken as to investments.

IV – Conclusion

41. In the light of the foregoing observations, I suggest that the Court respond to the questions referred by the Tribunal de première instance, Brussels, as follows:

(1)Article 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977 must be interpreted as meaning that SICAVs established in accordance with Council Directive 85/611/EEC of 20 December 1985 are taxable persons for value added tax purposes, so that the services referred to

in Article 9(2)(e) of the Sixth Council Directive 77/388/EEC of 17 May 1977 supplied to them are deemed to be provided at the place where the said SICAVs have established their business.
(2)Having regard to the response to the first question, it is unnecessary to reply to the second question.
1 – Original Language: Portuguese.
2 – Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses (OJ 2002 L 41, p. 20); Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS (OJ 2002 L 41, p. 35). The time-limit for transposition of the directives was 13 February 2004.
3 – Council Directive of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3).
4 – Sixth Council Directive 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).
5 – Case C-60/90 *Polysar* [1991] ECR I-3111, paragraph 13 and Case C-333/91 *Sofitam* [1993] ECR I-3513, paragraph 12.
6 – Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 32.
7 – Ibid., paragraph 37.
8 – Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567, paragraph 28.
9 – See, in particular, Case C-41/90 *Höfner* [1991] ECR I-1979.
10 – For a detailed account of the specific objectives of Community tax law, which do not entirely match those of competition law, see Berlin D., *Droit fiscal communautaire*, P.U.F., Paris, 1988, p. 229 et seq.
11 – Cf. Kremer C. & Lebbe I., *Les organismes de placement collectif en droit luxembourgeois*, Larcier, Brussels, 2001.
12 – By way of comparison, Advocate General van Gerven refers to features of an economic activity within the meaning of Article 4 of the Sixth Directive in the *Polysar* case, cited in footnote 5.
13 – On the concept of exploitation within the meaning of Article 4(2) of the Sixth Directive, see Case C-80/95 *Harnas & Helm* [1997] ECR I-745.
14 – See Case C-16/00 *CiboParticipations* [2001] ECR I-6663, paragraph 19. Admittedly, in certain circumstances, a holding company may provide ad hoc services to its subsidiaries in return for payment, such as the supply of administrative, financial, accounting and information technology services. However, specifically, in these exceptional cases, the Court has held that the involvement of the holding company in the management of its subsidiaries, in so far as it entails carrying out transactions which are subject to VAT by virtue of Article 2 of the Sixth Directive, must be regarded as an economic activity (Case C-142/99 *Floridienne and Berginvest*, cited in footnote 8, paragraph 19).
15 – The Commission points out that under Article 25 of Directive 85/611/EEC, a SICAV may acquire no more than 10% of the non-voting shares of any single issuing body.
16 – Case C-142/99 *Floridienne and Berginvest*, cited in footnote 8, paragraph 28.
17 – The Kingdom of Belgium put this criterion for distinction forward with a view to establishing that SICAVs, unlike holding companies, are taxable persons. It is noted, in this respect, that the observations of the Belgian State before the Court differ from the position it took before the national court.
18 – To distinguish the activity of a holding company, the Court thus noted that ‘the activity of a bondholder may be defined as a form of investment which does not extend further than

straightforward asset management' (Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraph 18).
19 – In another context, the Court stated that 'the principle of fiscal neutrality precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. It follows that that principle would be frustrated if the possibility of relying on the benefit of the exemption provided for activities carried on by the establishments or organisations referred to in Article 13A(1)(b) and (g) was dependent on the legal form in which the taxable person carried on his activity' (Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 20). The legal form of the body in question is consequently also irrelevant in cases where it is necessary to determine whether or not that body is a taxable person.
20 – This is the main criterion which distinguishes SICAVs from special investment funds. Special investment funds are contract-based but are not legal persons. As they are not legal entities, they may be considered as 'transparent' for tax purposes. Therefore, one cannot do otherwise but tax the management company which manages the collective portfolios. However, this approach is, in a sense, dictated both by default and out of necessity.
21 – Case C-267/00 *Zoological Society* [2002] ECR I-3353.
22 – See, lastly, Case C-45/01 *Dornier* [2003] ECR I-0000, paragraph 42.
23 – Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21.
24 – Advocate General Ruiz-Jarabo Colomer followed a similar reasoning in *SDC*, cited in footnote 22, paragraphs 54 et seq.
25 – See, in support of this, the Opinion of Advocate General Ruiz-Jarabo Colomer in *SDC*, cited in footnote 22, paragraph 57.
26 – Article 4 of the Sixth Directive confers a very wide scope on value added tax, see Case C?186/89 *van Tiem* [1990] ECR I-4363, paragraph 17.
27 – Case C-2/95 *SDC* [1997] ECR I-3017 and Case C-235/00 *CSC Financial Services* [2001] ECR I-10237.
28 – It should be noted that the Court, ruling, in a different context, on the concept of [the right to] 'manage undertakings' under the second paragraph of Article 43 EC, considered that this involved [a national of a Member State] having a holding in a company which gives him 'definite influence over the company's decisions and [which] allows him to determine its activities' (Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22).
29 – The services involved providing the SICAVs with information and assistance in managing assets within the framework of the investment policy adopted and material help in the acquisition, subscription and transfer of securities.
30 – Emphasis added.
31 – Case C-235/00 *CSCFinancial Services*, cited in footnote 27, paragraph 28.
32 – See the Resolution embodying the opinion of the European Parliament on the Commission's proposal for a Sixth Council Directive 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 1974 C 40, p. 34). [Not available in English.]
33 – In actual fact, BBL also relies on Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27). It is settled, however, that Article 2(2)(h) of the Directive excludes collective investment undertakings and the depositaries and managers of such undertakings from its scope of application.
34 – Article 5 of Directive 85/611/EEC as amended by Directive 2001/107/EC provides that 'The activity of management of unit trusts/common funds and of investment companies includes, for the purpose of this Directive, the functions mentioned in Annex II which are not exhaustive'. Annex II of the Directive includes the functions of investment management, administration, and marketing. Article 5(3) [of Directive 2001/107/EC] provides, by way of derogation from paragraph 2, that Member States may authorise management companies to provide, in addition to the management of unit trusts/common funds and of investment companies, services of management of portfolios of investments on a client-by-client basis and, as non-core services, investment advice and

safekeeping and administration services in relation to units of collective investment undertakings.
35 – Article 5(3)(b) of Directive 85/611/EEC as amended by Directive 2001/107/CE.
36 – See, by analogy, Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 18.