OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 8 September 2005 1(1)

Case C-169/04

Abbey National plc and Inscape Investment Fund (joined party)

v

Commissioners of Customs and Excise

(Reference for a preliminary ruling from the VAT and Duties Tribunal, London)

(Value added tax – Exemption of the management of special investment funds – Concept of management)

I – **Introduction**

1. What is covered by the concept of management of an investment fund? That is the central question of this reference for a preliminary ruling from the VAT and Duties Tribunals (London). Under the Sixth VAT Directive 77/388/EEC ('the Sixth Directive'), (2) transactions in connection with the management of investment funds are exempt from value added tax (VAT). The common funds/unit trusts or investment companies in Abbey National's VAT group involved in the main proceedings want the exemption to be applied also to certain services which they have outsourced to third parties.

2. Clarification is needed here as to the extent to which Council Directive 85/611/EC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (3) is to be taken into account in interpreting the provisions of VAT law. Directive 85/611 harmonises the national provisions on certain investment funds and includes in particular a definition of what is to be regarded as the management of a fund.

3. Directive 85/611 further contains a number of structural obligations for UCITS, which form a background that is of importance for understanding the functions and functioning of these investment instruments. Directive 85/611 basically recognises two forms of UCITS. First, there are funds which are created by contract and do not have legal personality (common funds). In the United Kingdom these funds often take the legal form of unit trusts. (4) Second, there are investment companies which are established as legal persons in their own right under the rules of company law.

4. As they do not have legal personality of their own, common funds need a management company which carries on their business. Investment companies, by contrast, are legal persons

which can also manage themselves and do not necessarily require a separate management company. However, under the United Kingdom provisions, they have an authorised corporate director (ACD). This function is generally performed by companies, so that their structure resembles that of a common fund with a management company.

5. The most important task of fund management consists in determining the investment policy, including decisions on the purchase and sale of specific securities. The management company also has accounting and settlement functions to perform. The reference for a preliminary ruling raises the question whether the latter activities, if they are outsourced to third parties, can still be regarded as exempt transactions in connection with the management of a common fund or investment company.

6. A further question relates to the classification of the activity of the depositary. Both common funds and investment companies (5) must entrust their assets to a third party for safekeeping. In the case of a unit trust, the trustee exercises the function of depositary. In practice, banks usually act as depositary. The depositary carries out the instructions of the management company. The depositary also has certain powers to supervise and participate. In particular, it must ensure that transactions involving assets in its safekeeping are properly recorded. With respect to the services of the depositary, the question again arises whether they constitute the VAT-exempt management of an investment fund.

II – **Legal context**

A – *Community law*

7. Under Article 13B of the Sixth Directive,

‘Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(d) the following transactions:

…

3. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;

…

5. transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding:

– documents establishing title to goods,

– the rights or securities referred to in Article 5(3);

6. management of special investment funds as defined by Member States;

…’

8. Common funds are defined as follows in Article 1(2) and (3) of Directive 85/611: (6)

‘2. For the purposes of this Directive, and subject to Article 2, UCITS [undertakings for collective investment in transferable securities] shall be undertakings:

– the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets referred to in Article 19(1) of capital raised from the public and which operates on the principle of risk-spreading and

– the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings’ assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.

3. Such undertakings may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).

For the purposes of this Directive “common funds” shall also include unit trusts.’

9. Article 4 of Directive 85/611 regulates the conditions for the authorisation of a UCITS by the authorities of a Member State. In particular, it follows from Article 4(2) that a common fund in contractual form must have a management company and a depositary, separate from that company. An investment company only needs a depositary.

10. The second subparagraph of Article 5(2) of Directive 85/611 refers, for a description of the management of common funds and investment companies, to the non-exhaustive list of functions in Annex II, which reads as follows: (7)

‘*Functions included in the activity of collective portfolio management:*

– Investment management.

– Administration:

(a) legal and fund management accounting services;

(b) customer inquiries;

(c) valuation and pricing (including tax returns);

(d) regulatory compliance monitoring;

(e) maintenance of unit-holder register;

(f) distribution of income;

(g) unit issues and redemptions;

(h) contract settlements (including certificate dispatch);

(i) record keeping.

– Marketing.’

11. Under Article 5g of Directive 85/611, Member States may permit management companies to delegate one or more of their functions to third parties if certain preconditions are complied with. It must be ensured, in particular, that the delegation of functions does not jeopardise supervision of the management company and that the functions are exercised properly.

12. Under Article 7(1) of Directive 85/611, the assets of the common fund must be entrusted to a depositary for safekeeping. The depositary’s duties are described as follows in Article 7(3).

‘A depositary must, moreover:

(a) ensure that the sale, issue, re-purchase, redemption and cancellation of units effected on behalf of a unit trust or by a management company are carried out in accordance with the law and the fund rules;

(b) ensure that the value of units is calculated in accordance with the law and the fund rules;

(c) carry out the instructions of the management company, unless they conflict with the law or the fund rules;

(d) ensure that in transactions involving a unit trust’s assets any consideration is remitted to it within the usual time-limits;

(e) ensure that a unit trust’s income is applied in accordance with the law and the fund rules.’

13. Under Article 9 of Directive 85/611, the depositary is liable under the law of the State in which the management company’s registered office is situated for wrongful failure to perform its obligations.

14. For the depositary of an investment company, Articles 14 and 16 of Directive 85/611 lay down similar rules to Articles 7 and 9.

15. Under Article 10 of Directive 85/611, a single company must not act as both management company and depositary. The same applies under Article 17 for investment companies and their depositaries.

B – *National law*

16. In the United Kingdom, the exemption laid down in the Sixth Directive for the management of common funds and investment companies was implemented by Items 9 and 10 of Group 5 of Schedule 9 to the Value Added Tax Act 1994 (‘the VAT Act 1994’). The rules apply to ‘authorised unit trusts’ or ‘trust-based schemes’ (Item 9) and open-ended investment companies (OEIC) (Item 10).

17. The provisions of the VAT Act 1994 refer for the definition of those undertakings to sections 236 and 237 of the Financial Services and Markets Act 2000 (‘the FSMA’). The FSMA transposes Directive 85/611 into national law. Further provisions are to be found in the Collective Investment Schemes Sourcebook of the Financial Services Authority (‘the CIS Sourcebook’). Finally, there are also specific provisions for investment companies in the Open-Ended Investment Companies Regulations 2001 (‘the OEIC Regulations’).

18. Additional duties supplementing the obligations under the directive are imposed on the

depositary or trustee by the CIS Sourcebook. The focus of these provisions is the aim of protecting the interests of consumers or investors. In detail, the referring tribunal mentions the following points:

(1) The trustee may agree with the manager to give approval for minor changes to the prospectuses (including changes relating to investment objectives);

(2) it must issue units on receipt of and in accordance with instructions given by the manager;

(3) it must notify the manager of its concerns and refuse to issue or cancel units if the trustee is of the opinion that the issue or cancellation would be in breach of a restriction on issue or that it is not in the interests of unitholders;

(4) it may authorise or require the manager to suspend the issue, cancellation, sale and redemption of units where exceptional circumstances apply;

(5) it must take reasonable care to determine whether non-cash consideration for the issuing of units is likely to prejudice existing or potential unitholders;

(6) it may forfeit a unitholder's units if it defaults in making any payment due to the manager or trustee;

(7) it must maintain a register of unitholders;

(8) it may convene a meeting of unitholders;

(9) it must be consulted about which markets outside the European Union should be eligible for investment;

(10) it must consider that the terms of stock lending transactions proposed by the fund manager are acceptable and ensure that adequate collateral is provided before it enters into them;

(11) it must approve the terms of over-the-counter derivative transactions;

(12) it may consent to the exercise by the manager of rights attributable to an investment of the authorised unit trust (such as the right to subscribe to a rights issue) if the exercise would otherwise result in a breach of restrictions on the size of holdings;

(13) it may, after consulting with the manager, decide whether or not to exercise any right of voting conferred by any of the scheme property which consists of units in any other collective investment scheme managed or otherwise operated by the manager or its associates, or shares in an approved investment fund which form part of the scheme property of a feeder fund managed or otherwise operated by the manager or by an associate of the manager;

(14) it must take reasonable care to ensure that the manager has taken all relevant considerations into account when he determines dilution levies and Stamp Duty Reserve Tax provisions;

(15) it may make any necessary borrowings for the use of the fund on the instructions of the manager;

(16) it must take steps to ensure that the correct procedures and methods for pricing of units are correctly determined and sufficient records are maintained;

(17) it must select or approve an independent valuer when there are potential conflicts of

interest in dealings in the trust's property;

(18) it may, on the invitation of the manager, approve any exchange rate other than that specified by the CIS Sourcebook for valuation of property which would otherwise be valued in another currency and alternative methods of valuing property;

(19) it may decide, after consultation with the manager, not to make an annual allocation of income if it appears to the trustee that the average allocation would be less than GBP 10;

(20) it must determine, in accordance with the governing law of trusts, whether payments out of the scheme property in respect of interest and charges on borrowings and taxation and duties in respect of scheme property should be paid out of the scheme's capital account or its income account;

(21) where the authorised unit trust has more than one class of unit and a unitholder requests conversion from one class of unit into another, the manager determines the appropriate number of units in the new class to issue to the unitholder, but must consult the trustee first;

(22) if a unitholder requests the redemption or cancellation of units, the manager may arrange for the cancellation of those units in return for part of the assets of the fund instead of cash. In such circumstances, the trustee must be consulted as to the selection of the scheme property to be transferred;

(23) the trustee may require the manager to dispose of (or purchase) property if a particular acquisition or disposal of property by the manager exceeds the powers conferred on the manager by the CIS Sourcebook or the custody arrangements for the title documents are inadequate;

(24) it must agree to the modification of the number of units issued or cancelled to rectify any error in the number of units held by the manager in its 'box'; (8)

(25) it must inform the Financial Services Authority immediately of serious breaches of the rules contained in the CIS Sourcebook;

(26) it may remove a manager by written notice in certain circumstances, including if the manager goes into liquidation, or a receiver is appointed, or 'for good and sufficient reason the trustee is of the opinion and so states in writing that a change of manager is desirable in the interests of unitholders'. Having removed the manager, the trustee must then appoint a new manager;

(27) it must give approval if the manager wishes to retire in favour of another manager.

19. For the depositary of an investment company, the CIS Sourcebook imposes largely the same obligations, with the monitoring and participation relating in this case to the acts of the ACD. The obligations in connection with the issue of units also do not apply.

III – **Facts and questions referred for a preliminary ruling**

20. Abbey National plc ('Abbey National'), the appellant in the main proceedings, forms together with a number of its subsidiaries a group ('Abbey National's VAT group') for the purposes of charging VAT. The members of the group are Abbey National Unit Trust Managers Ltd ('ANUTM'), Scottish Mutual Investment Managers Ltd ('SMIM'), Abbey National Asset Managers Ltd ('ANAM') and Inscape Investments Ltd ('Inscape'). These companies are managers of UCITS.

21. The trustees (depositaries) of those UCITS are Clydesdale Bank plc ('CB'), Citicorp Trustee

Company Ltd (‘CTCL’) and HSBC Bank plc (‘HSBC’). They charge a general trustee fee, plus VAT, for their functions as trustees. That fee does not include any charges for acting as custodian. CB and HSBC charge separate fees for this. CTCL does not itself act as custodian but makes use of a third party as custodian. Abbey National contests the charging of VAT on the trustee fee, since it regards the trustee’s activity as an exempt supply within the meaning of Article 13B(d)(6) of the Sixth Directive.

22. Inscape Investment Fund, an open-ended investment company whose ACD is Inscape, also objects to VAT being charged on the services of its depositary CTCL. Here too the dispute does not relate to the remuneration for custody services in the narrower sense, which are not supplied by CTCL but delegated to a global subcustodian. The subcustodian receives a separate remuneration for its services directly from Inscape.

23. Inscape also contracted out some of the functions it as managing company was required by law to exercise to Bank of New York Europe Ltd (‘BNYE’) and subsequently to Bank of New York (‘BNE’). BNYE and BNE charge Inscape VAT on those services. This too is challenged by Abbey National.

24. Under the contract between Inscape and BNYE, BNYE was, first, to perform the fund accounting, that is, inter alia, calculation of the current value of the shares and the distribution and yield, keeping of books of account, provision of information for the periodic statements and periodic accounts, preparation of tax documentation, and making of returns to the Statistics Office and the Bank of England. BNYE was, second, to carry out a number of other services, such as setting up and valuation of sub-funds, reconciliation and administration of accounts and payments of the fund, and estimation of the administrative costs which are passed on to incoming or outgoing shareholders in the form of the dilution levy.

25. The VAT and Duties Tribunal, London, before which the dispute was brought, by order of 29 March 2004 referred the following questions to the Court of Justice for a preliminary ruling under Article 234 EC:

‘1. Does the exemption for “management of special investment funds as defined by Member States” contained in Article 13B(d)(6) of the Sixth VAT Directive mean that the Member States have the power to define the activities comprising the “management” of the special investment funds, as well as the power to define the special investment funds which may benefit from the exemption?

2. If the answer to question 1 is no and the term “management” in Article 13B(d)(6) of the Sixth VAT Directive is to be given an independent Community law meaning, in the light of Council Directive 85/611/EEC as amended on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“the UCITS Directive”), are charges made by a depositary or trustee for the services it provides pursuant to Articles 7 and 14 of the UCITS Directive, national regulatory provisions and the relevant fund rules, exempt supplies of “management of special investment funds” under Article 13B(d)(6) of the Sixth VAT Directive?

3. Again, if the answer to question 1 is no and the term “management” is to be given an independent Community law meaning, does the exemption for the “management of special investment funds” in Article 13B(d)(6) of the Sixth VAT Directive apply to services performed by a third party manager in respect of the administrative management of the funds?’

26. In the proceedings before the Court of Justice, Abbey National, the United Kingdom and Luxembourg Governments and the Commission have made observations. An account of their

submissions will – so far as necessary – be given in connection with the legal assessment.

IV – **Legal assessment**

A – *Preliminary observation on the application of Article 13B(d)(6) of the Sixth Directive to investment companies*

27. In a common fund, the money of a large number of investors is collected and invested in securities of all sorts, and also in other items such as real property or goods. For investors, this has the advantage over the direct acquisition of securities that the risk is spread more widely and the choice of investments is made by highly specialised experts. The services provided in this form of financial investment come at a price, however.

28. The remuneration for the management of a common fund is exempt from VAT. This is intended in particular to facilitate access by small investors to this form of investment. (9) Because of the small volume of investment available to them, they have only a restricted opportunity of investing their money directly in a wide spread of securities. In addition, they often do not have the necessary knowledge for comparing and selecting securities.

29. The exemption also serves to avert distortions of competition between common funds *managed by others* and investment companies *managed by themselves*. (10) Because they do not have legal personality, common funds cannot manage themselves and have to make use of an external management company. The services the management company provides to the common fund would as such be taxable under the general rules. For a *self-managed* investment company, on the other hand, there are as a rule no taxable transactions within the meaning of Article 13B(d)(6), since the management activity does not involve the provision of services between two independent taxable persons. Without the exemption in point 6 of that provision, common funds managed by third parties would thus be burdened with an additional cost element and would thus be at a disadvantage compared with self-managed investment companies.

30. Article 13B(d)(6) of the Sixth Directive accordingly, as worded, relates only to the management of special investment funds, and does not mention self-managed investment companies.

31. This raises the question whether the provision applies at all to the latter if they outsource management services. If, on the basis of its wording, it had to be regarded as inapplicable, Abbey National could in the present case rely on the exemption only in relation to the unit trusts (11) and not in connection with services supplied to Inscape Investment Fund, which is an investment company.

32. On further consideration, however, the application of Article 13B(d)(6) of the Sixth Directive is precluded only in so far as an investment company actually manages itself. If, on the other hand, an investment company obtains management services from a third party, it is in the same position as a contract-based common fund, and should if appropriate, for reasons of competitive neutrality, enjoy the tax exemption to the same extent. (12)

33. After all, on the assumption that outsourced management services can come within the definition of the exemption in Article 13B(d)(6) of the Sixth Directive in the first place, it cannot make any difference whether a self-managed investment company or a common fund’s management company has delegated those services to third parties. Where common funds are mentioned below without further restriction, my observations therefore apply by analogy to investment companies as well.

B – *The first question*

34. By its first question, the VAT and Duties Tribunal seeks to know whether the definition of what is to be regarded as management of a special investment fund within the meaning of Article 13B(d)(6) of the Sixth Directive is a matter for national law, or whether this is an autonomous concept of Community law.

35. Only the United Kingdom argues that the provision not only refers to the Member States as regards the recognition of common funds but also leaves it to them to define what is to be regarded as the *management* of common funds. All the other parties, by contrast, regard the concept of management as a concept of Community law.

36. According to settled case-law, the exemptions provided for in Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition. (13) This does not apply, however, if in the directive the Council has actually entrusted the Member States with the definition of certain terms in an exemption. (14) In the present case it is not entirely clear which elements of the definition of the exemption in Article 13B(d)(6) of the Sixth Directive the Council wished to reserve for definition by the Member States.

37. The interpretation advocated by the United Kingdom finds a certain support in the English version of the provision: ‘management of special investment funds as defined by Member States’. Like the Dutch version, (15) this language version can be understood in such a way that the words ‘as defined’ relate not only to ‘special investment funds’ but to the entire expression ‘management of special investment funds’.

38. However, the other language versions (16) do not support the United Kingdom’s interpretation. On the contrary, they make it clear that the Member States are given only the power to recognise the common funds, this power now being overlaid by Directive 85/611.

39. If the various language versions of a legal act differ from each other, or at least leave room for divergent interpretations, the provision in question must – in accordance with settled case-law – be interpreted by reference to the context and purpose of the rules of which it forms part. (17)

40. The purpose of the Sixth Directive is to approximate the national provisions on value added tax. In order to avoid distortions of competition, it must be ensured in particular that uniform exemptions apply throughout the Community. That objective is jeopardised if the exemptions are complemented by concepts of national law which may diverge from each other. (18)

41. It is true that when the Sixth Directive was adopted, at which time the law on common funds had not yet been approximated by Directive 85/611, it made sense exceptionally to refer to national law for the definition of common funds. By so doing, it was ensured that the exemption takes effect only in clearly defined cases, namely the management of common funds which have State authorisation as such in a Member State. For the definition of what is to be regarded as *management* of a common fund, however, the general principle applies that the exemptions contain concepts that are defined in Community law.

42. The United Kingdom Government points out that, depending on the form taken by national rules on common funds, different management functions may arise. The definition of management is therefore indivisibly linked to the definition of the funds which benefit from the exemption.

43. That argument fails, however. First, the divergences between national provisions on common funds are probably not so fundamental that a uniform definition of the management of a

common fund for the purposes of levying VAT is not possible at Community level. That is all the more so as Directive 85/611 has in the meantime laid down common rules for many kinds of common funds. Second, it actually underlines the need to interpret at least the concept of management uniformly across the Community, if there are already differences in the definition of the undertakings that are recognised as common funds under national law.

44. The answer to the first question should therefore be that the concept of ‘management’ within the meaning of Article 13B(d)(6) of the Sixth Directive is an independent concept of Community law from which the Member States may not diverge. (19)

C – *The second and third questions*

45. The second and third questions both concern the interpretation of the concept of management within the meaning of Article 13B(d)(6) of the Sixth Directive and should therefore be examined together. The Court of Justice is asked to clarify whether

– the services of the depositary and

– the administrative activities outsourced by a management company to third parties

are covered by that concept of management.

46. Abbey National and the Luxembourg Government take the view that these are both cases of the tax-exempt management of a common fund, since the functions concerned are of substantial importance for the conduct of a common fund and are not of a merely technical nature. They refer in particular in this connection to the definitions of the functions of the management company and the depositary in Directive 85/611 and in national law.

47. The United Kingdom Government and the Commission, on the other hand, take a narrower view of the concept of management. They say that it covers only the activities which have a direct effect on the state of the assets and liabilities of the common fund, in other words the actual investment decisions, and not the services of the depositary and the outsourced bookkeeping and accounting functions.

48. The wording of Article 13B(d)(6) of the Sixth Directive, particularly the term management itself, gives no clear indication of the extent to which the services at issue in the present case are covered by it. An analysis of what the word ‘management’ means in everyday language or in specific fields of law helps no further here. (20)

49. However, the German version of the provision in particular raises the preliminary question of whether outsourced services can fall within the exemption at all. The wording could be understood as meaning that management services fall within the scope of the exemption only if the investment company provides them itself.

1. Exemption not limited to services provided by the investment company itself

50. According to the German text of Article 13B(d)(6) of the Sixth Directive, the exemption applies only to the management of special investment funds *by capital investment companies* (‘durch Kapitalanlagegesellschaften’). The concept of a capital investment company is not defined more precisely, nor may it be found either in Directive 85/611 or in other Community legal acts. In German legislation, the expression is used for management companies of common funds. (21) It might be concluded that the definition of the exemption includes a person-related element, with the consequence that it is inapplicable from the outset for management services that are outsourced to third parties.

51. However, it must be stated here that none of the other language versions contains a corresponding express formulation referring to management by a specific agent. (22) In the other versions, it could at most be concluded from the term management (gestion) itself that the exemption relates only to services of the *management* company (société de gestion).

52. That would, however, contradict the clear line developed by the Court in its case-law on other comparable exemptions in Article 13B of the Sixth Directive. It has focused on the nature of the particular service concerned, not on who supplies that service. In *SDC*, for example, the Court said: (23)

‘The transactions exempted under points 3 and 5 of Article 13B(d) are defined according to the nature of the services provided and not according to the person supplying or receiving the services. Those provisions make no reference to that person.’

53. Similar comments may also be found in decisions on the exemption for insurance transactions under Article 13B(a) of the Sixth Directive. (24)

54. The definition of the exemption under Article 13B(d)(6) of the Sixth Directive – if one disregards the completely isolated German version – does not contain a clear reference to specified providers of services any more than the definitions in Article 13B(d)(3) and (5). Application of the exemption in Article 13B(d)(6) to the services at issue in the present case is therefore not excluded solely because they are not provided by the investment company itself but by the depositary or by a third party specialising in bookkeeping and accounting services. Rather, it must be ascertained by reference to the nature of the services themselves whether they are among the transactions exempted under Article 13B(d)(6).

55. Not every function, however, that would be exempt if it were performed by the management company of a common fund or by an investment company itself as part of its activities must also be classified as an exempt transaction if it has been outsourced to a third party.

56. The functions that have to be performed in operating a common fund range from specific functions characteristic for the management of a common fund, such as the choice of the securities in which the investors’ money is to be invested, to perfectly normal activities that occur in any commercial business, such as bookkeeping, staff management, the operation of computers and the maintenance of office premises.

57. If all the functions are performed by the management company or investment company itself, then they must be regarded as a whole as the exempt management of an investment company, in accordance with their centre of gravity. (25) Ancillary services that are not characteristic of that management are classified in the same way as the principal service. (26) If, on the other hand, the management company outsources certain services, then it must be ascertained separately, for those services, whether or not they are characteristic of the management of a common fund. What criteria are decisive here will be considered below.

2. General considerations on the interpretation of the concept of management in Article 13B(d)(6) of the Sixth Directive

58. The Court has not yet expressed a view on the interpretation of Article 13B(d)(6) of the Sixth Directive. However, here too reference may be made to the general statement that the expressions which describe the exemptions under Article 13 of the Sixth Directive are to be interpreted strictly, as they constitute exceptions to the general principle that every service provided by a taxable person for consideration is subject to VAT. (27) At the same time, the principle applies that the expressions describing the exemptions are to be interpreted by reference to the context and the purpose of the rules of which they form part (28) and that the interpretation meets the requirements of the principle of fiscal neutrality on which the entire system of VAT is based. (29)

59. In his Opinion in the *BBL* case Advocate General Poiares Maduro developed the following criteria for distinguishing the transactions closely linked to management which are covered by the exemption in Article 13B(d)(6) of the Sixth Directive from the ancillary transactions which are no longer covered. The exemption should apply to transactions:

‘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.’ (30)

60. In his view, what matters is whether the services at issue directly affect the financial position of the fund and thus influence the assessment of financial risks or decisions on investments. That was not the case with the information, advisory and other services at issue in the *BBL* case, provided by that bank to investment companies (SICAV).

61. Those conclusions of the Advocate General were based on the Court’s case-law on the related exemptions in Article 13B(d)(3) and (5) of the Sixth Directive. Thus the Court held in particular in *SDC* that the transactions in question must be distinct in character in the sense of forming a distinct whole and be specific to and essential for the exempt transactions. (31) The Court regarded it as essential for the exemptions under point 3 for transfers and the exemption under point 5 for transactions in securities that the services concerned entail changes in the legal and financial situation. (32)

62. It is questionable to what extent those findings of the Court may – as proposed by Advocate General Poiares Maduro – be applied to the exemption for the management of common funds for the purposes of Article 13B(d)(6) and what consequences follow for the services which the national tribunal has to assess in the present case.

63. I am of the view that transactions must be distinct in character – that is, must form a distinct whole – and must be specific to and essential for the exempt transactions in order to fall within the exemption under point 6. The aspect of change in the legal and financial situation, which the Court developed in connection with transactions within the meaning of points 3 and 5, is not decisive for determining whether a transaction is exempt under point 6.

64. Transactions within point 3 concern payments and transfers and related operations, and transactions within point 5 concern dealings in securities. Both thus relate to specific operations in finance. Here it is therefore appropriate to regard a change in the legal and financial situation as the decisive criterion, since there can be no question of such operations unless they have actually led to a corresponding change of situation.

65. The concept of management in point 6 is more general and is not related to specific operations. Corresponding operations are indeed certainly carried out in connection with the management of a common fund, but this is not mandatory. Precisely in the case of long-term investment strategies or certain kinds of funds such as property funds, it is conceivable that for quite long periods of time the market is merely observed and no new investments are made. But even during such periods there are functions to be performed which are part of the management of a common fund.

66. If the exemption were restricted to activities that affect the composition of the portfolio, only a minor part of the activity of common funds would be exempt from VAT. The practical effect of Article 13B(d)(6) of the Sixth Directive would be called into question – activities of other kinds, such as those at issue in the present case, in practice make up a substantial proportion of the operations which arise in the course of the management of a common fund. An excessively narrow understanding of the concept of management would also have the effect of making outsourcing of partial services unattractive and thus making an economically sensible division of labour more difficult.

67. For the exemption under point 6 to take effect, then, the sole decisive factor is whether the service in question is distinct in character and specific to and essential for the management of a common fund. Those criteria should be determined more closely by reference to the purpose of the provision and its schematic connection with the exemptions in Article 13B(d) for related transactions. What importance is to be attached to Directive 85/611 here must also be examined.

– Purposes and schematic context of the exemption under Article 13B(d)(6) of the Sixth Directive

68. The purpose of the exemption of transactions connected with the management of common funds is inter alia to facilitate investment in common funds for small investors. (33) For that purpose to be achieved, the expenditure on the management of the common fund is to be exempted from tax. If the exemption did not exist, the owners of units in common funds would have a greater tax burden than investors who invest their money directly in shares or other securities and do not have recourse to the services of a fund management.

69. To secure equal fiscal treatment of forms of investment, as required by the principle of the neutrality of VAT, however, investment in common funds should not be better treated than direct investment in securities either. Since the exemption under point 5 does not apply to the management and safekeeping of securities, the corresponding transactions should also be liable to tax when third parties carry them out for the benefit of a common fund.

70. It should be observed here, however, that the concept of management does not have the

same meaning in points 5 and 6. (34) As the Court stated in *CSC Financial Services*, management and safekeeping under point 5 cover ‘services of an administrative nature which do not alter the legal or financial position of the parties’. (35)

71. In practice, the exception to the exception in point 5 concerning management and safekeeping relates principally to the activity of the custodian. Besides the safekeeping of the securities, its management activity consists primarily in carrying out technical operations, such as drawing up statements, receiving dividends, transmitting information between share companies and their shareholders, and deducting withholding taxes and issuing tax certificates.

72. By contrast, the concept of the management of a common fund under point 6 has a completely different meaning. Without wishing to anticipate the further analysis, the role of the fund manager may be compared with that of the investor himself investing in securities directly. Management is thus not confined here to purely technical operations that are normally carried out by a custodian, but includes the decisions that have to be made in investing money. In addition, there is the function of issuing, marketing and redeeming units in the fund, including the associated administrative functions (valuation of units, bookkeeping and payments).

– The importance of Directive 85/611 for the interpretation of the concept of management of a common fund for the purposes of the Sixth Directive

73. Directive 85/611 approximates the laws of the Member States concerning certain common funds and investment companies. In addition to conditions for the authorisation of UCITS and their investment policies, the provisions on the obligations of the management companies and depositaries form a principal component of Directive 85/611. It contains in particular in Annex II, to which Article 5(2) refers, a non-exhaustive list of the functions which are regarded for the purposes of the directive as the ‘activity of management of unit trusts/common funds and of investment companies’. Inferences could be made from that provision for the interpretation of Article 13B(d)(6) of the Sixth Directive.

74. It is in principle desirable to aim at a uniform interpretation of the same concept in different legal acts. Particularly in the interpretation of the autonomous concepts of the Sixth Directive, the taking into account of specific rules of Community law on the sector to which the taxed transactions are to be allocated is an important aid. It is often scarcely possible to derive from the Sixth Directive itself further indications to fill out its undefined legal concepts.

75. In *BBL* the Court, in relation to the question whether the activity of a SICAV is an economic activity for the purposes of the Sixth Directive, already referred to the definitions in Directive 85/611. (36) Equivalent references may also be found in connection with the definitions of other exemptions in Article 13 of the Sixth Directive. The concept of insurance transactions in Article 13B(a), for example, was interpreted by the Court by reference to Directive 73/239/EEC on direct insurance. (37) Advocate General Mischo referred, for the definition of an insurance broker in the same exemption, to the directive relevant for that occupation. (38) (39)

76. Advocate General Poiares Maduro objected, however, to adducing the description of management functions in Directive 85/611 for the interpretation of Article 13B(d)(6) of the Sixth Directive, as the subject-matter of those two provisions is different. (40)

77. The Court has indeed used that argument to decline to borrow from other legal acts in connection with the interpretation of the Sixth Directive. Thus it did not regard it as appropriate, for example, to give the concept of the provision of medical care in Article 13A(1)(c) of the Sixth Directive the same meaning as in the directive on freedom of movement for doctors. (41) (42)

78. Directive 85/611 aims to create uniform rules for common funds. The conditions of competition are to be approximated and obstacles to cross-border dealings in investment units removed, while at the same time ensuring protection for investors. (43) The new provisions on the activities of management companies introduced by Directive 2001/107 (44) (including Annex II) are intended to continue further with harmonisation. The more comprehensively the management activities are specified in Directive 85/611, the more complete the approximation of laws.

79. There is a certain tension between this orientation of Directive 85/611 and the obligation to interpret strictly the provisions of the Sixth Directive which provide for exemptions from VAT – in the present case, specifically the concept of management of a common fund. The conditions of the two legal acts can be harmonised, however, if the concepts in Annex II to Directive 85/611 are regarded not as definitions of the management services of a common fund but as a description of the typical functions of the management company. (45) This approach leaves room for taking the management functions listed in Annex II to Directive 85/611 into account in the context of the Sixth Directive only as an indication of the existence of activities of the management of a common fund. At the same time, the requirement of a strict interpretation of the exceptions can then be taken into account as far as necessary.

80. If the provisions in Article 5(2) of and Annex II to Directive 85/611 were regarded as an exhaustive definition of the management of a common fund, applicable for the Sixth Directive too, the services of the depositary would be excluded from the outset from being covered by that concept: the depositary's functions are regulated separately in Articles 7 and 14 of Directive 85/611.

81. The strict division between the functions of the management company and the depositary corresponds to the particular purposes and scheme of Directive 85/611. (46) Annex II describes the functions of one of those agents, namely the management company, without saying anything about the classification of the functions of the depositary. Article 13B(d)(6), on the other hand, concerns the management of a common fund generally, without differentiating according to the various agents. (47) In this respect the concept of management in the Sixth Directive is broader than the definition in Annex II to Directive 85/611 and in principle allows the functions of the depositary also to be regarded as management.

82. The United Kingdom Government correctly points out that Directive 85/611 does not cover certain kinds of common funds (48) which Article 13B(d)(6) of the Sixth Directive nevertheless applies to. However, that does not preclude taking Directive 85/611 into account in answering the question as to which operations are specific to and essential for the management of a common fund in this case. That is because the funds or investment companies concerned in the main proceedings fall within the scope of Directive 85/611.

– Interim conclusion

83. The concept of management of a common fund for the purposes of Article 13B(d)(6) of the Sixth Directive also includes services which are not provided by the management company itself. Whether an outsourced operation is to be regarded as management in that sense does not depend on whether the operation concerned affects the investment policy of the fund. The exemption must be interpreted in the light of the aims of facilitating investment in common funds by small investors and of not placing that form of investment at a disadvantage compared to direct investment in other securities. In interpreting the Sixth Directive, account may be taken of Directive 85/611; however, the list of management functions in Annex II to Directive 85/611 does not contain an exhaustive definition of fund management that can be transposed unchanged to Article 13B(d)(6) of the Sixth Directive. What is decisive is, rather, whether the function outsourced to a

third party forms a distinct whole and is specific to and essential for the management of a common fund.

84. It must now be examined, on the basis of those conclusions, whether the services to be assessed by the referring tribunal are to be regarded as exempt transactions concerning the management of a common fund.

3. Classification of the activity of the depositary

85. The depositary constitutes – as the Commission puts it – the third fundamental pillar of the legal framework created for common funds by Directive 85/611, alongside the fund and its manager. (49) Its functions consist essentially in safekeeping the common fund's assets and monitoring the management company. In so doing it must act solely in the interest of the unit-holders (50) and it is liable to them for breach of its obligations. (51) The directive has effectively introduced a second-pair-of-eyes principle for the protection of investors.

86. In this connection, Abbey National points to the fourth recital in the preamble to Directive 2001/107, which speaks of a 'two-man management'. In its view, it follows simply from that that the depositary too participates in management. However, this is a misunderstanding on the part of Abbey National. That recital does not relate to the division of functions between the management company and the depositary, but to the provision in Article 5a(1)(b) of Directive 85/611. Under that provision, the business of a management company must be conducted by at least two persons of sufficiently good repute and sufficient experience.

87. What the depositary's functions consist of in detail is by no means regulated fully by Directive 85/611. (52) National law is therefore additionally of considerable importance for describing those functions. It may in particular permit the delegation of functions from the depositary to subcustodians, although without the depositary being able to escape its liability thereby. (53)

88. Directive 85/611 does not impose on the Member States conditions which are mandatory in every detail for the division of functions between the management company and the depositary. (54) Thus the keeping of the register of unit-holders, for instance, is the responsibility of the trustee (in other words, the depositary) (55) under the CIS Sourcebook, although that function is allocated to the management company in point (e) of the second indent of Annex II to Directive 85/611.

89. For that reason alone, the definitive classification of the activity of the depositaries in the main proceedings must be reserved to the referring tribunal. The Court can only, with respect to the factual and legal situation submitted to it, give information on the interpretation of the concept of management in Article 13B(d)(6) of the Sixth Directive.

90. With reference to the criteria set out above, it must be stated that the activity of the depositary constitutes a distinct whole. That follows from the mere fact that under Directive 85/611 the depositary is given a separate role, distinct from the functions of the management company.

91. The activity is also essential for the management of a common fund. Investing money in a common fund brings with it the risk for investors that the moneys entrusted to the funds will not be applied properly or will even be misappropriated. The investor himself will scarcely be in a position to monitor the conduct of the fund manager. The separation of safekeeping from the other functions of fund management is therefore of decisive importance for the safety and hence the attractiveness of this form of investment. The other monitoring functions exercised by the depositary in relation to the management company also contribute particularly to this.

92. The activity of the depositary admittedly has as a rule no direct effect on the composition of the portfolio or the other financial circumstances of the fund. Only if – for example – decisions on investments which contradict statutory or contractual requirements are corrected on the basis of intervention by the depositary is such influence possible. However, as already stated, it is not appropriate in any event to transpose this criterion, developed in the context of the exemptions under points 3 and 5, to the exemption for the management of common funds at issue in the present case. (56)

93. Finally, the activity of the depositary is also specific to the management of a common fund. It is not comparable, for example, with the functions of an auditor, who checks the correctness of balance sheets only after the event, after a considerable lapse of time. Instead, when exercising its monitoring functions, the depositary has an active part in the daily business of a fund.

94. The activity is not limited only to the safekeeping of securities in the technical sense, which is also done by custodians. Pure custodianship functions are subject to VAT in accordance with Article 13B(d)(5) of the Sixth Directive. If the function of a depositary were essentially the same as that of a custodian, but the corresponding services were none the less brought within the exemption under point 6, that would lead to a privileged position being given to investment in common funds as opposed to investment in other securities.

95. It is precisely the purely technical safekeeping of the fund’s assets that the depositaries concerned in the main proceedings delegated to third parties, however. The VAT treatment of those functions is not in dispute. Safekeeping in the technical sense is nevertheless one of the characteristic functions of the depositary. Even if the depositary has outsourced this function to third parties, it remains responsible to the investor for the proper safekeeping and is liable for faults that are committed. It cannot change the focus and hence the fiscal treatment of its activity by having essential parts of its functions performed under its supervision by third parties – in this case, by so-called global sub-custodians. It is also immaterial in this connection that the global sub-custodians evidently receive their remuneration from the management company directly and not from the depositary under whose control they act.

96. The referring tribunal must therefore ascertain whether, taking an overall view of all the functions of the depositary, safekeeping in the technical sense is the principal component of the functions which national law in principle assigns to the depositary. If that were the case, the activity of the depositary would have to be regarded as liable to VAT in its entirety, because the other functions would, as ancillary services, share the classification of the main service.

97. In view of the extensive supervisory functions assigned to depositaries by the CIS Sourcebook, however, it appears if anything improbable that those functions are to be regarded as mere ancillary services which are subordinate to safekeeping in the technical sense. Furthermore, it was obviously feasible for safekeeping in the technical sense to be outsourced, which would scarcely seem possible if that constituted the main function of the depositary.

4. Classification of the administrative functions outsourced to third parties

98. The activities outsourced by Inscape to BNYE or BNY fall within the concept of management within the meaning of Article 13B(d)(6) of the Sixth Directive if they form a distinct whole and are essential for and specific to the management of the fund. To what extent this is the case in the main proceedings is ultimately for the referring tribunal to ascertain.

99. An argument in favour of the services forming a distinct whole in the present case is the fact that BNYE/BNY took on not just individual ancillary operations but so to speak an inclusive

service, as follows from the description of the outsourced functions in point 24 above. The transferred functions constitute an essential part of the activities which are listed as management functions in Annex II to Directive 85/611. BNYE/BNY is responsible in particular for valuing the units and making payments. It also takes over core functions of accounting and reporting.

100. Some of the outsourced functions may, taken individually, not have distinctive character. In that respect, it is not sufficient for exemption from VAT that a certain function is listed in Annex II to Directive 85/611. The necessary distinctiveness is attained, however, if the third party takes on a bundle of services which forms an essential part of all the functions arising in the management of the fund.

101. Distinctiveness derives in that case not only from the extent of the outsourced services but also from the inner coherence of the operations outsourced. Valuation, for instance, is an important element for drawing up settlement documents and reports.

102. In addition, there is some indication that the functions outsourced to BNYE/BNY are to be regarded as a whole as essential for and specific to the management of a common fund. A common fund is essentially a pool of securities, whose composition can change, just as can the value of the individual securities it contains. Accordingly, the value of the shares in the pool is subject to constant fluctuations. For dealings in units in a common fund to be possible, they have to be revalued at short intervals. The valuation takes account of interest and dividend income as factors enhancing the value and administrative costs as factors reducing the value. Closely connected with valuation is the keeping of the corresponding records for the purpose of rendering accounts to the present (and potential) unit-holders and to the supervisory authorities. Operations in connection with the establishment and management of sub-funds are also to be regarded as essential and specific.

103. Some of the outsourced functions, on the other hand, are admittedly just as essential but not to the same extent specific to the management of a common fund, such as the functions in connection with payments. The mere fact that an element is essential for completing an exempt transaction does not warrant the conclusion that the service that element represents is exempt. (57)

104. Classification of the (entire) activity of BNYE/BNY as an exempt transaction within the meaning of Article 13B(d)(6) of the Sixth Directive is not precluded, however, by the fact that some component activities are not specific to fund management. What is decisive is instead that the services provided by the external service provider, viewed as a whole, are distinctive and are essential for and specific to the management of a common fund. It is precisely the bundling of numerous more or less specific operations that is typical of the management of a common fund.

V – **Conclusion**

105. In conclusion, I propose the following answer to the questions referred by the VAT and Duties Tribunal:

(1) The concept of ‘management’ within the meaning of Article 13B(d)(6) 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 is an autonomous concept of Community law from which Member States may not diverge.

(2) Services provided by a depositary within the meaning of Articles 7 and 14 of Council Directive 85/611/EC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable

securities are exempt from value added tax under Article 13B(d)(6) of the Sixth Directive if:

– they form a distinct whole and are essential for and specific to the management of the common fund or investment company, and

– the focus of those services is not on activities of safekeeping and administration within the meaning of Article 13B(d)(5) of the Sixth Directive.

(3) Services provided by an external manager in the form of administrative operations in the management of the fund are exempt from value added tax under Article 13B(d)(6) of the Sixth Directive if they form a distinct whole and are essential for and specific to the management of the common fund or investment company.

1 – Original language: German.

2 – 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).

3 – OJ 1985 L 375, p. 3, as last amended by Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 (OJ 2004 L 145, p. 1).

4 – Where common funds generally are referred to below, this is to be understood as including funds established in the form of unit trusts.

5 – There are certain exceptions to this obligation for investment companies quoted on the stock exchange.

6 – Article 1 was given the form material here by Directive 2001/108/EC (OJ 2002 L 41, p. 35).

7 – Article 5 was given the form material here by Directive 2001/107/EC (OJ 2002 L 41, p. 20), which also introduced the Annex II referred to in that provision.

8 – The ‘box’ is the term given to the units in a common fund which the fund’s management company itself holds.

9 – See the Opinion of Advocate General Poiares Maduro of 18 May 2004 in Case C?8/03 *BBL* [2004] ECR I?0000, point 26.

10 – Opinion of Advocate General Poiares Maduro in *BBL*, cited in footnote 9, point 26.

11 – Under Article 1(3) of Directive 85/611, unit trusts are equated with contract-based common funds.

12 – The same view was taken, in relation to Belgian ‘sociétés d’investissement à capital variable’ (SICAV), by Advocate General Poiares Maduro in his Opinion in *BBL*, cited in footnote 9, point 28.

13 – Case 348/87 *Stiching Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13, Case C?358/97 *Commission* v *Ireland* [2000] ECR I?6301, paragraph 51, and Case C?428/02 *Fonden Marselisborg Lystbådehavn* [2005] ECR I?0000, paragraph 27.

14 – Case C?468/93 *Gemeente Emmen* [1996] ECR I?1721, paragraph 24.

15 – ‘Het beheer van gemeenschappelijke beleggingsfondsen, als omschreven door de Lid-Staten.’

16 – The following versions may be cited as examples:

ES: la gestión de fondos comunes de inversión definidos como tales por los Estados miembros,

DK: forvaltning af investeringsforeninger, således som disse er fastsat af medlemsstaterne,

DE: die Verwaltung von durch die Mitgliedstaaten als solche definierten Sondervermögen durch Kapitalanlagegesellschaften,

FR: la gestion de fonds communs de placement tels qu’ils sont définis par les États membres,

IT: la gestione di fondi comuni d’investimento quali sono definiti dagli Stati membri.

17 – Case C?372/88 *Cricket St. Thomas* [1990] ECR I?1345, paragraph 19, Case C?2/95 *SDC* [1997] ECR I?3017, paragraph 22, and Case C?384/98 *D* [2000] ECR I?6795, paragraph 16.

18 – See Case C?349/96 *Card Protection Plan* [1999] ECR I?973, paragraph 15, and *SDC*, cited in footnote 17, paragraph 52.

19 – This conclusion is also reached by Advocate General Poiares Maduro in his Opinion in *BBL*, cited in footnote 9, point 25.

20 – See Opinion of Advocate General Poiares Maduro in *BBL*, cited in footnote 9, point 30.

21 – See Paragraph 2(1) of the Investmentgesetz (Law on Investment): ‘Common funds are public special funds in accordance with the requirements of Directive 85/611/EC managed by a capital investment company …’, and the first sentence of Paragraph 6(1) of the Investmentgesetz: ‘Capital investment companies are credit institutions whose field of business is directed to the management of special funds …’.

22 – See only the English version cited in point 39 and the other versions cited in footnotes 15 and 16.

23 – *SDC*, cited in footnote 17, paragraph 32. See also Case C?281/91 *Muys’ en De Winter’s Bouw- en Aannemingsbedrijf* [1993] ECR I?5405, paragraph 13, with respect to Article 13B(d)(1) of the Sixth Directive.

24 – *Card Protection Plan*, cited in footnote 18, paragraph 22, Case C?240/99 *Skandia* [2001] ECR I?1951, paragraph 41, and Case C?8/01 *Taksatoringen* [2003] ECR I?13711, paragraph 40. The Court admittedly regarded the decisive point here as being that the taxable person provides the service to an insured party in the framework of a contractual relationship, so that services of third parties who are brought in by the insurer but are not in a contractual relationship with the insured party do not fall within this exemption. The application of that approach to other exemptions (proposed by Advocate General Ruiz-Jarabo in his Opinion in *SDC*, point 31 et seq.) was declined by the Court (*SDC*, cited in footnote 17, paragraph 39 et seq., especially paragraph 57; see also *Skandia*, paragraph 35 et seq.).

25 – Only services provided by a management company as separate principal services in addition to the management of the common fund, such as consultancy services for third parties, are to be assessed separately with respect to VAT.

26 – Case 173/88 *Henriksen* [1989] ECR I?2763, paragraphs 14 to 16, Joined Cases C?308/96

and C?94/97 *Madgett and Baldwin* [1998] ECR I?6229, paragraph 24, and *Card Protection Plan*, cited in footnote 18, paragraph 30.

27 – *Stichting Uitvoering Financiële Acties*, cited in footnote 13, paragraph 13, *SDC*, cited in footnote 17, paragraph 20, and *Taksatoringen*, cited in footnote 24, paragraph 36.

28 – See the references in footnote 17.

29 – Case C?45/01 *Christoph-Dornier-Stiftung* [2003] ECR I?12911, paragraph 42.

30 – Opinion in *BBL*, cited in footnote 9, point 33. In its judgment in this case the Court did not deal with the interpretation of Article 13B(d)(6) of the Sixth Directive.

31 – *SDC*, cited in footnote 17, paragraphs 66 and 68, and Case C?235/00 *CSC Financial Services* [2001] ECR I?10237, paragraph 25.

32 – *SDC*, cited in footnote 17, paragraphs 53, 66 and 73, and *CSC*, cited in footnote 31, paragraphs 26 to 28.

33 – See point 27 et seq. above.

34 – See the Opinion of Advocate General Poiares Maduro in *BBL*, cited in footnote 9, point 38.

35 – *CSC Financial Services*, cited in footnote 31, paragraph 30.

36 – *BBL*, cited in footnote 9, paragraph 42.

37 – *Card Protection Plan*, cited in footnote 18, paragraph 18.

38 – Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities (OJ 1977 L 26, p. 14).

39 – Opinion in *Taksatoringen*, cited in footnote 24, point 88 et seq. The Court left open the question of the extent to which Directive 77/92 was to be referred to, but did none the less examine the provisions of that directive (paragraph 45 of the judgment).

40 – Opinion in *BBL*, cited in footnote 9, point 39.

41 – Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1).

42 – Case C?212/01 *Unterpertinger* [2003] ECR I?13859, paragraph 37.

43 – See the first, second and third recitals in the preamble.

44 – Cited in footnote 7.

45 – See to this effect also the Commission’s proposal, COM(98) 451 final, p. 8.

46 – On this point, see further point 85 et seq. below.

47 – On this point, see point 50 et seq. above.

48 – Directive 85/611 does not apply, for example, to closed funds or funds which do not invest in securities.

49 – Communication from the Commission to the Council and to the European Parliament, Regulation of UCITS depositaries in the Member States: review and possible developments, COM(2004) 207 final of 30 March 2004, p. 2, point 2.

50 – Articles 10(2) and 17(2) of Directive 85/611.

51 – Articles 9 and 16 of Directive 85/611.

52 – See the Communication from the Commission, cited in footnote 49, p. 3, point 2.2, and p. 8, p. 4.3.2. The Commission considers further harmonisation to be necessary, however, and proposes, in Annex II, point 3, of the Communication, the addition to Directive 85/611 of a list of functions of the depositary.

53 – See Articles 7(2) and 14(2) of Directive 85/611.

54 – See the table in Annex II, point 4.3, of the Communication of the Commission, cited in footnote 49.

55 – See point 18 above, point 7.

56 – See point 63 et seq. above.

57 – *CSC Financial Services*, cited in footnote 31, paragraph 32.