OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 13 May 20091(1)

Case C?242/08

Swiss Re Germany Holding GmbH

v

Finanzamt München für Körperschaften

(Reference for a preliminary ruling from the Bundesfinanzhof (Germany))

(VAT – Common system of value added tax – Determination of the place of supply – Exemptions – Concept of ‘insurance and reinsurance transactions’ – Transfer of a number of reinsurance contracts, for consideration, to a taxable person established in a third country)

1. In the present case, arising from a series of questions referred by the Bundesfinanzhof – Germany’s supreme fiscal court – for a preliminary ruling, the Court is asked to define certain aspects of the system of VAT applicable to insurance transactions. It will be necessary, in particular, to determine whether a transfer of insurance contracts from one insurer to another may be regarded, for tax purposes, as an ‘insurance transaction’.

I – **The legal context**

2. The Sixth VAT Directive (2) divides taxable transactions in general into two main categories: supplies of goods and supplies of services. Article 5, in particular, defines supplies of goods in the following terms:

‘1. “Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.

2. Electric current, gas, heat, refrigeration and the like shall be considered tangible property.

…’

3. Article 6 states that ‘“supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5’. Such transactions may include ‘assignments of intangible property, whether or not it is the subject of a document establishing title’.

4. So far as is relevant for present purposes, the Sixth Directive deals specifically with insurance and reinsurance transactions in Articles 9 and 13.

5. Article 9 provides that, in general, for the purposes of VAT, the place where a service is supplied is to be deemed to be the place where the supplier is established. However, it provides for a number of exceptions to that general principle and, in particular, Article 9(2)(e) provides that:

'the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

…

– banking, financial and insurance transactions, including reinsurance, with the exception of the hire of safes;

…'.

6. Article 13 of the Sixth Directive provides for a number of exemptions to the system of VAT. In particular, Article 13B provides that:

'Without prejudice to other Community provisions, 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:

(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;

…

(c) supplies of goods used wholly for an activity exempted under this Article or under Article 28(3)(b) when these goods have not given rise to the right to deduction, or of goods on the acquisition or production of which, by virtue of Article 17(6), [VAT] has not become deductible;

(d) the following transactions:

…

2. the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

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

…'.

II – **Facts, national procedure and the questions referred**

7. Swiss Re Germany Holding GmbH ('Swiss Re'), a company established in Germany, operates in the reinsurance sector. In 2002 Swiss Re (3) transferred 195 reinsurance contracts to S, a company established in Switzerland and belonging to the same group of companies as Swiss

Re. The other parties to those contracts with Swiss Re were insurance companies established in countries other than Germany, both Member States of the Community and third countries.

8. The contracts were transferred in return for payment of a sum by S: that sum was calculated, inter alia, by ascribing a negative value to 18 of the 195 contracts. For the purposes of determining the final price of the transfer, the value of those 18 contracts was accordingly deducted from the total value of the other 177.

9. Also, the transfer of the reinsurance contracts was completed only upon the consent of the parties which had concluded those contracts with Swiss Re ('the "first level" insurance companies'). S took over from Swiss Re the rights and obligations under the contracts which were transferred.

10. The German tax authorities or, to be precise, the Finanzamt München für Körperschaften (Tax Office for Corporate Bodies, Munich; 'the Finanzamt'), regarded the transfer of the contracts as a supply of goods which took place in Germany and accordingly issued a demand for payment of VAT on the value of the transaction. Swiss Re, for its part, contested that decision before the national courts, claiming that VAT was not payable.

11. The referring court takes the view that, under German law, the transaction at issue constitutes a supply of services which took place in Germany, on which VAT is payable. However, that court has doubts as to whether the national legislation is compatible with the Community rules and it has therefore referred the following questions to the Court for a preliminary ruling:

'(1) Must the fifth indent of Article 9(2)(e), Article 13B(a) and Article 13B(d)(2) and (3) of the Sixth Directive … be interpreted as meaning that, where in consideration for payment of the sales price by the purchaser a transfer of a life reinsurance contract is effected, on the basis of which, with the consent of the policyholder, the contract's purchaser takes over the exempted reinsurance activities of the previous insurer and in place of the previous insurer supplies to the policyholder tax-exempt reinsurance services, such transfer must be regarded as:

(a) an insurance or banking transaction within the meaning of the fifth indent of Article 9(2)(e) of the Sixth Directive …, or

(b) a reinsurance transaction in accordance with Article 13B(a) of the Sixth Directive …, or

(c) a transaction which in substance consists of the tax-exempt assumption of an obligation and an exempt transaction concerning debts in accordance with Article 13B(d)(2) and (3) of the Sixth Directive …?

(2) Is the answer to Question 1 any different where payment in respect of the transfer is made not by the purchaser but by the previous insurer?

(3) If alternatives (a), (b) and (c) of Question 1 are all answered in the negative, must Article 13B(c) of the Sixth Directive … be interpreted as meaning that:

– the transfer of life reinsurance contracts in return for consideration constitutes a supply of goods, and

– that in the application of Article 13B(c) of the Sixth Directive … no distinction is to be drawn depending on whether the place in which the exempted activities are carried out lies in the Member State in which the goods are supplied or in a different Member State?'

III – **Legal analysis**

A – *The nature of the transaction at issue (answer to the third question)*

12. The first logical step in replying to the questions raised by the referring court is to determine the nature of the transaction at issue for the purposes of the Sixth Directive and, in particular, to establish whether it is to be regarded as a supply of goods or a supply of services.

13. Since the third question, regarding the possibility that the transaction at issue could be exempt pursuant to Article 13B(c) of the Sixth Directive, is predicated on the assumption that the transaction at issue may be regarded as a supply of goods, it follows that, if it were to be classified as a supply of services, the question could immediately be answered in the negative.

14. As I mentioned earlier, the German tax authorities proceeded on the assumption that the transfer of the contracts was a supply of goods. The referring court, on the contrary, takes the view that under national law it was a supply of services. Moreover, all the parties which have submitted observations in the present proceedings, with the sole exception of the Finanzamt, agree that what we have here is a supply of services since, under Article 5 of the Sixth Directive, only transfers of tangible property are to be regarded as supplies of goods, and Article 6 of that directive defines any transactions which are not supplies of goods as supplies of services. In particular, the German Government draws attention to the intangible nature of the subject of the transfer, which consists of a number of contracts each of which entails a set of rights and obligations, that is to say, things that are intangible by definition. The Greek Government, the United Kingdom Government and the Commission expressed themselves in the same terms but did not consider that there was any particular need to go into this question in detail, as it did not in their view raise any doubts as to interpretation.

15. It is also interesting to note that Swiss Re itself maintained in its written observations that the exemption provided for in Article 13B(c) of the directive was not applicable in the present case, since it applies only in the case of property which is movable and tangible, and that the contracts which had been transferred were not movable tangible property. And this despite the fact that it might be in Swiss Re’s interest, at least in the lesser alternative, to categorise the transfer of the contracts as a supply of goods in order to satisfy, and thus benefit from, the grounds for exemption mentioned by the referring court in the last question.

16. The main factor that the Finanzamt relies on to support the argument that the transfer of the contracts at issue constitutes a supply of goods is the statement attached to the minutes of the Council meeting at which the directive was approved, (4) according to which the Council and the Commission state that the transfer of a client base in connection with an exempt activity is covered by Article 13B(c).

17. In my view, however, the Finanzamt’s argument cannot be accepted and the transfer of the contracts from Swiss Re to S falls to be regarded, for the purposes of the Sixth Directive, as a supply of services.

18. It should be noted first that, as all the other parties have rightly pointed out, under the Sixth Directive only transfers of tangible property or goods which, by their nature, are normally sold as if they were tangible property (gas, electric current, and so on) are to be regarded as supplies of goods. Conversely, Article 6 explicitly categorises 'assignments of intangible property whether or not it is the subject of a document establishing title' as supplies of services. It therefore seems more appropriate to attribute the transfer of a contract – that is to say, a set of rights and obligations arising from a legal act – to the latter category.

19. As regards the position expressed by the Council and the Commission at the time when the Sixth Directive was approved, according to which the transfer of a client base for the purpose of pursuing an activity exempt from VAT could itself be exempt, I note first that it is settled case-law that the content of preparatory work cannot be taken into account for the purposes of interpreting Community legislation where that content is not reflected in any of the provisions laid down in the legislation in question. (5)

20. It should also be pointed out that, in any event, the transfer of contracts at issue in the present case does not constitute a situation that corresponds in all respects to the situation considered in the statement made by the Council and the Commission: that statement appears to imply a situation where all the data relating to the client base have actually been 'sold', and the sale may have been accompanied by a transfer of the contracts. In the case before the referring court, however, there is only a transfer of contracts, not a 'transfer of the client base' in its entirety.

21. Since, in accordance with the Sixth Directive, the transfer of contracts at issue falls to be regarded as a supply of services, not as a supply of goods, the third question, regarding the possible exemption of the transaction at issue under Article 13B(c), can immediately be answered in the negative, since it is predicated on the assumption that the transaction at issue is a supply of goods.

22. Moreover, even if, for the sake of argument, the transfer of contracts at issue were to be categorised as a supply of goods, the possibility that it could be exempt pursuant to Article 13B(c) of the Sixth Directive would have to be ruled out in the light of the purpose of that provision, which is to exempt from VAT supplies of goods acquired previously on which VAT has been paid and which are used (6) wholly to pursue an exempt activity (7). In the case before the referring court, however, the contracts that were transferred are not goods acquired previously on which VAT had been paid and which are to be used to pursue the exempt activity (that is to say, the insurance activity): on the contrary, they were *the actual result of Swiss Re's activity*.

23. I therefore propose that the answer to the third question should be that a transfer of reinsurance contracts such as the transfer at issue in the main proceedings constitutes a supply of services for the purposes of the Sixth Directive and cannot therefore fall to be exempted in accordance with Article 13B(c) of that directive.

B – *General observations on the system of VAT applicable to insurance transactions*

24. The Sixth Directive contains a number of provisions devoted specifically to insurance activities (and to reinsurance activities, which are equated with insurance activities). In the first place, as we have seen, Article 9(2)(e) provides that, for the purposes of VAT, the place where those services are deemed to be supplied is the place where the customer is established.

25. In the second place, 'insurance and reinsurance transactions' are activities which are exempt from VAT under Article 13. No clear or explicit justification for that exemption, which was confirmed in Article 135 of Directive 2006/112, is to be found in the Sixth Directive itself: it may be

supposed, however, that social and political factors, as well as considerations connected with the difficulty of assessing the added value of an insurance transaction, played a part in the legislature's choice in this matter (8). Moreover, it should not be forgotten that, under Article 33 of the Sixth Directive, Member States are allowed, as a rule, to '[maintain] or [introduce] taxes on insurance contracts'. That general authorisation was confirmed in Article 401 of Directive 2006/112.

26. In the case before the referring court, if the transfer of the insurance contracts is regarded as an insurance transaction, it clearly follows that the German tax authorities would not be entitled to demand payment of VAT on the transfer itself. To be more precise, the transfer would have to be deemed to have taken place in Switzerland, in accordance with the fifth indent of Article 9(2)(e). It would in fact have to be regarded as a supply of services, the supplier being Swiss Re, established in Germany, and the customer being S, established in Switzerland: in consequence, Switzerland – as the State in which the customer is established, and a State other than the State in which the supplier is established – would be the place of supply. Furthermore, the transaction would in any case be exempt under Article 13. (9)

27. Consequently, the first and fundamental question to be addressed is whether, in general terms, a transfer of insurance contracts may be regarded, for the purposes of VAT, as an insurance transaction.

C – *Assessment of the transaction at issue: the first question*

28. By its first question, the referring court seeks to ascertain, first, whether the transfer of contracts at issue in the main proceedings constitutes an insurance transaction and must consequently be deemed to have been carried out outside the Community for the purposes of Article 9 (the first part of the question) and/or to be exempt from VAT in accordance with Article 13 (the second part of the question). Lastly, by the third part of the question, the Court is asked to determine whether the transaction at issue may be exempted on the basis of Article 13B(d)(2) of the Sixth Directive, read in conjunction with Article 13B(d)(3) thereof.

29. I shall begin by analysing the first two parts of the question, which can be taken together, since both assume that the transfer of the contracts can be categorised as an insurance transaction.

1. Whether the transfer of contracts at issue can be categorised as an 'insurance transaction'

a) The positions of the parties

30. The parties' positions are quite different with regard to the central problem in the present case, that is to say, on the question whether the transfer of a portfolio of reinsurance contracts may be regarded as an 'insurance transaction'.

31. On the one hand, Swiss Re and the Commission propose that the question should be answered in the affirmative. In particular, they claim that the fact that the contractors which were transferred – the insurance companies which had concluded the reinsurance contracts with Swiss Re – had had to give their consent to the transfer, which for them entailed a switch in the other party to the contracts (from Swiss Re to S), confirms the existence of the legal connection between (re)insurer and (re)insured which the Court has consistently held to be an essential feature of an insurance activity within the meaning of the Sixth Directive.

32. The German, United Kingdom and Greek Governments, on the other hand, argue that the transfer of the contracts cannot be regarded as an insurance transaction and cannot therefore be

exempted from payment of VAT. They point, in particular, to the fact that insurance activity, as defined in the case-law, consists exclusively in payment of a premium in exchange for cover of a risk: the transfer of an insurance contract does not fit that formula and cannot therefore be exempted from VAT. The Finanzamt takes an essentially similar position.

33. All the parties, whatever answer they propose should be given, refer not only to the same legislative provisions but also to the same line of authority. The issue on which they are divided, therefore, concerns the way in which the facts that are the subject of the proceedings should be assessed in the light of the case-law of the Court.

b) Assessment

34. The Sixth Directive does not define insurance transactions: however, the Court has had occasion to interpret that concept in a number of significant judgments relating, in particular, to Article 13 of the directive.

35. In the first place, it is clear and settled case-law that the concept ‘insurance transaction’ is a concept of Community law. (10) In my view, that approach, adopted by the Court with reference to Article 13, must undoubtedly also apply whenever the same term occurs in the Sixth Directive and must therefore also apply to Article 9. As I have already pointed out, (11) I see no reason to suppose that the insurance transactions referred to in Article 9 are different from the insurance transactions referred to in Article 13. Moreover, albeit not with reference to insurance transactions, the Court has already had occasion to affirm the need for a uniform interpretation, at Community level, of the legal concepts contained in Article 9(2)(e), of the Sixth Directive. (12)

36. It is also settled case-law, with reference to Article 13 of the Sixth Directive, that that provision must be interpreted strictly since it provides for a number of exceptions to the general rule that VAT is payable on all supplies of goods and all supplies of services. (13) That principle, by its very nature, appears to be more difficult to apply with reference to Article 9 of the Directive, which does not provide exceptions to the system of VAT but is simply designed to delimit the scope of the powers of the Member States with respect to taxation. (14) In my view, however, it is possible – as will become clear in the course of this Opinion – to define a Community concept of ‘insurance transaction’ without having to refer to the rule of strict interpretation: it is consequently not impossible to interpret that concept uniformly in relation both to Article 9 and to Article 13 of the Directive.

37. The Court has held that ‘the essentials of an insurance transaction are (…) that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded’. (15) Thus, the distinguishing feature of an insurance transaction is the payment of a premium, on the one hand, in exchange for protection against a risk, on the other.

38. It must nevertheless be pointed out that, while an insurance transaction may be regarded as such even if it is carried out by a party which does not have the formal status of insurer, (16) it is absolutely essential, as the Court made clear in *Skandia*, that there be a legal relationship between the party which carries out the transaction, on the one hand, and the insured parties, on the other. (17)

39. It seems clear to me that the requirements specified in the case-law are not satisfied in the case before the referring court. The transaction to be assessed, which consists simply in the exchange of a portfolio of contracts, on the one hand – regarded, when taken together, as a source of possible profit – in return for a price, on the other. There is no doubt that, after the contracts were transferred, a legal relationship was established between S, which had acquired

them, and the insurance companies which had originally concluded the reinsurance contracts with Swiss Re (and which, it should be noted, had also had to give their consent to the transfer). However, that legal relationship, which is certainly in the nature of an insurance transaction, was formed *after* the transaction at issue here: the transaction that is the subject of our examination concerned only Swiss Re and S, allowing the contractors which were transferred only a kind of 'right of veto' with respect to the completion of the transfer.

40. The transfer of the contracts from Swiss Re to S is not therefore, in itself, an insurance transaction.

41. The possibility that the transaction at issue may be regarded as an 'outsourced' component of an exempt insurance activity, by analogy with the ruling in *Abbey National*, (18) must also be ruled out. In that case, as is well known, the Court held with reference to the concept of the 'management of special investment funds', which is exempt from VAT under Article 13B(d) of the Sixth Directive, that administration and accounting services supplied to investment funds by a third party may also be exempted if, 'viewed broadly, they form a distinct whole and are specific to, and essential for, the management of those funds'. (19) In my view, that case-law is not applicable here, for at least two reasons.

42. In the first place, the judgment in *Abbey National* refers specifically to financial services, which differ significantly from insurance services in respect of the nature of the service. In particular, the concept of insurance activity defined by the Court in *Skandia* should be borne in mind. (20) It does not appear therefore that, as Community law now stands, the outsourcing of some components of an insurance activity can be exempted from VAT.

43. It is true that a recent proposal for a directive, presented by the Commission with a view to updating the legal framework of VAT on financial and insurance services, (21) seeks to extend the principle established in *Abbey National* to cover insurance activity. (22) However, even supposing for the sake of argument that *Abbey National* could apply in the case before the referring court, its actual application must in any event be ruled out on the facts, given that, in the present case, what occurred was not the outsourcing *of a specific part* of the insurance activity but the transfer *en bloc* of a number of insurance relationships (from Swiss Re to S). The fact that Swiss Re and S belong to the same group, so that the ultimate reason for the transfer could be analogous to the reasons for outsourcing, (23) is irrelevant for our purposes.

44. Further confirmation of that interpretation of the provision is to be found in the Court's case-law on one of the other exemptions provided for in Article 13B of the Sixth Directive: I refer to the exemption, provided for in Article 13B(b), of the leasing or letting of immovable property. While it is true that in *Lubbock Fine* it was accepted that a transaction consisting in 'the termination of the lease [on a property] for consideration' was exempt, (24) the Court subsequently held in *Cantor* that the transfer of a lease from the former tenant to a new tenant could not be exempted. (25)

45. It seems therefore that, in general, a principle emerges from the case-law of the Court on insurance transactions and on the leasing or letting of immovable property, according to which the exemptions from VAT recognised in this context may extend, beyond the 'principal' transaction (that is to say, the original contract between insurer and insured, or between landlord and tenant), only to 'secondary' transactions which constitute events 'within' the original contracts and not to situations in which, as in the case before the referring court, the transaction to be assessed falls outside the original contractual framework.

46. It is true that, on the basis of concerns associated with the general rationale underlying the rules providing for exemption from VAT, it might be considered advisable to grant exemption also in the case under consideration here, in order to prevent hidden VAT from being included in the

final price paid by the consumer.

47. However, it must be pointed out in this connection, first, that it is impossible to prevent any form of hidden VAT completely. (26) Secondly, it seems to me that the transfer of the contracts from Swiss Re to S cannot be regarded as an upstream transaction with respect to the insurance service provided by S for the customers. In other words, it cannot be maintained that the sum paid to acquire the contracts is directly included in the price set (by S) to be paid by the insured who, inter alia, at the time when the contracts were transferred, were already (contractual) parties to a relationship, the conditions of which – hence also the price of the insurance service – had already been defined earlier, when the contract was concluded with Swiss Re.

48. I therefore consider that the answer to the first and second parts of the first question should be that a transfer of reinsurance contracts such as the transfer at issue in the main proceedings does not constitute an insurance transaction for the purposes of either Article 9 or Article 13 of the Sixth Directive.

2. The third part of the first question

49. By the third and last part of the first question, the referring court seeks essentially to ascertain whether the transaction at issue may be exempted on the basis of Article 13B(d)(2) of the Sixth Directive, read in conjunction with Article 13B(d)(3) thereof. In that case, in particular, the transfer of the contracts from Swiss Re to S and the payment of the price in that connection would constitute a transaction consisting in an ‘assumption of obligations’ (within the meaning of Article 13B(d)(2)) and a ‘transaction (…) concerning (…) debts’ (within the meaning of Article 13B(d)(3)). To be more precise, the ‘obligations’ would be the obligations assumed by S towards the insured, while the ‘debts’ would consist of S’s right to collect the insurance premiums from the insured.

50. As the referring court itself points out, it must be possible for the provisions of Article 13B(d)(2) and (3) of the Directive to apply cumulatively for the transaction at issue to be exempt: taken separately, the two grounds for exemption are not sufficient.

51. The parties are divided on that particular point, as they are on the answer to the first two parts of the question. On the one hand, Swiss Re and the Commission maintain that, if the transaction at issue is not to be regarded as an insurance transaction, it could be exempted in the alternative by applying those two exemption clauses cumulatively. By contrast, all the intervening governments and the Finanzamt argue that, in view of the fact that VAT exemptions are characterised by their exceptional nature and by the attendant obligation to interpret them strictly, the possibility of applying the two grounds for exemption together to a single transaction must be precluded on principle.

52. On this aspect, too, the approach taken by the governments and the Finanzamt seems to me to be more convincing than the line taken by Swiss Re and the Commission.

53. In my view, the possibility of applying two grounds for exemption jointly must generally be ruled out in the light of the obligation to interpret exceptions strictly. (27) To admit the possibility of artificially subdividing a single transaction in order to make its components into individual situations, each of which is covered by an exemption, could jeopardise the proper functioning of the system of VAT. As we saw earlier, an insurance transaction consists in the payment of a premium (by the insured) in exchange for an undertaking to bear the risk (given by the insurer). To separate those two components of the legal relationship, by exempting each on the basis of a different legislative provision, would be a clear distortion.

54. There is also another reason, apart from the problem of applying two exemption clauses

jointly, on the basis of which the application of Article 13B(d)(2) and (3) of the Directive can be ruled out here. All the exemptions provided for in Article 13B(d) concern financial and banking transactions, despite the fact that some language versions, such as the German and Italian versions, are worded in more general terms which could, at first sight, appear to be applicable to other types of activity also. (28) Thus, in order to be exempt, it is not sufficient for the transactions at issue to be pecuniary transactions, as the referring court appears to believe: (29) they must be financial and/or banking transactions, and a transfer of insurance contracts does not appear to fall into that category. (30)

55. I therefore consider that the transaction at issue in the main proceedings cannot be exempted from VAT on the basis of Article 13B(d)(2) and (3) of the Sixth Directive either.

3. Conclusions on the first question

56. Concluding my examination of the first question, I therefore propose that the Court's answer should be that a transfer of reinsurance contracts such as the transfer at issue in the main proceedings does not constitute an insurance transaction for the purposes of either Article 9 or Article 13 of the Sixth Directive; nor can it be exempted from VAT on the basis of Article 13B(d)(2) and (3) of the Sixth Directive.

D – *The second question*

57. By the second question, the referring court seeks essentially to ascertain whether the answer to the first question can be confirmed despite the fact that a price is paid not by the party which acquires the contracts but by the party which transfers them. The question is raised because in the present case, as we saw earlier, 18 of the 195 contracts which were transferred were considered to have a negative value, which was deducted from the total value of the other 177 in order to determine the final price of the transfer. Considered separately, the transfer of those 18 contracts would be a 'reverse' transaction from the point of view of VAT: the supplier would be S, which would take over the unprofitable contracts in return for compensation, relieving the customer (Swiss Re) of them.

58. All the parties which have submitted observations in the present proceedings argue that the answer should be in the affirmative: in their view, the fact that there were 18 contracts with a negative value should not affect the answer to be given to the first question. Swiss Re, the Commission and the Finanzamt, in particular, point out that the transaction at issue is strictly a single transaction, which must therefore be assessed as a whole, without considering the contracts with a negative value separately. The German and United Kingdom Governments, for their part, while not ruling out a priori the possibility of considering the contracts with a positive value separately from those with a negative value, maintain that this cannot in any way alter the answer to be given to the question, since neither the contracts with a positive value nor those with a negative value are insurance transactions, even if they are considered separately.

59. The position of the German and United Kingdom Governments seems to me to be essentially correct in the part where they point out that, just as the transfer of contracts in the context of which S makes a payment to Swiss Re cannot be regarded as an insurance transaction, so too there is no reason to regard the transaction in which the contracts were transferred to S, which received payment for taking them, as an insurance transaction. The transaction is in the opposite direction but it is still a transaction which does not have the characteristics identified earlier as marking an insurance transaction within the meaning of Community law.

60. In my view, however, the examination of the question cannot stop at this point, even if the solution to the problem raised by the referring court is already to be found in the observations I

have just made.

61. It remains to be determined whether, irrespective of whether transactions involving the transfer of insurance contracts can be categorised as insurance transactions, a transfer of 195 contracts such as the transfer at issue can be analysed for the purposes of VAT as a unit comprising two distinct transfers, one involving contracts with a positive value and the other contracts with a negative value. In the alternative, each contract could be regarded as the subject of a separate transfer: there would thus be 195 distinct transfers.

62. The point may appear to be irrelevant but it is nevertheless worth considering. Even if the possibility that the transfer of the contracts represented an insurance transaction is ruled out a priori, the possibility of considering the components of that transaction with a positive value separately from those with a negative value could have significant consequences for the payment of VAT. (31)

63. However, in my view, that possibility must be ruled out. In the negotiations which led to the agreement between Swiss Re and S, the 195 reinsurance contracts which were transferred were considered as a whole and S paid Swiss Re a single price for their transfer – including both the contracts with a positive value and those with a negative value – clearly considering that Swiss Re had supplied a single service. This makes it clear that the principle established by the Court in *CPP* , according to which ‘a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system’, (32) must be taken into account. Consequently, for the purposes of VAT, since the transfer of the contracts at issue which have a positive value cannot be separated from the contracts which have a negative value, the transaction at issue must be regarded as a single transaction.

64. I therefore propose that the answer to the second question should be that the answer to the first question is no different where some of the contracts which are transferred have a negative value.

IV – **Conclusions**

65. In the light of the foregoing considerations, I propose that the Court give the following answer to the questions submitted by the Bundesfinanzhof:

A transfer of reinsurance contracts such as the transfer at issue in the main proceedings does not constitute an insurance transaction for the purposes of either Article 9 or Article 13 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; nor can it be exempted from VAT on the basis of Article 13B(d)(2) and (3) of that directive.

The answer to the first question is no different where some of the contracts which are transferred have a negative value.

A transfer of reinsurance contracts such as the transfer at issue in the main proceedings constitutes a supply of services within the meaning of the Sixth Directive and cannot therefore fall to be exempted under Article 13B(c) of that directive.

1 – Original language: Italian.

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 – To be precise, the company which transferred the contracts was a company controlled by Swiss Re, but which has not been further identified: that company was also the original party to the re-insurance contracts. Since it has not been possible to learn the name of that company from the case-file, I shall consistently refer to 'Swiss Re' – the claimant in the main proceedings – as the party which transferred the contracts in question.

4 – Note R/716/77 (FIN 151).

5 – See, for example, Case C?375/98 *Epson Europe* [2000] ECR I?4243, paragraph 26 and the case-law cited.

6 – The Italian wording of the provision may be misleading in certain respects since, at least in the first part, it appears to suggest that the exemption applies to the *first* supply of goods *intended* [*destinati*] for an exempt activity. In reality, it is a matter of goods which have (already) been used for an exempt activity and which are subsequently resold. The new Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) now speaks of 'the supply of goods *used* [*già destinati*] *solely for an activity exempted …*' (added emphasis).

7 – The purpose of the provision is clearly to avoid double taxation, since anyone who used the goods to carry out exempt activities could not recover the VAT paid on the goods and therefore paid the tax definitively as a final consumer. The subsequent resale of the goods in question, on which VAT has now been paid, is therefore exempted in order to avoid the tax being paid anew, this time by the new purchaser. See Case C?45/95 *Commission* v *Italy* [1997] ECR I?3605 and the Opinion of Advocate General Ruiz-Jarabo Colomer in that case, points 14 to 20. See also the order in Joined Cases C?18/05 and C?155/05 *Salus and Villa Maria Beatrice Hospital* [2006] ECR I?6199, paragraphs 29 and 30.

8 – See, in this connection, the Opinion of Advocate General Fennelly in Case C?349/96 *CPP* [1999] ECR I?973, point 26, and the Opinion of Advocate General Poiares Maduro in Case C?472/03 *Arthur Andersen* [2005] ECR I?1719, point 13.

9 – There does not seem to be any reason to interpret differently in each case the transactions described, in the two provisions cited, as 'insurance transactions, including reinsurance' in Article 9 and 'insurance and reinsurance transactions' in Article 13, respectively. I therefore take the view that the two passages I have just cited refer to the same activities.

10 – See, for example, Case C?2/95 *SDC* [1997] ECR I?3017, paragraph 21, and *Arthur Andersen* , cited in footnote 8, paragraph 25.

11 – See footnote 9 above.

12 – Case C?68/92 *Commission* v *France* [1993] ECR I?5881, paragraph 14.

13 – See *Arthur Andersen*, cited in footnote 8, paragraph 24 and the case-law cited.

14 – See Case C?401/06 *Commission* v *Germany* [2007] ECR I?10609, paragraph 29.

15 – *CPP*, cited in footnote 8, paragraph 17.

16 – *CPP*, cited in footnote 8, paragraph 22. See also, by analogy, *SDC*, cited in footnote 10, paragraph 32.

17 – Case C?240/99 *Skandia* [2001] ECR I?1951, paragraphs 39 and 40.

18 – Case C?169/04 *Abbey National* [2006] ECR I?4027.

19 – *Abbey National*, cited in footnote 18, paragraph 72.

20 – Cited in footnote 17 above.

21 – Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services (COM(2007) 747 final).

22 – In particular, the draft directive proposes to insert in Article 135 of Directive 2006/112/EC a paragraph 1a which reads: ‘The exemption provided for in points (a) to (e) of paragraph 1 shall apply to the supply of any constituent element of an insurance or financial service which constitutes a distinct whole and has the specific and essential character of the exempt service’.

23 – One thinks, for example, of economies of scale, rationalisation and, of course, tax reasons.

24 – Case C?63/92 *Lubbock Fine* [1993] ECR I?6665, paragraphs 9 and 10.

25 – Case C?108/99 *Cantor Fitzgerald International* [2001] ECR I?7257, paragraphs 21 to 24.

26 – This is not of course to play down the extent of the problem, which is particularly significant precisely in the financial and insurance sectors. The wish to reduce hidden VAT is one of the reasons given by the Commission for its proposal for a directive, referred to in footnote 21. See also the opinion of the Economic and Social Committee on that proposal (OJ 2008 C 224, p. 124), particularly point 3.

27 – See point 36 above.

28 – See, on this point, Case C?455/05 *Velvet & Steel Immobilien* [2007] ECR I?3225, paragraphs 21 and 22.

29 – As the Court itself observed in *Velvet & Steel Immobilien*, cited in footnote 28, paragraph 18, the fact that the exemptions concern only financial and banking activities is particularly clear, for example, in the English and Spanish versions of the directive. In the judgment in *Velvet & Steel Immobilien*, which presents some discrepancies between the language versions, discrepancies attributable partly to differences in the various language versions of the Sixth Directive, the Court confined itself to ruling that, for the purposes of the exemptions referred to in Article 13B(d)(2), it was essential that a transaction be pecuniary but did not go so far as to maintain that that alone was sufficient to enable the exemption to be applied.

30 – In considering the content and context of the provision, it might be wondered whether, in the intentions of the legislature responsible for the Sixth Directive, the ‘impegni’ (obligations) referred to in the Italian, French and German versions, for example, but not in the English version, for example, should not be understood simply as ‘impegni di garanzia’ (obligations to guarantee). On the employment of systematic interpretation as a consequence of the differences in the language versions of Article 13 of the Sixth Directive, see Case 173/88 *Skattenministeriet* v *Henriksen* [1989] ECR 2763, paragraphs 10 and 11; Case C?305/01 *MKG* [2003] ECR I?6729, paragraphs

69 and 70; and *Velvet & Steel Immobilien*, cited in footnote 28, paragraph 20 and the case-law cited.

31 – In fact, on the general principle that the place of the supply of services is the place where the supplier is established (and not the specific place for insurance transactions, which on the contrary are located in the place where the customer is established), under Article 9 of the Sixth Directive the transfer of the 177 contracts with a positive value would take place in Germany and the transfer of the 18 contracts with a negative value would take place in Switzerland.

32 – *CPP*, cited in footnote 8, paragraph 29.