

OPINION OF ADVOCATE GENERAL

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1. This preliminary reference concerns the classification of underwriting guarantee services for the purposes of VAT.

2. Share underwriting guarantee services generally refer to a situation where an underwriter guarantees, for a certain fee, to purchase or subscribe (in the case of a new issue of shares) the parts of the shares which cannot be sold or subscribed on the market. The aim of such services is, therefore, to ensure that the share issue or sale will be fully subscribed or purchased, and that the issuer will receive a certain amount of capital.

3. In the present case certain limited companies sought underwriting guarantee services with such an aim. The underwriter (Skandinaviska Enskilda Banken ('SEB')) undertook to acquire shares not subscribed during the time within which the subscription of shares was to be completed, in exchange for commission.

4. The main issue is whether and if so under which provision of Article 13B of the Sixth VAT Directive² that underwriting guarantee service should be classified. Three provisions of Article 13B of that directive are of particular relevance: insurance transactions in Article 13B(a); granting of credit and credit guarantees in Article 13B(d)(1) and (2); and transactions in shares and other securities in Article 13B(d)(5).

5. The classification of underwriting guarantee services represents somewhat of a

1 — Original language: English.

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 ('Sixth VAT Directive') (OJ 1977 L 145, p. 1). Article 13B(a) and (d) of the Sixth VAT Directive is now Article 135(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive'), which replaces the Sixth VAT Directive with effect from 1 January 2007 (see the Correlation Table in Annex XII to the VAT Directive). The aim of the VAT Directive is to present the applicable provisions in a clear and rational manner, consistent with the principle of better regulation (recital 3 in the preamble).

difficult task considering the fact that the economic reality of services relating to corporate finance offered on financial markets, being dynamic in nature, does not fit easily into the static, pre-determined provisions that the legislation provides for.

I — Legal framework

The Sixth VAT Directive

6. Article 2(1) of the Sixth VAT Directive concerns its scope. It states that ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’ shall be subject to VAT.

7. Article 13B of the Sixth VAT Directive concerns exemptions from VAT. As far as is relevant for the purposes of the present case that Article states that the following shall be exempt from VAT:

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

...

(d) 1. the granting and the negotiation of credit and the management of credit by the person granting it.

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.

...

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).³

3 — Article 5 of the Sixth VAT Directive refers to rights to dispose of tangible property as owner, and Article 5(3) lists what is to be considered as tangible property, including shares or interests equivalent in shares giving the holder *de jure* or *de facto* rights of ownership or possession over immovable property or part thereof.

*National legislation'***II — Facts and questions referred**

8. Under Chapter 1, Article 1, of *mervärdesskattelagen* (Law on VAT) (1994:200) ('ML'), VAT is to be paid on supplies within the territory of the State of goods or services which are subject to tax and carried out as part of a professional activity. The provision is intended to implement Article 2(1) of the Sixth VAT Directive and Article 2(1) of the VAT Directive.

9. Under Chapter 3, Article 9, of the ML, supplies of banking and financial services and transactions involving securities are exempt from taxation. Transactions involving securities means, *inter alia*, sales of shares, other interests or claims. Under Article 10, supplies of insurance and reinsurance services are tax exempt. The provisions are intended, *inter alia*, to implement Article 13B(a) and (d)(1), (2) and (5) of the Sixth VAT Directive and Article 135(1)(a) to (c) and (f) of the VAT Directive.

10. The case concerns a VAT group 'SEB AB Momsgrupp' ('SEB Momsgrupp') of which a bank, SEB, is the group leader. At the material time SEB and another company in the SEB Momsgrupp supplied services to limited companies which were about to carry out a new share issue. The service provided by SEB consisted in the provision of an underwriting guarantee.

11. SEB Momsgrupp took the view that the underwriting guarantee services were tax exempt and therefore did not charge or account for VAT in respect of them. Skatteverket (the Swedish tax authority) subsequently audited the group and levied additional output VAT for the period in question. SEB Momsgrupp appealed against that decision and were unsuccessful before both *Länsrätten i Stockholms län* (County Administrative Court for Stockholm) and *Kammarrätten i Stockholm* (Stockholm Administrative Court of Appeal).

12. The dispute before *Regeringsrätten* (the Supreme Administrative Court) essentially concerns the question whether the underwriting guarantees can be exempt. According to that court the supply of such guarantees can be provided either independently or

together with services in connection with the issuing of shares.

13. In those circumstances Regeringsrätten asks the Court of Justice to make a preliminary ruling on the following question:

‘Is Article 13B of the Sixth VAT Directive (Article 135(1) of the [VAT Directive]) to be interpreted as meaning that the tax exemptions provided for therein also include services (underwriting) which involve a credit institution providing, for consideration, a guarantee to a company which is about to issue shares, where under that guarantee the credit institution undertakes to acquire any shares which are not subscribed within the period for share subscription?’

III — Analysis

A — *The nature of the underwriting guarantee service*

14. Underwriting services are classified as financial services by various EU provisions. Thus, Directive 2004/39/EC on markets in

financial instruments qualifies underwriting as an investment service for the purposes of that directive.⁴ Furthermore, Directive 2006/49 requires that a credit institution has a certain amount of capital relating to the underwriting risks they have undertaken.⁵ However, the classification of an activity as a financial service under internal market legislation does not as such determine the VAT treatment of corresponding transactions.

15. There was some debate at the hearing about the nature of the underwriting service guarantee and whether it was to be treated as part of or ancillary to the general issue of

4 — Annex I, section A(6) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1) (‘Directive 2004/39’). I note that the various linguistic versions of that directive use expressions having a slightly different meaning to that of ‘underwriting’ in English. The linguistic difficulties in this area of law were noted in the First Report where it was noted that ‘since Council directives are authentic in the languages of the Member States to which they are addressed, they must of necessity try to avoid wherever possible the use of legal concepts or expressions which mean different things in different countries. Unfortunately, this rule cannot always be observed; and in any case, blind observance might well produce an intelligible phraseology which itself could give rise to divergent interpretations.’ (See First Report from the Commission to the Council on the application of the common system of value added tax, submitted in accordance with Article 34 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 (COM (83) 426 final).

5 — Annex I, title ‘underwriting’, paragraph 41 of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJ 2006 L 177, p. 201) (‘Directive 2006/49’). The same linguistic problem exists in this directive as in Directive 2004/39 (see footnote 4).

shares (and thus to be treated in the same way for tax purposes), or as an independent service.

B — *Interpreting Article 13B of the Sixth VAT Directive*

16. It emerged that the scope of underwriting services is understood differently in the Member States. Some, such as Ireland, consider as underwriting the provision of a bundle of services including advice regarding the share issue, marketing and distribution of shares as well as the guarantee that the financial institution also underwrites the shares if necessary. In Sweden, however, the underwriting guarantee services may and do occur independently of other services connected to the issuing of shares.

17. SEB, Sweden and Skatteverket are unanimous in submitting that the underwriting guarantee can be provided independently. The referring court also stated as much in the order for reference. In addition, SEB confirmed at the hearing that in the present case SEB gave the guarantee to underwrite the shares, while the issuing of the shares was carried out by another undertaking.

18. It is therefore clear that the underwriting guarantee service should be treated independently in the present case, and not as ancillary to the other services provided in an issue of shares.

19. Before analysing the three relevant provisions in question a few general remarks should be made.

20. First, the concepts in question are independent concepts of EU law and thus should be interpreted uniformly to avoid divergences in the application of the VAT system between Member States.⁶ They should also be placed in the general context of the common system of VAT.⁷

21. Secondly, according to the Court's case-law, the exemptions in Article 13B of the Sixth VAT Directive should be interpreted restrictively since they are exceptions to the general rule that VAT is charged on all supplies of goods and services.⁸

22. Thirdly, it is not clear what the reason for exempting financial transactions is since the *travaux préparatoires* do not deal with that point. According to the Court's case-law,

6 — Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 21; Case C-472/03 *Arthur Andersen* [2005] ECR I-1719, paragraph 25; Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 23.

7 — Recital 11 of the Sixth VAT Directive. See also Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10099, paragraph 33 and case-law cited there.

8 — *Skandia*, cited in footnote 6, paragraph 32; *Arthur Andersen*, cited in footnote 6, paragraph 24; *SDC*, cited in footnote 6, paragraph 20 and case cited there.

however, the purpose of exempting financial transactions is to alleviate the difficulties connected in determining the tax base and the amount of VAT deductible, as well as to avoid the increase in the cost of consumer credit.⁹

definition of that expression in *CPP*,¹¹ where it held that the essential characteristics 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.¹²

1. Insurance transactions

23. Insurance transactions are exempt by Article 13B(a) of the Sixth VAT Directive. That article states that ‘Member States shall exempt...insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents’.

25. Thus, the definition of insurance transaction was broad enough to include the provision by a taxable person who was not himself an insurer but who made use of the supplies of an insurer who assumed the risk insured.¹³

26. From that we can conclude that the focus is on the nature of the transaction and not on the person providing the transaction, which means that a person other than an insurance company can provide insurance services.

24. Insurance transactions are not defined in the Sixth VAT Directive, or in the insurance directives.¹⁰ The Court first provided a

27. SEB argues that these elements are fulfilled in the present case and that the transactions should be considered exempt under Article 13B(a) of the Sixth VAT Directive.

9 — Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-3225, paragraph 24 and order of 14 May 2008 in Joined Cases C-231/07 and C-232/07 *Tiercé Ladbroke*, paragraph 24.

10 — See for example Council Directive 84/641/EEC of 10 December 1984 amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1984 L 339, p. 21).

11 — Case C-349/96 [1999] ECR I-973.

12 — *CPP*, cited in footnote 11, paragraph 17. Thus, the road assistance services that a body undertakes to provide to its members, in return for the payment of a fixed annual subscription have been held to amount to an insurance transaction for the purposes of Article 13B(a) of the Sixth VAT Directive. See Case C-13/06 *Commission v Greece* [2006] ECR I-11563.

13 — *CPP*, cited in footnote 11, paragraph 22.

28. Skatteverket, on the other hand, considers that an insurance transaction requires an element of compensation for loss. It considers that since there is no compensation for loss in the present case, the services in question cannot be exempt under Article 13B(a) of the Sixth VAT Directive.

29. The 'loss' element was included in Advocate General Fennelly's definition of an insurance transaction in *CPP*, but was not reproduced by the Court in its judgment in that case.¹⁴

30. In my view, the crucial difference between an insurance transaction and the present case is the situation after the risk has arisen.

31. In an insurance transaction all that is required when the risk arises is the payment of an agreed sum or specific performance such

as assistance to the insured person,¹⁵ to the economic detriment of the insurer. In doing so the insurer obtains nothing new.¹⁶ His gain is generated in the pre-risk phase.

32. In the present case, however, when the risk materialises the bank obtains title to the shares against the agreed price. This entails a risk of depreciation of the value of the shares and activation of financing costs relating to the acquisition. However, no *a priori* assumption of a final loss can be attributed to such a situation. This difference means that, in my view, the present situation is not analogous to an insurance transaction.

33. The underwriting guarantee services in the present case cannot therefore be considered to be an insurance transaction within the meaning of Article 13B(a) of the Sixth VAT Directive.

15 — Regarding specific performance see *Commission v Greece*, cited in footnote 12.

16 — I note that in certain forms of insurance contracts the insurer may have a right to redeem the damaged goods that are insured by the contract. For example, an insurance company might prefer to take the written-off car and provide the insured party with the compensation for its value if it is too costly to repair the damaged car. In my opinion such action aiming at the limitation of loss is contingent in its nature, and as such legally different than the obligation of the underwriter to acquire the unsubscribed shares for a prefixed price.

14 — Opinion of Advocate General Fennelly in *CPP*, cited in footnote 11, point 34.

2. Grant of credit and credit guarantees

34. Article 13B(d)(1) and (2) of the Sixth VAT Directive exempts the ‘granting of credit’ and ‘any dealings in’ credit guarantees or in any other security for money.

35. SEB argues that the underwriting services it provides should be exempt under those provisions since they have the same aim as a guarantee, namely to raise a specific amount of capital required, and since they entail the same risks from the point of view of the lender or the guarantor as the grant of credit.

36. Skatteverket argues that the present situation does not fall under those provisions since it is different in nature. According to it, Article 13B(d)(1) of the Sixth VAT Directive normally covers a loan or a payment, the consideration for which is the interest charged. Article 13B(d)(2) of the Sixth VAT Directive covers only financial engagements, which Skatteverket interprets to mean an obligation to pay a sum of money, such as reimbursing a creditor. According to it, the present case is more than a simple obligation to pay a certain sum of money, and is therefore not a financial engagement in the sense of the Sixth VAT Directive.

37. As regards Article 13B(d)(1) of the Sixth VAT Directive, the Court has explicitly stated that that Article is not limited to loans or credits granted by banking and financial institutions.¹⁷ Furthermore, it stated that the definition is broad enough to cover credit granted by a supplier of goods in the form of deferral of payment.¹⁸

38. In my view the present situation does not amount to a grant of credit because the nature of the transaction is different.

39. When credit is granted the grantor expects a return of the money it has given in addition to interest, which amounts to its payment. In the present situation the bank does not provide the company with any money if the risk does not materialise. In the event that it does, it certainly does not require a return of the money it has granted or interest. It merely makes a payment in return for the shares it obtains, which it then sells on to recoup the money.¹⁹ Again, it is this mutual exchange of shares for money which makes it substantially different in nature from a grant of credit.

¹⁷ — *SDC*, cited in footnote 6, paragraph 34.

¹⁸ — *SDC*, cited in footnote 6, paragraph 34.

¹⁹ — At the hearing SEB stated that legally the underwriter is obliged to sell the shares acquired as a result of the underwriting guarantee service as soon as possible, albeit without loss.

40. As regards Article 13B(d)(2) of the Sixth VAT Directive, some differences exist between the different language versions of that provision. The English version of the Sixth VAT Directive refers to 'credit guarantees' while the French text is more broadly worded, simply referring to guarantees.²⁰ As a result, in order to clarify its meaning, reference must be made to the context in which the phrase occurs and consideration given to the structure of the Sixth VAT Directive.²¹

42. In spite of this, I do not see a reason to limit Article 13B(d)(2) of the Sixth VAT Directive to only credit guarantees. Article 13B(d) of the Sixth VAT Directive relates to banking and financial services, and exempts almost all activities of institutions providing such services. Since these institutions can provide both credit guarantees as well as guarantees in a wider sense, Article 13B(d)(2) of the Sixth VAT Directive should be read in the wider sense. 'Credit guarantees' mentioned in the English version are merely an example or a species of the more generic 'securities for money' which are also referred to in that Article.²³ That conclusion does not change because the provision in question is an exemption and thus to be interpreted strictly, since strictly does not necessarily mean restrictively.²⁴

41. The *travaux préparatoires* do not shed any light on which language version better supports the aim of that provision. The proposal for the Sixth VAT Directive simply states that the other exemptions, which are set out in section B, relate to specific fields, such as insurance, provision of credit and dealings in currency and on the stock exchange, where they are justified for reasons of general policy common to all the Member States.²² Article 13B(d)(2) of the Sixth VAT Directive was adopted in the Sixth VAT Directive without having been mentioned in the proposal or in any amendment.

43. The potentially wide nature of such a reading is combated by the limitations given to that provision by the Court's case-law. According to that case-law in order to be regarded as an exempt transaction the service provided must, viewed broadly, form a distinctive whole, fulfilling in effect the specific, essential functions of a service described in that provision.²⁵ That means that it has to

20 — The Swedish, Finnish, Slovenian and Estonian versions follow the English wording, while the Spanish, German, Portuguese and Danish versions follow the French.

21 — See by analogy *SDC*, cited in footnote 6, paragraph 22 and case-law cited there.

22 — Proposal for a Sixth Council Directive on the harmonisation of the laws of the Member States concerning turnover taxes, Common system of value added tax: Uniform basis of assessment (submitted to the Council by the Commission on 29 June 1973), *Bulletin of the European Communities*, Supplement 11/73, p. 15.

23 — See Terra, B. and Kajus, J., *A guide to the European VAT directives* (Cd Rom), IBFD, 2004-, 9.3.2.2. 'Credit Guarantees or any other security for money'.

24 — Advocate General Jacobs in Case C-267/00 *Zoological Society of London* [2002] ECR I-3353, point 19.

25 — *Swiss Re Germany Holding*, cited in footnote 7, paragraph 45 and case-law cited there.

relate, as a whole, to the sphere of financial transactions.²⁶

44. The question therefore arises whether the assumption of an obligation to subscribe unsold shares which are issued for the first time relates, as a whole, to the sphere of financial transactions.

45. The Court has not yet provided any guidance as to the meaning of what exactly constitutes a financial transaction. In *Velvet & Steel* the assumption of the obligation to renovate a building was not, by its nature, a financial transaction. In *Tiercé Ladbroke* the taking of bets on behalf of a principal who operates a business of taking bets was held not to amount to a financial transaction. Finally, in *Swiss Re Germany Holding* a transfer of a portfolio of life reinsurance contracts was not considered to be a financial transaction.²⁷

46. The definition of what constitutes a financial transaction should be considered with regard to the economic context of the

transaction. Whereas in *Velvet & Steel* the transaction did not occur in the financial markets sphere, in the present case the provision of underwriting services clearly does. Support for this view may be found in Directive 2004/39, which qualifies underwriting as an investment service for the purposes of that directive.²⁸ In my opinion, operations of a financial institution relating to corporate finance should be considered as occurring in the sphere of financial transactions, with the possible exception of such ancillary services that can also be provided by non-financial actors such as marketing or legal advice. As such, the underwriting guarantee service relates to the sphere of financial transactions.

47. Next, it needs to be considered whether the underwriting guarantee service fulfils the conditions of a guarantee. That term is not defined in the directive and it has not previously been considered in the Court's case-law either.

48. In my view, a guarantee is essentially an assurance that, in the case of default by another, the person acting as guarantor will undertake the necessary performance, usually payment, that the defaulting party has failed to make. Guarantees can also be autonomous,

²⁶ — *Velvet & Steel*, cited in footnote 9, paragraph 22; *Tiercé Ladbroke*, cited in footnote 9, paragraph 17 and case-law cited there.

²⁷ — *Swiss Re Germany Holding*, cited in footnote 7, paragraph 48.

²⁸ — Annex I, section A(6) of Directive 2004/39.

that is, independent of the performances of another party such as guarantees relating to the economic outcome of a project ('no-loss guarantees'). However, such guarantees are situated at the outskirts of the meaning of the concept.

3. Transaction in shares

49. In the present case, there is no specified 'other party' that could be identified as guaranteed by SEB even though the guarantee obviously covers situations where an initial promise to subscribe shares is not honoured by an investor. The defaulting party is the market as such. In my opinion the notion of a guarantee provided for in Article 13B(d)(2) of the Sixth VAT Directive cannot be stretched to cover such situations.

51. Finally, under Article 13B(d)(5) of the Sixth VAT Directive, Member States shall exempt transactions in shares. The meaning of 'transaction in shares' has been interpreted in three cases to date,²⁹ from which it is unclear what the precise test to be employed in order to discern whether a transaction amounts to a transaction in shares is. First, in *SDC*, the Court stated in relation to transactions in securities that the acts should alter the legal and financial situation as between the parties.³⁰ Subsequently, in *CSC Financial Services* the Court held in relation to transactions in shares, purportedly applying the test in *SDC* by analogy, that a transaction had to be *liable* to create, alter or extinguish the parties' rights and obligations in respect of securities.³¹ Finally, in *AB SKF* the Court, referring to both

50. Therefore, in my view, the underwriting guarantee services described in the present case do not fit into Article 13B(d)(1) and (2) of the Sixth VAT Directive and cannot be exempt under it.

29 — In Case C-29/08 *AB SKF* [2009] ECR I-10413, case C-235/00 *CSC Financial Services* [2001] ECR I-10237, and in *SDC*, cited in footnote 6.

30 — In *SDC* the Court analysed transactions concerning transfers within the meaning of Article 13B(d)(5) of the Sixth VAT Directive, and held that transactions in shares include transactions on the market in marketable securities, and that trade in securities involves acts which alter the legal and financial situation as between the parties. See *SDC*, paragraphs 72 to 73.

31 — *CSC Financial Services*, cited in footnote 29, paragraph 33. Advocate General Colomer in that case clarified (at point 29 of his Opinion) that this would occur when an operation directly affects the legal relationship embodied in the security, and is capable of having an impact on the substance thereof. He listed as examples the issue, transfer, endorsement, payment and redemption of the security.

of those cases, stated that the sale of shares changes the legal and financial position of the parties to the transaction, and that it was therefore capable of being covered by the exemption in Article 13B(d)(5) of the Sixth VAT Directive.³²

52. In my view the test set out in *CSC Financial Services* is better adapted to reflecting the commercial and economic reality of transactions in shares because operations on the primary market are always potential in the sense that shares are legally born only at the end of the issue.

53. Following the test in *CSC Financial Services*, the change does not have to occur in fact, but the transaction must be *liable* to change the relationship. Therefore, the fact that SEB *might* be called on to acquire the shares if they fail to be subscribed is sufficient to pass this test and therefore to amount to an exemption within the meaning of Article 13B(d)(5) of the Sixth VAT Directive.

54. If the Court does not choose to apply the test in *CSC Financial Services* and considers that the transaction must change the financial and legal relationship between the parties, the main question becomes whether there can be said to be such a change, even though the bank might never have to acquire the shares in fact.

55. In my view there is such a change because the change to the legal and financial situation must be construed broadly as including transactions which constitute sources of obligations in the law.³³

56. In the present case, a legal obligation is placed on SEB the moment it provides the underwriting guarantee service, that is, the promise to acquire shares. This obligation alters the legal position between the parties since, if the situation arises and SEB refuses to buy the shares, the company issuing the shares will have a valid claim against it. It also alters the financial situation between the parties because SEB needs to ensure that it has sufficient funds in order to buy the shares

32 — Cited in footnote 29, paragraph 50.

33 — In that respect I agree with Advocate General Colomer's definition in *CSC Financial Services*, cited in footnote 29, point 23.

should the situation arise.³⁴ Therefore, SEB's situation is undoubtedly altered as a result of the underwriting guarantee services that it is providing to the issuing company.

57. Furthermore, from the point of view of fiscal neutrality, it is advisable to view underwriting guarantee services as transactions in shares, like most Member States seem to do. The same result, that is non-liability as to VAT, can be achieved by using different means. A company can raise capital through share disposal in two ways: (i) by means of an issue of shares targeted at the bank with the latter's commission taken into account in the agreed subscription price, or (ii) (as in the present case) by issuing shares on the market, with a bank guaranteeing to acquire the shares in case they are not all sold or subscribed. The former of those situations will not be subject to VAT, since it will be outside the scope of the Sixth VAT Directive.³⁵ Treating these two situations differently would be contrary to the principle of fiscal neutrality, which the Sixth VAT Directive aims to preserve. Therefore, this is a further reason as to why the underwriting guarantee services should be held to be exempt under Article 13B(d)(5) of the Sixth VAT Directive.

58. SEB submitted that the present case is analogous to the sale of put options on the secondary market. In my view, however, that is not the case since Article 3(1) of Regulation 1777/2005³⁶ provides that

‘(t)he sale of an option, where such a sale is a transaction within the scope of point (5) of Article 13(B)(d) of Directive 77/388/EEC, shall be a supply of services within the meaning of Article 6(1) of that Directive. That supply of services shall be distinct from the underlying operations to which the services relate.’

Hence, the exemption of underwriting guarantee services cannot be based on their analogy with put options on shares because the sale of put options are within the scope of the Sixth VAT Directive, whereas sales of shares are not.

59. As a result, the provision of an underwriting guarantee amounts to a transaction in shares and is therefore exempt from VAT pursuant to Article 13B(d)(5) of the Sixth VAT Directive.

34 — See Annex I, paragraph 41 of Directive 2006/49, cited in footnote 5.

35 — Case C-465/03 *Kretztechnik* [2005] ECR I-4357. As Ireland correctly pointed out, many if not most of the transactions specified in Article 13B of the Sixth VAT Directive occur beyond the scope of that directive, since they do not fulfil the requirements of Article 2(1) of the Sixth VAT Directive. They are therefore unaffected by being specified in Article 13B of the Sixth VAT Directive.

36 — Council Regulation (EC) No 1777/2005 of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax (OJ 2005 L 288, p. 1). This regulation is of course not applicable *ratione temporis* in this case.

IV — Conclusion

60. On the basis of these reasons I propose to the Court to answer as follows:

The exemption provided for in Article 13B(d)(5) 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 to be interpreted as including underwriting guarantee services which involve a credit institution providing, for consideration, a guarantee to a company about to issue shares, where under that guarantee the credit institution undertakes to acquire any shares which are not subscribed within the period for share subscription.