OPINION OF ADVOCATE GENERAL MISCHO

delivered on 3 October 2002 [1]

1. Although most unusual for a new system of tax, when the Community system of value added tax (hereinafter 'VAT') was introduced, it succeeded in securing a large degree of support.

2. This support can no doubt be ascribed in part to the manifest shortcomings of most of the outdated fiscal systems which it replaced.

3. Its fundamental justification, however, is to be found in the advantages inherent in VAT and especially in the neutrality which is of its essence. VAT is structured in such a way that liability for the tax falls on the end customer and is the same, however complicated the route taken by the goods or services in question before they reach him.

4. This result is achieved by bringing all transactions within the scope of the tax, while at the same time incorporating a mechanism for deduction, whereby a taxable person is required to pay to the fiscal authorities only the difference between the amount of tax he himself has paid to his suppliers and the amount of tax paid to him by his customers when making payment of sums invoiced.

5. However, this pleasant harmony may be broken if the principle of general application of the tax is departed from, whether in the area of defining those who are taxable persons or in that of setting out those transactions which are taxable.

6. The risk of distortion is material when there is a break, irrespective of its circumstances, in the chain which, in linking taxation and deductibility, leads to the end customer.

7. A trader who is not a taxable person or who undertakes an exempt transaction cannot deduct VAT because he does not receive any. Save only where he carries on business in a sector operating wholly outside the VAT system, both as regards purchases as well as sales, the carrying on

1 — Original language: French.

of his activities will mean that when he purchases goods or services from third parties he will have to pay VAT without being able to recover it.

8. To mention these difficulties is not, however, to dismiss exceptions to the general scope of the tax under the guise of a form of purism which cannot replace the role of the political authorities in structuring the taxation system.

9. Specific transactions may be exempted from VAT and certain categories of persons may be declared not to be taxable in order to address perfectly understandable concerns, particularly where these relate to the end cost payable by customers, for example in the field of medical and hospital services.

10. However understandable and justifiable they may be, it is not surprising that the exemptions specified by the Community legislature in the Sixth Council Directive 77/388/EEC of 17 May 1997 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [2] (hereinafter the 'Sixth Directive') have none the less been subject to challenge. This applies particularly to the question of their application, as they may affect different operators in different ways, some being able to benefit fully from them, and others, for various reasons, being unable to do so to the same extent.

11. This is precisely the situation that has arisen in the case relating to the exemptions specified in Article 13A(1)(f) and 13B(a) of the Sixth Directive brought by Assurandør-Societetet (Association of Insurance Companies), acting on behalf of Taksatorringen (hereinafter 'Taksatorringen'), before the Østre Landsret (Eastern Regional Court) (Denmark), against Skattenministeriet (The Ministry of Fiscal Affairs).

12. Taksatorringen is an association established by small and medium-sized insurance companies authorised to underwrite motor-vehicle insurance policies in Denmark. The association has approximately 35 members.

13. The purpose of the association is to assess damage caused to motor vehicles in Denmark on behalf of its member companies, its members being required to allow Taksatorringen to assess damage to motor vehicles insured with them throughout Denmark.

2 — OJ 1977 L 145, p. 1.

14. The expenses involved in Taksatorringen's activity are apportioned among its members in such a way that an individual member's payment for services provided by the association corresponds exactly to that member's share of the joint expenses.

15. Members may terminate their membership of Taksatorringen by giving six months' notice.

16. Where a policy holder's vehicle has been damaged and is to be repaired at the expense of a company affiliated to Taksatorringen, the policy holder draws up a damage declaration which, along with the damaged vehicle, is brought to a car-repair workshop of the policy holder's own choice. The workshop examines the damaged vehicle and, on conclusion of the examination, requests that the vehicle be inspected by an assessor (hereinafter 'the expert') from one of Taksatorringen's local assessment centres.

17. The expert estimates the damage to the vehicle after consultation with the workshop. He prepares a detailed assessment report which contains a description of the work and information on spare parts, wages and paintwork, together with the total expenses involved in repairing the damage. This must be repaired in compliance with the expert's report. Should the workshop become aware, while carrying out the repair work, of discrepancies between the information contained in the expert's report and the actual damage, the expert must be contacted so that possible amendments to the prepared assessment report can be discussed.

18. If the expenses involved in repairing the damage to the vehicle are below DKK 20 000, the insurance company pays the amount calculated in the expert's report directly to the workshop immediately after the date on which the repair work is completed. The expert's report functions as an invoice for the work in question. Should the costs involved in repairing the damage exceed DKK 20 000, the workshop draws up an invoice, to be approved by the expert, and the invoice is then sent to the insurance company, which arranges payment to the workshop.

19. In the case of a 'total write-off', that is to say, damage in respect of which the repair costs exceed 75% of the commercial value of the vehicle, the expert agrees on cash compensation with the policy holder corresponding to the vehicle's replacement value. The expert prepares a compensation report, on the basis of which the insurance company arranges payment of the agreed compensation to the policy holder. The expert then invites tenders for the vehicle wreck and arranges for its disposal. The expert sends the proceeds to the insurance company, and the case can then be concluded for Taksatorringen's purposes.

20. When assessing damage caused to vehicles that have been in an accident, experts employed by Taksatorringen use a computer-based system which, by agree-

ment with the car repair trade, covers all insurance companies in Denmark that underwrite car insurance policies.

21. The system is adapted from an international system, owned by a Swiss company which grants licences to use it. Rights of use in Denmark are held by Forsikring & Pension, which is a sector-based association representing insurance companies operating within the area of damage insurance. There is nothing to prevent an insurance company which is a member of Forsikring & Pension from engaging an independent subcontractor to provide assessment services and from authorising that subcontractor to use the system for that purpose in return for payment of a fee.

22. In 1992, Taksatorringen was initially authorised by the tax authorities to carry on its activities without being obliged to register for VAT purposes. This authorisation was subsequently withdrawn in 1993.

23. Taksatorringen thereupon reapplied for VAT exemption, basing its application on Paragraph 13(1).20 of the national law on VAT, which implements the Sixth Directive. This provides that there is to be a VAT exemption for:

'services supplied by independent groups of persons who carry on activities which are exempt from or not subject to value added tax, for the purpose of providing their members with the services directly required for the exercise of their activity. This is subject to the condition that the payment made by individual members for these services corresponds exactly to each member's share of the joint expenses and that the exemption from tax liability cannot give rise to distortions of competition.'

24. As this application was unsuccessful, Taksatorringen brought proceedings before the Østre Landsret. As that court took the view that an interpretation of the Sixth Directive was required in order to answer the matter, it made use of the procedure under Article 234 EC to refer the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of 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, and in particular the provision in Article 13B(a) thereof, be interpreted as meaning that assessment services which an undertaking provides for its members are to be regarded as being covered by the term "insurance transactions", within the meaning of that provision, or by the term "related services performed by insurance brokers and insurance agents"?

(2) Must Article 13A(1)(f) of the Sixth VAT Directive be interpreted as meaning that exemption from VAT must be granted for services of the type which an undertaking — which otherwise meets the conditions set out in that provision for VAT exemption — provides for its members, in the case where it cannot be demonstrated that the exemption will produce actual or imminent distortion of competition but where there is merely a possibility that this might happen?

(3) Does the issue of how remote the possibility of a distortion of competition may be assumed to be, or whether the possibility seems unrealistic, have any bearing on the answer to Question 2?

(4) Would it be incompatible with Article 13A(1)(f) of the Sixth VAT Directive to proceed on the basis that under national law it is possible to make a tax exemption that is notified pursuant to that provision limited in time in cases where there is doubt as to whether the exemption might at a later stage distort competition?

(5) Does the fact that assessment services are, so far as the largest insurance companies are concerned, provided by assessors employed by those insurance companies themselves and are thus exempt from VAT have any bearing on the answers to Questions 1 and 2?'

25. The reference was received at the Court Registry on 10 January 2001 and was allocated case number C-8/01. Written observations were lodged by the two parties to the main action, and by the United Kingdom Government and the Commission.

26. Before addressing these questions, reference should be made to the provisions of the Sixth Directive, to which the questions put by the national court refer.

27. Article 13A(1)(f) of the Sixth Directive provides as follows:

'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 such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(f) services supplied by independent groups of persons whose activities are exempt from or are not subject to value added tax, for the purpose of rendering their members the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to produce distortion of competition.'

28. Article 13B(a) of the Sixth Directive 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'.

The first question

29. The first question referred by the national court in effect comprises two questions, as it asks the Court to consider Taksatorringen's activities in relation to two concepts appearing in Article 13B(a) of the Sixth Directive, namely those of 'insurance transactions' and 'related services performed by insurance brokers and insurance agents'.

30. I shall start by attempting to define the concept of insurance transactions, and note immediately that, as was pointed out by the Court in the *CPP* case,[3] which Taksatorringen cites and which also related to the exemption afforded to insurance transactions, the Sixth Directive does not define it in any way.

31. In its judgment in the *CPP* case, the Court held that 'the essentials of an insurance transaction are, as generally understood, 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' (paragraph 17).

32. Taksatorringen claims that it follows from this that the concept of an insurance transaction is not restricted to the covering of a risk, but includes the payment of compensation to an insured party if the risk materialises. It argues that an assessment of

3 — Case C-349/96 [1999] ECR I-973.

the damage suffered by an insured party, without which compensation cannot be paid, cannot be separated from the carrying on of insurance activities and falls to be treated as an insurance transaction.

33. At the very least, Taksatorringen's activities should be considered to be services ancillary to the covering of a risk. As such, and as the Court held at paragraph 30 of the *CPP* judgment, and confirmed in its judgment in *Commission* v *France*,[4] they should be subject to the same fiscal regime as that which applies to the covering of a risk, in other words, they should benefit from the exemption set out in Article 13B(a) of the Sixth Directive.

34. Taksatorringen further argues in support of its position that the logic underlying the exemption for insurance transactions extends to providing an exemption for the services which it provides. As the Court held in the *CPP* case, the underlying intent is that the end customer, who already has to bear the cost of the special tax on insurance policies that may be levied by Member States, should not be penalised.

35. Were the services provided by Taksatorringen to be subject to VAT, this would have a cost implication which, in one way or another, would result in the cost of insurance being increased.

36. Taksatorringen relies on the *CPP* judgment for another reason. The Court there observed that 'a taxable person, not being an insurer, who, in the context of a block policy of which he is the holder, procures for his customers, who are the insured, insurance cover from an insurer who assumes the risk covered performs an insurance transaction within the meaning of [Article 13B(a) of the Sixth Directive]' (paragraph 25). It follows that the fact that Taksatorringen is not itself an insurance company does not prevent services provided by it from being exempted.

37. Furthermore, a similar approach was followed in the *SDC* case[5] in relation to the exemptions laid down under points 3 and 5 of Article 13B(d) of the Sixth Directive, namely transactions, including negotiations, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments and transactions in shares.

38. In that case, the Court held that the exemption provided for under these provisions 'is not subject to the condition that the transactions be effected by a certain type of institution, by a certain type of legal person or wholly or partly by certain electronic means or manually' (paragraph 38), and that 'the exemption... is not subject to the condition that the service be provided by an institution which has a legal relationship with the end

4 — Case C-76/99 [2001] ECR I-249, paragraph 27.

5 — Case C-2/95 *SDC* [1997] ECR I-3017.

customer. The fact that a transaction covered by those provisions is effected by a third party but appears to the end customer to be a service provided by the bank does not preclude exemption from the transaction' (paragraph 59).

39. Taksatorringen does not seek to deny the fact that in the later *Skandia* judgment [6] the Court, while basing its analysis on the *CPP* judgment, defined the concept of insurance transaction in a manner that does not support its position.

40. In that judgment, the Court held 'that the identity of the person supplied with the service is relevant for the purposes of the definition of the type of services covered by Article 13B(a) of the Sixth Directive and that an insurance transaction necessarily implies the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance, namely the insured' (paragraph 41). This led it to conclude that 'a commitment assumed by an insurance company to carry out, in return for remuneration at market rates, the business activities of another insurance company, which is its 100% subsidiary and which would continue to conclude insurance contracts in its own name, does not constitute an insurance transaction within the meaning of Article 13B(a) of the Sixth Directive' (paragraph 44).

41. However, Taksatorringen claims that the reasoning underlying this judgment does not apply in the present case, because it does not invoice its services at market rates, but instead recovers its overheads from its member companies, with each of them being charged a contribution based on the average price of providing the services multiplied by the number of times it has called upon Taksatorringen to provide them.

42. This analysis of the case-law is disputed in the other observations submitted to the Court.

43. These are unanimously of the opinion that, as Article 13B(a) of the Sixth Directive represents an exception to the principle that tax is assessed on the provision of services, it should not be broadly construed. The Commission points out in this regard that in the case of *D.* [7] the Court held that the exemption under Article 13A(1)(c) of the Sixth Directive which relates to the provision of medical and paramedical services does not extend to medical services which do not consist in providing medical care

6 — Case C-240/99 *Skandia* [2001] ECR I-1951.

7 — Case C-384/98 *D.* v *W.* [2000] ECR I-6795.

but in establishing the genetic affinity of individuals through biological tests, as their purpose is not to prevent, diagnose or treat a disease and accordingly they do not consist in the provision of care to a person.

44. They all refer to the fact that both the *CPP* and the *Skandia* cases held that the identity of the recipient of a service is of fundamental importance, as is the existence of a legal relationship between the person who provides services under an insurance transaction and the recipient of those services, in this case the insured party. They point out that Taksatorringen not only does not provide cover to insured parties but also does not have any legal relationship with them.

45. In their view, Taksatorringen is merely a provider of services to which insurance companies subcontract the task of assessing damage in respect of which compensation may fall to be paid. While this is an essential part of the underwriting operation, it is none the less distinct from it.

46. Even if the services which Taksatorringen provides were to be considered to be services related to insurance transactions, Taksatorringen would still require to be an insurance broker or agent in order for the exemption to apply. This is also disputed, as will be seen below.

47. The Commission also suggests that, for the purposes of the Sixth Directive, Taksatorringen's activities should be treated as being a supply of valuations of movable tangible property, expressly referred to by Article 9(2)(c) of the Sixth Directive, which determines the place of supply. They should therefore not be confused with the insurance transactions referred to in Article 13B(a) of the Directive.

48. The United Kingdom Government argues that Article 28(3)(b) of the Sixth Directive also makes it clear that the Community legislature sought to distinguish assessment transactions from insurance transactions.

49. That article provided for a transitional exemption, terminated by Eighteenth Council Directive 89/465/EEC of 18 July 1989 on the harmonisation of the laws of the Member States relating to turnover taxes — Abolition of certain derogations provided for in Article 28(3) of the Sixth Directive, 77/388, [8] relating to the 'services of experts in connection with insurance claim assessments'.

8 — OJ 1989 L 226, p. 21.

50. If these transactions were insurance transactions within the meaning of Article 13B(a) of the Sixth Directive, it would not have been necessary to have a special provision exempting them.

51. As to which of the opposing submissions should be preferred, I am of the view that the argument that Article 13B(a) of the Sixth Directive should be interpreted narrowly because it provides for an exception to the general application of VAT to services provided for consideration (see *Skandia*, at paragraph 32) is not conclusive.

52. As Advocate General Fennelly pointed out at paragraph 24 of his Opinion in *CPP*, this rule of interpretation does not mean that an exemption which has been unambiguously laid down must be given a particularly narrow interpretation.

53. On the other hand, I am of the view that the judgments in *CPP* and *Skandia* are conclusive. Although they reached opposite views as to the existence *in concreto* of the right to an exemption sought by the respective applicants before the national courts, they adopt the same reasoning and form a perfectly coherent whole.

54. The concept of an insurance transaction is construed in the same way in both judgments. It requires that there be in place an undertaking given by the party claiming the exemption in favour of the insured.

55. In the *CPP* case, the Court held that 'CPP is the holder of a block insurance policy under which its customers are the insured. It procures for those customers, for payment, in its own name and on its own account... insurance cover by having recourse to an insurer' (paragraph 21).

56. In the *Skandia* case, by contrast, the Court stated that 'Skandia would have no contractual relationship with persons insured with Livbolaget and would assume no liability in respect of the insurance business carried out, since all risks would devolve wholly upon Livbolaget, which would preserve its status of insurer' (paragraph 40).

57. As the Court held, these two radically different legal situations, involving on the one hand a contract between the service provider and the insured party, and on the other a service provider who contracted only with an insurance company, had to be treated differently when it came to defining the scope of an exemption limited to insurance transactions.

58. The first should be considered to be an insurance transaction, as the service provider procures insurance for consumers seeking cover for certain risks. The second cannot be an insurance transaction, because it involves a provider who supplies to an insurer a service which facilitates the carrying out of the latter's activities while remaining entirely outside the actual contract of insurance itself.

59. If one applies this distinction to Taksatorringen, it is clear that its activities bear no resemblance to those of CPP, but are very similar to those of Skandia.

60. It has no legal relationship with persons insured by the companies to which it provides services in order to enable them efficiently to meet the obligations they alone have undertaken in relation to the insured persons who make up their customers.

61. Taksatorringen is merely a subcontractor of the insurance companies which are its members. The subcontracting arrangement does not relate to the essence of an insurance contract, that is to say, the provision of a guarantee against a risk in exchange for payment.

62. Furthermore, Taksatorringen's argument that, unlike Skandia, it does not charge for its services at market rates, is without merit.

63. It is true that this point is referred to in the operative part of the *Skandia* judgment, but that is only because the Court, following its settled practice, intended to provide an interpretation of Community law in the precise factual and legal context of the question referred by the national court for a preliminary ruling.

64. The inclusion of this reference in no way means that the actual way in which Skandia was remunerated for its services had any bearing on the Court's analysis, and indeed there is no stage at which a reading of the judgment would suggest that this was the case.

65. It is also not possible to understand in what way this point could have been of any significance in the context of the implementation of the Community VAT regime, the scope of which extends, subject to certain express exemptions, to the provision of all services for consideration, without drawing any distinction according to the method of calculating the amount invoiced by the provider of the services.

66. The fact that the provider does not make a profit does not mean in any way that the service is not provided for consideration.

67. I am also not persuaded by the support Taksatorringen seeks to draw from the *SDC* judgment.

68. The terms of the *SDC* judgment, which is concerned with establishing the scope of the exemption laid down under Article 13B(d) of the Sixth Directive, admittedly appear less strict than the *CPP* and *Skandia* judgments, which relate to the exemption under Article 13B(a) of the Directive. However, this does not justify calling into question the approach taken by the *CPP* and *Skandia* judgments, as there is no question of following the same reasoning in relation to a provision exempting 'insurance transactions' as in relation to a provision exempting 'transactions concerning transfers', the wording of which itself suggests the possibility of an interpretation allowing an exemption for transactions the only purpose of which is to effect a transfer.

69. Furthermore, in the *SDC* judgment the Court noted that the text of Article 13B(d) of the Sixth Directive was 'sufficiently broad to include services provided by operators other than banks to persons other than their end customers' (paragraph 56).

70. Lastly, the argument that as Taksatorringen provides services ancillary to insurance transactions it should be subject to the same fiscal regime as those transactions also falls to be rejected. Even though the *CPP* judgment held that where ancillary services are provided they should receive the same tax treatment as the principal supply (see paragraph 32), it was envisaging services that were in each case provided to the end customer by the same provider.

71. I would again stress that Taksatorringen does not provide its services to insured parties but to insurance companies. This is quite different from the situation addressed in the *CPP* judgment, and means that its services cannot be considered to be ancillary to the services which those companies provide to the parties whom they insure.

72. It must therefore be held that the case-law developed by the Court in relation to the concept of an insurance transaction within the meaning of Article 13B(a) of the Sixth Directive means that the services provided by Taksatorringen to its members cannot come within the definition of insurance transactions and so be entitled to exemption from VAT. It is unnecessary to rely on the arguments put forward *a contrario* by the United Kingdom Government and the Commission in that regard.

73. These arguments none the less confirm, should it be necessary to do so, that the Sixth Directive distinguishes clearly between transactions involving the assessment of damage and insurance transactions.

74. This leads to the second possibility which the national court had in mind, namely whether, though it does not carry out insurance transactions, Taksatorringen should nevertheless be treated as coming within the category of insurance brokers or insurance agents, whose services are exempted by Article 13B(a) of the Sixth Directive when they relate to insurance transactions.

75. Taksatorringen argues that this is the case. As the Sixth Directive does not provide any definition, it relies instead on 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. [9]

76. Article 2(1) of Directive 77/92 states that:

'This Directive shall apply to the following activities falling within ex ISIC Group 630 in Annex III to the General Programme for the abolition of restrictions on freedom of establishment:

(a) professional activities of persons who, acting with complete freedom as to their choice of undertaking, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carry out work preparatory to the conclusion of contracts of insurance or reinsurance and, where appropriate, assist in the administration and performance of such contracts, in particular in the event of a claim;

(b) professional activities of persons instructed under one or more contracts or empowered to act in the name and on behalf of, or solely on behalf of, one or more insurance undertakings in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding, contracts of insurance, or in assisting in the administration and performance of such contracts, in particular in the event of a claim;

(c) activities of persons other than those referred to in (a) and (b) who, acting on behalf of such persons, among other things carry out introductory work, introduce insurance contracts or collect premiums, provided that no insurance commitments towards or on the part of the public are given as part of these operations.'

9 — OJ 1977 L 26, p. 14.

77. Taksatorringen claims that the services which it provides to insurance companies are precisely those contemplated by Article 2(1)(b) of Directive 77/92 when it refers to assisting in the administration and performance of insurance contracts, in particular in the event of a claim. It follows that Taksatorringen should be treated as an insurance broker or agent for the purposes of both Directive 77/92 and the Sixth Directive. Nothing suggests that it was intended that definitions set out in the former should not apply to the latter.

78. As the definitions of insurance broker and agent are matters of Community law, it is of no relevance that Danish law would not hold Taksatorringen to be an insurance broker or agent.

79. The Danish Government rejects this claim. It argues that the terms of Directive 77/92 in no way affect the requirement that in order to benefit from the exemption set out in Article 13B(a) of the Sixth Directive for services which are not insurance transactions but are none the less related to those transactions, the services must be provided by a party who is an intermediary between the insurance company and the insured.

80. According to the Danish Government, Taksatorringen cannot claim to be a broker within the meaning of Article 2(1)(a) of Directive 77/92, as even though this provision contemplates that a broker will assist in the performance of an insurance contract in the event of a claim, it is of the nature of such an entity that its activities comprise the bringing together of insurance companies and persons seeking insurance. Taksatorringen does not do this in any way. Its task is solely to provide insurance companies with its opinion on the cost of repairing damage suffered by a vehicle.

81. According to the Danish Government, this approach to the nature of a broker's activities may be found both in Commission Recommendation 92/48/EEC of 18 December 1991 on insurance intermediaries, [10] with which the Danish Government complied, and in the proposal for a Directive 2001/C 29 E/10 of the European Parliament and of the Council on insurance mediation presented by the Commission on 20 September 2000, [11] which also makes it clear that the role of an intermediary requires there to be in place an independent legal relationship between the intermediary and persons seeking insurance.

82. This requirement of a legal relationship with the insured party also applies to those activities referred to in Article 2(1)(b) of

10 — OJ 1992 L 19, p. 32.
11 — OJ 2001 C 29 E, p. 245.

Directive 77/92, as the use in that provision of the expressions 'in the name of' and 'on behalf of' means that the intermediary must be authorised to bind the insurance company in arrangements entered into with the insured party. Without this authority, assistance provided in the administration or performance of an insurance contract would simply be provided in the capacity of subcontractor.

83. Lastly, the Danish Government rejects Taksatorringen's argument based on the exemption from VAT that exists in the United Kingdom for assessors giving opinions relating to compensation for damage caused to vehicles on the basis that they are providing services as insurance agents. It points out that it is only when these assessors have been appointed as the insurance company's agents for the purpose of handling claims for compensation that this exemption is available; this is fully compatible with its submissions relating to the concept of an insurance intermediary.

84. The United Kingdom Government puts forward a similar argument. It observes that even if Taksatorringen were to carry on certain of the activities of an insurance broker or agent, that does not mean that it is an insurance broker or agent for the purposes of Directive 77/92 or the Sixth Directive unless at the same time it carries on those activities which distinguish this type of undertaking from other categories, that is to say, the bringing together of insurance companies and persons seeking insurance, and unless it has a direct relationship with persons insured.

85. The Commission also disputes Taksatorringen's claim that it carries on activities which mean that it should be treated as an insurance broker or agent for the purposes of Article 2(1) of Directive 77/92. It points out in addition that Article 13B(a) of the Sixth Directive should be narrowly interpreted, referring to the judgment in *Commission* v *Germany*, [12] in which the Court held that the exemption for public postal services did not apply to services provided to them by other undertakings.

86. I am of the opinion that the weight of these arguments against Taksatorringen's submissions is sufficient to dispose of the matter. Even if Article 13B(a) of the Sixth Directive is not particularly well drafted, in that it distinguishes between insurance brokers and insurance agents, whereas a broker is truly an insurance agent in that his task is to act on behalf of a person seeking insurance in finding an insurance company that will offer cover exactly suited to his needs, it remains clear that this provision applies only to services provided by those professionals who have a relationship with both the insurance company and persons seeking insurance.

12 — Case 107/84 [1985] ECR 2655.

87. Taksatorringen itself does not contend that it has any kind of relationship with insured persons, in other words it does not claim to act as an intermediary.

88. That is why it argues that in order to establish whether its activities may none the less be treated as being those of an insurance broker or insurance agent it is necessary to have regard to Directive 77/92.

89. This point appears reasonable, even though it is not absolutely clear that a directive concerning VAT should necessarily be interpreted in the light of a directive relating to the free movement of persons. However, it is not necessary to reach a view on this matter, as Directive 77/92 provides no support for Taksatorringen's submissions.

90. Admittedly, the activities set out in Article 2(1)(a) of Directive 77/92, which under paragraph 2 of that article correspond to those of an insurance broker, include those of assisting in the administration and performance of insurance contracts, particularly in the event of a claim, but it is stated clearly that this assistance is to be provided 'where appropriate' in conjunction with the activities which are distinctive of the carrying on of the business of an insurance broker, namely the bringing together of insurers and persons seeking insurance and the preparation of insurance contracts.

91. As far as the activities described in Article 2(1)(b) of Directive 77/92 are concerned, which by paragraph 2 of that article correspond to those of an insurance agent, the wording itself of the Community legislation does not refer to assistance given in the administration and performance of insurance contracts, particularly in the event of a claim, as being an ancillary activity, as this form of assistance is prefaced by the conjunction 'or', and thus within the same category as the introduction, proposing and carrying out of insurance contracts. In order for this assistance to be provided by an insurance agent, however, it must be given within the context of a contract or an authority to act and 'in the name and on behalf of, or solely on behalf of, one or more insurance undertakings'. There must therefore be a power to bind the insurance company in relation to an insured person who has submitted a claim. Once again, this requirement is not met by Taksatorringen.

92. My conclusion on the first question referred by the national court is therefore that the assessments carried out by Taksatorringen on behalf of its members cannot be exempted from VAT by virtue of Article 13B(a) of the Sixth Directive.

The second, third and fourth questions

93. This leads to the interpretation to be given to Article 13A(1)(f) of the Sixth Directive, which is the subject of the second, third and fourth questions referred by the Østre Landsret. These may conveniently be examined together.

94. All of the observations submitted to the Court agree that Taksatorringen is an independent group of persons whose activity is exempt from or not subject to VAT, the purpose of which is to render its members the services directly necessary for the exercise of their activity, and that it only claims from its members exact reimbursement of their share of the joint expenses.

95. Furthermore, the national court states that 'the parties are in agreement that, when VAT exemption was refused, there was no actual or imminent possibility that an exemption at that point in time would have produced a distortion of competition'.

96. The issues may therefore be focused on the question of whether the Community legislature had sought to restrict the exemption to groups whose activities not only do not in fact produce distortion of competition, but also whose activities by their nature are *never* likely to produce distortion.

97. The Commission argues forcefully for the latter interpretation. It submits in this regard that:

'An interpretation of the expression "likely to produce" based on the type of activity (that is to say, by asking whether an activity is of a type that does not per se produce distortion of competition) and not on an assessment of circumstances which have the result that, notwithstanding exemption from VAT, there is no actual distortion of competition at the relevant time, better reflects the aims of measures of harmonisation intended to impose a uniform basis of assessment throughout the Member States.'

98. Taksatorringen argues on the other hand that it is never possible to exclude a risk of distortion with total certainty, and that if one were to take into account purely hypothetical possibilities of distortion of competition this would result in Article 13A(1)(f) of the Sixth Directive being stripped of all meaning.

99. However, the Community legislature, it contends, intended to provide for an exemption that would be available to certain groups, and not to create an exemption in the form of a mirage that could never have any practical reality.

100. That is why, in Taksatorringen's view, it is the duty of an authority which proposes to refuse an exemption sought by a group which otherwise meets all the requirements of this provision to establish that there is a real and well-founded probability that the grant of the exemption would distort competition.

101. An analogy may usefully be drawn with competition law, more precisely with Article 81 EC, which prohibits all agreements which may affect trade between Member States and which the Court has consistently interpreted as meaning that, as the judgment in *Ferriere Nord* v *Commission*[13] records, 'in order that an agreement, decision or concerted practice may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as to give rise to the fear that the realisation of a single market between Member States might be impeded (see Case 54/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 170)' (paragraph 20).

102. Lastly, Taksatorringen argues that the existence of a risk of distortion of competition was taken into account in providing an exception to the rules relating to exemption under Article 13A(1)(f) of the Sixth Directive, and that the exception should therefore be narrowly construed.

103. Against this, the Danish Government submits that the interpretation supported by it, according to which there are sufficient grounds for refusing the exemption if there is a possible risk that independent third parties would fail to enter the market for the provision of the relevant services, not only reflects the literal and usual meaning of the text, but is also necessary to achieve the purpose of allowing collaboration between undertakings providing exempt services without preventing third parties from entering the market for services subcontracted by those undertakings.

104. The Danish Government does not deny that its interpretation would mean that exemption under Article 13A(1)(f) of the Sixth Directive would be limited in its

13 — Case C-219/95 P [1997] ECR I-4411.

scope, but submits that this does not deprive the provision of all meaning. It would remain applicable, for example, where the existence of exclusive rights in itself resulted in access to the market being closed.

105. Lastly, it argues that it would be wrong to require national authorities, which do not have the means at their disposal, to undertake complex assessments in order to establish the precise degree of likelihood of distortion of competition arising.

106. As well as the argument already mentioned, the Commission submits that the use of the term 'likely' means that distortions of a purely potential kind are intended to be covered, that as an exemption is involved the circumstances in which it is to be granted should be narrowly construed, that the background to the provision confirms that the insertion subsequent to the initial proposal of a condition requiring the absence of any distortion of competition was intended to restrict the circumstances in which an exemption should be permitted, that the closing of the market to independent operators risks being to the detriment of customers and, lastly, that the need for a strict interpretation is supported by the purpose of the Sixth Directive, which is to establish a uniform basis of assessment, in particular with a view to the recovery of resources belonging to the Community, and to put the Member States on an equal footing in relation to such recovery.

107. As regards the last of these arguments, I would, however, allow myself to point out that the realisation of the purpose of establishing a uniform basis of assessment for VAT is not affected by whether one adopts a strict or a narrow interpretation of the provision in question. As far as this object is concerned, the only thing that counts is that the provision is applied in a uniform manner throughout the Member States.

108. Nor is the argument relating to the background to the provision very convincing. The Commission states that it had proposed that the exemption under Article 13A(1)(f) of the Sixth Directive should read as follows:

'services supplied to their members by independent groups of persons *carrying on medical or paramedical activities*, necessary for the exercise of their exempted activities'. [14]

109. The Commission explains that the text adopted differs from that set out above in two ways.

14 — Author's emphasis.

110. First, its scope was widened, as it is not restricted to independent groups carrying on medical or paramedical activities.

111. Secondly, the scope of the provision was reduced, as the statement that exemption should not be granted where it was 'likely to produce distortion of competition' was added.

112. But when it comes to providing an example of a situation where the exemption might legitimately apply, the Commission could only suggest 'the purchase of a scanner for medical purposes'. In my view, it is not wholly out of the question that a doctor practising independently could purchase a scanner and thereby in fact compete with a scanner bought jointly by several hospitals because the waiting lists for access to the scanner belonging to the group of hospitals was too long.

113. It is therefore difficult to identify, in the abstract, 'cases where it is clear that an exemption would not give rise to any distortion of competition, whether actual or potential'. [15]

15 — Commission's wording.

114. As regards the interests of consumers, I would point out that the legislature wished to act in such a way that insurance contracts would not be unduly costly. With this in mind, it exempted not only 'insurance transactions' but also services provided by brokers and agents, whose intervention is after all not essential. There would be an immediate benefit to consumers if this approach were applied to the assessment of damage.

115. On the other hand, if the Commission's submissions were to be followed, the benefits of freedom of competition for consumers would not become a reality where, as in the present case, no independent undertaking had effectively established itself in the market, nor had it shown any intention of establishing itself, and where it was doubtful whether such an undertaking, were it to exist, could provide the same service at a lower cost, so as to be in a position to exercise an influence on prices charged by the group. It may be assumed that if small and medium-sized undertakings have grouped together, this is precisely in order to be able to take advantage of assessments carried out at a lower cost than if they had been required to use the services of independent assessors (or to employ their own assessors).

116. Far from benefiting consumers, the result of taxing the group would, in such a case, be to penalise them for no purpose.

117. In my opinion, the proper starting point is to consider the reason why the exemption under Article 13A(1)(f) of the Sixth Directive was introduced and the market conditions created by the presence of an entity which provides services to its members while only claiming exact reimbursement of its share of the joint expenses.

118. It appears that the exemption was introduced in order to avoid a situation where the cost of providing services which the Community legislature had intended to exempt for legitimate and diverse reasons was none the less burdened with a charge to VAT because in order to provide them the operator, probably because the size of its undertaking required it so to do, found it necessary to enter into arrangements with other organisations making available the same services by means of a jointly owned entity set up to undertake certain activities essential to the provision of the service.

119. It was thought that the fiscal treatment of a service made available to a provider in such a group should, provided certain conditions were met, be the same as that of a transaction carried out using internal resources.

120. From one point of view, and however paradoxical this may appear, the purpose of this exemption is to unify conditions of competition in a market covered simultaneously by large undertakings, capable of offering their services through the use of their internal resources alone, and other, smaller, undertakings, obliged to call upon external assistance in order to offer the same services.

121. There are two fundamental requirements that must be met in order to qualify for an exemption. First, the independent external service provider must consist only of operators carrying out an activity which is exempt from, or not subject to, value added tax. Secondly, it is essential that the group does not exist for purposes of gain, in the sense that it only charges its members for expenses incurred by it in order to meet their requirements, and makes no profit whatsoever out of doing so.

122. This means that the group must be entirely transparent and that, from an economic point of view, it must not have the characteristics of an independent operator seeking to create a customer base in order to generate profits.

123. The provisions relating to the absence of distortion of competition appear to me to have been added only in order to avoid a situation arising in which the arrangements intended to benefit groups, which aim to create a level playing field as far as conditions of competition among operators providing exempted services are concerned, do not create distortion at another level,

namely that of the market for services which these providers themselves require.

124. In other words, a remedy was provided against certain inequalities in the area of competition that might arise by reason of undertakings being of different sizes, while at the same time care was taken to ensure that this did not give rise to symptoms whose result might be that the remedy was worse than the disease.

125. If one turns to consider the market for services necessary for the carrying on of the exempt activities, it must be said that it is a thoroughly unusual one.

126. The buyers in this market do not include the biggest consumers, namely large companies which make use of their own internal resources. The sellers are operators, namely the groups referred to in Article 13A(1)(f) of the Sixth Directive, which are not allowed to make a profit of any kind, and in relation to which it may be assumed that those who control them do so in such a way as to ensure that they carry on business at the lowest possible cost.

127. In order to achieve their aim, and as their structure reflects, these groups are intended to have a captive customer base, namely their members.

128. Plainly, this is a most unusual market in the context of an ideal conceptualisation of the notion of competition. If one accepts a situation in which certain operators, namely groups, carry on business without any view of gain, what is the place of an independent operator seeking to generate profits?

129. As mentioned above, such an operator can hope to enter the market and to remain there only if he is able to offer services at a lower price than groups that are prohibited from making a profit.

130. Admittedly, the possibility cannot be entirely excluded that these groups might operate in a cumbersome and inefficient manner and provide their services at a high price, albeit invoiced at cost-price and even though their overheads are spread over a large number of transactions. What the legislature intended to avoid, in my opinion, was a situation in which such groups would nevertheless be able to exclude all competition by reason of the exemption from VAT set out in Article 13A(1)(f) of the Sixth Directive.

131. But if, independently of all questions of taxation or exemption, these groups are assured of retaining their members' customer base because they carry out their operations efficiently, it could not be suggested that it is the exemption from which they benefit that closes the market to independent operators.

132. In my view, it is in this way that the condition requiring the absence of a risk of distortion of competition laid down under Article 13A(1)(f) of the Sixth Directive should be understood. I suggest that this analysis reflects, *mutatis mutandis*, the provisions of Article 81 EC, and to which Taksatorringen rightly refers.

133. Exemption should not be refused because of a hypothetical possibility that there may be a situation in which, by exempting a group while at the same time requiring an independent operator to pay tax, distortion of competition would be likely to arise.

134. The proper approach is to consider, on the basis of the actual circumstances of the case, whether an exemption given to one party and the imposition of liability to tax on another is the *determining cause* of independent operators being excluded from the market.

135. If this is the case, exemption must be refused, as it has, of itself, produced a distortion of competition. If this is not the case, there is no reason to refuse it, as in reality it does not modify the market conditions.

136. In light of this conclusion, the other arguments of the Danish Government and the Commission have little weight, and some are even untenable. There is thus no reason why exemption should be refused because an assessment of the risk of distortion would impose a heavy burden on the authorities, a heavy burden which it would be easier to discharge by allowing them to invoke any risks, however hypothetical, of distortion. If the Commission can carry out such assessments when considering the application of Articles 81 EC and 82 EC, there is no obvious reason why national authorities should not be able to undertake the same type of assessments.

137. Nor is it clear why, on the pretext that exemptions should be strictly interpreted, limitations on the exemptions should, conversely, be particularly widely construed. This loses sight of the point that the legislature created an exemption because it considered it appropriate to do so, while at the same time taking care to ensure that its purpose would not be distorted. This does not mean that it should be strictly construed.

138. Given the *conclusion* thus reached in relation to the *second question*, namely that exemption should not be refused unless it appears with at least a strong degree of probability that the exemption would, of

itself, exclude independent operators from carrying on business on the market in which the group is operating, it is unnecessary to answer the national court's *third question* separately.

139. As regards the national court's *fourth question*, the answer to it is now clear. If national legislation permits the granting of an exemption that is limited in time, there is no reason to suppose that the Sixth Directive prevents such a facility being made use of. The effectiveness of a group which can, at a given time, exclude potential competitors for reasons that have nothing to do with their being treated differently for fiscal purposes may very well be reduced over time, with the result that the group enjoys a benefit from a situation which is entirely due to an exemption granted to it. Such an exemption would then be the sole cause of distortion of competition, to which it would then be necessary to put an end.

140. Given that it is in principle easier to reconsider periodically whether an exemption granted for a limited period should be renewed than to revoke a decision to exempt that is not accompanied by a temporal limitation, in the absence of any prohibition in the Directive against this method of proceeding, I see nothing to prevent the grant of an exemption that is limited as to time.

141. My opinion on the *second, third and fourth questions* is therefore that the exemption under Article 13A(1)(f) of the Sixth Directive should not be refused on the grounds that it might produce distortion of competition unless it appears with at least a high degree of probability that the granting of an exemption would of itself exclude independent operators from carrying on business in the market in which the group is operating. The exemption may be granted on a merely temporary basis.

The fifth question

142. It remains to consider the fifth question, in which the Østre Landsret asks whether the fact that the largest insurance companies make use of assessors employed by them and do not have to account for VAT on the services provided by them internally has any bearing in the case in question.

143. Subject to what has been stated above in relation to the second question, namely the interpretation to be given to Article 13A(1)(f) of the Sixth Directive, this question should be answered in the negative. In reply to a similar question asked in the *SDC* case, the Court held that the difference between operators which effect transactions with their own resources

using their own staff and those which purchase their services from another economic operator 'is one of liability to tax and not one of exemption under points 3 and 5 of Article 13B(d) of the Sixth Directive, which is quite neutral since it arises from the actual nature of the transactions' (paragraph 28 of the *SDC* judgment, cited above).

144. The Court thus adopted the reasoning of Advocate General Ruiz-Jarabo Colomer, who explained in the clearest possible way in his Opinion that:

'[I]t is impossible to accept the plaintiff's argument as to the alleged tax discrimination between banking undertakings which have their own data-handling resources and the others which are obliged to engage the services of a third person for such purposes.... that is the logical consequence resulting from the tax structure specific to VAT.

The principle of fiscal neutrality, which is at the basis of VAT, is not affected by the exercise of that option. In fact, the chargeable event for VAT, as affecting supply of services, is that there should be two independent taxable persons, in a legal relationship, one of whom performs an action on behalf of another.

So, paid employees who, under the direction of their employer and remunerated by him, perform their services for the company which engages them are not taxable persons. In the performance of such services there is no chargeable event subject to VAT; strictly speaking that is a phenomenon of non-liability, [16] resulting *a sensu contrario* from the positive configuration of the chargeable event for VAT and even from the very nature of that tax.

Business policy decisions may lead an undertaking to opt to carry out certain tasks with its own resources using its paid staff. In such a case, there is no chargeable event subject to VAT. It may, on the other hand, choose to contract with third persons, legally distinct from the undertaking, for the supply of its services; in that case, the transaction is subject to VAT' (points 55 to 58).

16 — It is not, therefore, a mere exemption. Properly speaking, there is a tax exemption only when there is an event previously chargeable, that is, subject to tax. The concept of exemption presupposes an initial obligation to pay tax for which the legislature grants, for various reasons, a dispensation from paying. It depends therefore on there being an express reference in the law to an exemption from the duty to pay the tax. Before examining whether a given transaction meets the requirements for benefiting from exemption, it is necessary to ascertain that it falls within the field of application of the tax.

Conclusion

145. In view of all the foregoing considerations, I propose that the Court of Justice should reply as follows to the questions referred to it by the Østre Landsret:

— The provisions of 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, and in particular Article 13B(a) thereof, should be interpreted as meaning that assessments carried out by an undertaking on behalf of its members are not insurance transactions within the meaning of that provision and are also not related services performed by insurance brokers and insurance agents.

— Article 13A(1)(f) of Sixth Directive 77/388 should be interpreted as meaning that exemption from value added tax under that provision should not be refused for services provided by independent groups of persons whose activities are exempt from or are not subject to value added tax for the purpose of rendering their members the services directly necessary for the exercise of their activity, where these groups merely claim from their members exact reimbursement of their share of the joint expenses, on the grounds that the exemption might produce distortion of competition, unless it appears with

at least a high degree of probability that it would of itself exclude independent operators from carrying on business in the market in which the group is operating. The exemption may be granted on a merely temporary basis.

— The fact that the largest insurance companies carry out transactions using their own employees which other smaller undertakings carry out through groups which they have established for that purpose, and are, unlike the latter undertakings, thus exempt from value added tax on these transactions, does not have any bearing on the answers to Questions 1 and 2.