# OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 7 February 2002 [1]

## I — Introduction

1. The Tribunale amministrativo regionale per la Toscana (Regional Administrative Court, Tuscany) asks the Court for clarification of the term 'investment service' as defined in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field. [2] By its questions, the national court seeks to ascertain whether a national provision which is not fully consistent with the definition in the directive is permitted under Community law.

## II — Legal framework

### A — *Community legislation*

2. According to the third recital in the preamble, the approach adopted in the directive is to effect only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems, making possible the grant of a single authorisation valid throughout the Community and the application of the principle of home Member State supervision.

3. Under Article 14(1) of the directive, any investment firm recognised in one Member State is entitled to provide investment services within the territories of all the Member States either by the establishment of a branch or under the freedom to provide services.

4. Article 1(2) of the directive defines 'investment firm' for the purposes of the directive as any legal person the regular occupation or business of which is the provision of investment services for third parties on a professional basis.

5. In accordance with Article 2(1), the directive is to apply to all investment firms. Only a few provisions of the directive apply to credit institutions the authorisation of

1 — Original language: Dutch.
2 — OJ 1993 L 141, p. 27.

which, under Directives 77/780/EEC and 89/646/EEC, covers one or more of the investment services listed in Section A of the Annex to the directive.

6. The eighth recital in the preamble to the directive provides *inter alia* that an investment firm may, if it deems it necessary, retain tied agents to receive and transmit orders for its account and under its full and unconditional responsibility. According to that recital, in those circumstances, such agents' business must be regarded as that of the firm. [3]

7. The term 'investment service' is defined in Article 1(1) of the directive as 'any of the services listed in Section A of the Annex relating to any of the instruments listed in Section B of the Annex that are provided for a third party'.

8. Section A of the Annex to the directive is entitled 'Services'. In particular, that is taken to mean:

'...

3. Managing portfolios of investments in accordance with mandates given by investors on a discriminatory, client-by-client basis where such portfolios include one or more of the instruments listed in Section B.'

9. Section B of the Annex to the directive contains a list of the 'financial instruments' in question and mentions '[t]ransferable securities' at Point 1(a).

B — National legislation

10. Legislative Decree No 415/96 of 23 July 1996 (hereinafter also 'the decree'), [4] which contains a set of rules governing investment firms and services, was adopted to implement the directive in

3 — This recital is reflected in the final subparagraph of Article 1(2) of the operative part of the directive. The scope of that provision is limited to the activities referred to in Point 1(a) of Section A of the Annex.

4 — GURI No 186 of 9 August 1996, supplement No 133, p. 3.

Italy. Article 1(3)(d) lists under 'investment services' and related activities *inter alia* 'managing investment portfolios on an individual basis on behalf of third parties'. [5]

11. Article 2(1) of the decree allows stock-broking firms and banks to engage on a professional basis, in accordance with the provisions of the decree, in the provision of any of the abovementioned investment services which are offered to the public.

12. Under Article 4(1) of the decree, the purpose of the supervision exercised by the Commissione nazionale per le società e la borsa (National Companies and Stock Exchange Commission, 'Consob') and the Banca d'Italia is to ensure the transparency and lawfulness of the conduct, and the sound and prudent management, of the persons supervised. That supervision is intended to guarantee the protection of investors, stability, competition and the proper functioning of the financial system.

13. Article 17(2) of the decree provides that, in performing investment services, investment firms and banks may, subject to prior written consent ('previo consenso scritto'), act in their own name and on behalf of their clients.

14. Under Article 18(1) of the decree, contracts for the services covered by the decree are to be drawn up in writing and the client is to be provided with a copy thereof.

15. Article 20 contains rules on managing investment portfolios. Article 20(1)(a) of the decree provides that such a management contract must be drawn up in writing.

16. Under Article 22(1) of the decree, 'out-of-office canvassing' ('offerta fuori sede') means the promotion and sale to the public of financial instruments and investment services away from the firm's premises.

17. In Article 23, the decree contains a set of special rules for financial promoters ('promotori finanziari'). A financial promoter is defined in Article 23(2) as a natural person who, acting as an employee, agent or authorised representative, engages in the abovementioned out-of-office activities on a professional basis.

5 — For the sake of completeness, the referring court notes that the same provision was incorporated (as Article 1(5)(d)) in Legislative Decree No 58 of 24 February 1998, which consolidates all provisions in the field of financial intermediation but which, *ratione temporis*, is not applicable to the present case.

## III — Facts, procedure and questions referred for a preliminary ruling

18. Mr Testa and Mr Lazzeri are financial promoters who, under an agency agreement, act on behalf of Banca Fideuram SpA, which offers its investment services both on and away from its premises. They undertook switch transactions on behalf of clients who were investors, making switches from one sub-fund to another within the same investment trust.

19. By two decisions of 3 June 1998, Consob removed Mr Testa from the central register of financial promoters and suspended Mr Lazzeri from it for four months. Consob found that the two men had undertaken a large number of identical switch transactions on behalf of a considerable proportion of clients. The management activity in question was said to be characterised by movements from one sub-fund to another within the investment trust, occurring at short intervals, for a large number of clients, and the financial promoters were alleged to have done this with the aim of generating commission for those operations.

20. Both were alleged to have contravened a 1991 law which reserves asset management to persons expressly authorised for that purpose and, in so far as the offences were committed after 1 September 1996, Article 2(1) of Legislative Decree No 415/96. Even though the financial promoters had prior consent from the clients concerned, they were guilty, according to Consob, in view of the manner in which they acted (large number of contemporaneous transactions between sub-funds within the same investment trust, circular course of those transactions), of 'covert management' or 'management with prior consent' of securities. Under the Italian legislation concerned, that form of management is reserved to specific persons, in this case stockbrokers, who must be duly authorised by the national supervisory authorities.

21. Mr Testa and Mr Lazzeri appealed against those Consob decisions before the Tribunale amministrativo regionale per la Toscana. The appellants argued that all the switch operations had been authorised by the clients by virtue of their autonomous decisions and that there was no question of delegation of management to the financial promoter. The view taken by Consob, that this was management with prior consent, which financial promoters are not allowed to undertake, but is reserved to stockbrokers, was contrary to *inter alia* the directive. According to Mr Testa and Mr Lazzeri, by attributing a wider meaning to the term 'management' than it is given in the directive, Consob deemed 'management with prior consent' to be a reserved sphere of activity which is closed to financial promoters.

22. Mr Testa and Mr Lazzeri are supported in the main proceedings by Banca Fideuram as intervener. According to Banca Fideuram, it follows from the definition under Community law that a mandate conferring discretion must be given. That is an essential element in the definition. All cases in which clients who are investors themselves make disposals within their own financial sphere are therefore excluded from that definition. Consob thereby unlawfully extended the scope of the Community legislation by imposing new prohibitions in relation to activities of financial promoters and thus also in relation to those of stockbrokers who rely on the activities of the former in order to be able to offer their services.

23. Consob argued in the main proceedings that, although the national legislation does not expressly incorporate those elements from the directive, the legislature was entitled to adopt a broader definition of matters covered than the Community legislation because the directive in question aims to achieve essential, and not full, harmonisation.

24. According to the referring court, in view of the clear difference between the definitions in Community law and national law, it appears relevant to the issue to examine whether and, if so, to what extent the Italian Republic was entitled to depart from the directive, in particular as regards the requirement of a mandate. By an order registered at the Court on 26 September 2000, the Tribunale amministrativo regionale per la Toscana therefore referred the following questions for a preliminary ruling:

'1. Must Point 3 of Section A of the Annex to Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, which contains the definition "[m]anaging portfolios of investments in accordance with mandates given by investors on a discriminatory, client-by-client basis" be interpreted as meaning that that Community provision is infringed by a national provision which departs from it and which, in this case, does not require that the management of portfolios of investments should be on "a discriminatory, client-by-client basis" and "in accordance with mandates given by investors"?

2. Conversely, does a national provision which, in implementing a "harmonising" directive, omits the abovementioned requirements, comply with Community law?'

25. Written and oral observations have been submitted by Mr Testa, Mr Lazzeri

and Banca Fideuram SpA (hereinafter 'Testa and others'), the Government of the Italian Republic and Consob, as well as the European Commission.

## IV — Assessment

26. By its questions referred for a preliminary ruling, the Tribunale amministrativo regionale per la Toscana seeks to ascertain whether a national provision may depart from a Community definition given by the directive. However, the fundamental issue before the referring court is primarily one of national law and of fact and, in my opinion, to a lesser extent one of Community law.

### A — *Admissibility*

27. The Italian Government and Consob have argued that the reference for a preliminary ruling is inadmissible since the directive is not applicable in this case. The activities of financial promoters are expressly excluded from the scope of the directive and are not covered by the harmonisation pursued by it. Article 2 of the directive provides that the directive is to apply exclusively to investment firms. Moreover, the relevant recital in the preamble states that 'the door-to-door selling of transferable securities should not be covered by this Directive and the regulation thereof should remain a matter for national provisions'.[6] The questions submitted therefore have no connection with an actual dispute or with the subject-matter of the main proceedings.

28. I share the view of Testa and others and the Commission that the reference is most certainly admissible. According to settled case-law, it is for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.[7]

29. That need has been adequately explained by the national court. Consob expressly linked the penalties imposed on Mr Testa and Mr Lazzeri to 'managing investment portfolios' within the meaning of Article 1(3)(d) of Legislative Decree No 415/96, which implemented the directive in Italy. By widening the term 'management' to 'management with prior consent', Consob attributed a wider meaning to it than the directive allows. The national

6 — Eighth recital.

7 — See the recent judgment in Case C-472/99 *Clean Car Autoservice* [2001] ECR I-9687, paragraph 13.

court assumes that there is a difference between the definitions of 'managing' investment portfolios in the directive and in the national legislation, and in particular as regards the requirement of a mandate.

30. The national court needs an answer from the Court in order to establish whether the activities of Mr Testa and Mr Lazzeri at issue are to be regarded as 'managing portfolios of investments' within the meaning of the directive. In particular, it may need a ruling on the scope of the requirement of the discretion conferred on the investment firm by the investing client under a mandate. If a mandate conferring discretion is always a prerequisite for management, as argued by Testa and others in the main proceedings, there are clearly no grounds for the penalty imposed by Consob for 'covert management'.

31. The referring court is therefore requesting the Court to give an interpretation of a substantive provision of the directive, so that it can indicate the limits of the powers which individuals have under national law.

32. It is established that the financial activities at issue of Banca Fideuram come within the scope of the directive. The documents before the Court show that Mr Testa and Mr Lazzeri act in the name of Banca Fideuram. In the eighth recital in the preamble, the directive refers to 'tied agents' who receive and transmit orders for the account and under the full and unconditional responsibility of the investment firm. The activities of those agents must be regarded as activities of the investment firm.

33. However, the questions submitted by the national court are not aimed at defining the powers of the financial promoters themselves in the light of the directive. They do not relate to the personal scope of the directive and in particular do not concern the interpretation of the aforementioned passage in the preamble regarding the activities of tied agents of an investment firm. The interpretation of 'managing portfolios of investments' will enable the referring court to assess the activities of persons who are described in Italian law as financial promoters. Viewed thus, the question whether financial promoters fall within the scope of the directive, or whether, in the present case, Mr Testa and Mr Lazzeri must be regarded as 'tied agents', is irrelevant. Those are matter on which the national court will have to decide.

34. In my opinion, the questions submitted therefore have a connection with the subject-matter of the main proceedings, as described by the national court.[8] They must therefore be answered by the Court.

8 — See *Clean Car Autoservice*, cited above, paragraph 14.

B — *Substance*

35. Both the referring court's questions seek to ascertain from the Court whether Point 3 of Section A of the Annex to the directive, in which the term 'investment service' is defined as '[m]anaging portfolios of investments in accordance with mandates given by investors on a discriminatory, client-by-client basis...', must be interpreted as meaning that that provision precludes a national provision which does not require that the management of investment portfolios take place 'on a discriminatory, client-by-client basis' and 'in accordance with mandates given by investors'.

36. In order to provide the national court with a helpful answer, I must first examine whether the operations carried out by Mr Testa and Mr Lazzeri, assuming that they were entirely for the account of Banca Fideuram, are permitted by the directive.

37. It is clear from the replies to a written question from the Court on this point that Banca Fideuram falls within the scope of the directive and is entitled, as a bank, to offer the services listed in Annex A to the directive.

38. The activities complained of consist of a large number of identical switch transactions carried out on behalf of a substantial proportion of investing clients and characterised by movements at short intervals from one sub-fund to another within the same investment trust. It is assumed that the clients gave the investment firm prior consent for the transactions in question, although the significance of such prior consent must also be examined. [9]

39. In the present case, the operations in question must be examined in the light of the definition of the service of 'managing portfolios of investments' within the meaning of Point 3 of Section A of the Annex to the directive. The definition of that service includes three cumulative conditions by which the service is distinguished from the other services listed in Section A, such as the straightforward reception and transmission, on behalf of investors, of orders in relation to securities and the execution of such orders, within the meaning of Point 1.

40. First, there must be 'mandates given by investors'. The Commission points out that

9 — The order for reference shows that in the main proceedings handwritten (but identical) declarations by clients were produced, in which those clients confirm that they never intended to relinquish their own direct and immediate power to take decisions regarding their investments by entrusting such transactions to the discretion of a financial promoter. However, those declarations were regarded by Consob as merely a cover, because it did not consider it credible that so many clients could independently make the same choice on the same day (namely, to withdraw their investments one sub-fund and reinvest them in another). On the contrary, Consob believed that those transactions were the result of management by the financial promoter and of the latter's decisions which were communicated to the client before being executed. The value of those clients' declarations is a question of fact which must be assessed by the national court.

this condition assumes a qualifying and enduring relationship between the investor and the firm, in the context of which the firm is entrusted with taking investment decisions on behalf of the investor.

41. Second, portfolios must include 'one or more of the instruments listed in Section B'. The list in Section B includes *inter alia* the instrument of 'transferable securities'. The instruments belong to the investors and are managed by the investment firm in the interests and on behalf of the investors. In this context, Article 10 of the directive prohibits an investment firm from using investors' securities for its own account, except with the investors' express consent.

42. Finally, the investment portfolio must be managed 'on a discriminatory, client-by-client basis'. In its observations, the Commission states that this requirement implies, on the one hand, that the investor is able to take an active part in the *strategic* decision-making process connected with the investment (type of market, geographical placement, degree of risk, profit prospects, spread of instruments, etc.). On the other hand, according to the Commission, the investment firm retains discretion as regards the *tactical* choices in the execution of the investment decisions.

43. It is beyond dispute that the transactions undertaken in the name of the Banca Fideuram related to transferable securities. Since the transactions took place within different sub-funds of one investment trust, it may be assumed that the investor himself made the strategic investment choice. If the manager — in this case Banca Fideuram or its tied agents — holds a general authorisation from clients, no further prior consent is required for the specific individual transactions, assuming that those transactions are covered by the authorisation.

44. It may therefore be assumed that the operations undertaken by Mr Testa and Mr Lazzeri remain within the scope of the powers which the directive grants to investment firms which offer an 'investment service' as provided for in Point 3 of Section A of the Annex. Moreover, the directive does not preclude the provision of such a service away from the offices of an investment institution.

45. The question then arises as to the significance of national legislation which lays down requirements which depart from those of the directive in respect of the provision of an 'investment service' by the investment firm or by 'tied agents' acting in its name.

46. To answer this question, the position and meaning of the term 'investment service' must be examined in the light of the objectives of the directive.

47. The directive seeks to secure the mutual recognition of authorisations and of prudential supervision systems in the field of investment services in transferable securities. Firms which provide the investment services covered by the directive must hold an authorisation issued by the home Member State. Authorisation is granted if the conditions laid down in or pursuant to the directive, which are intended to protect investors and the stability of the financial system, are fulfilled. An authorisation granted in the home Member State is valid throughout the Community. The investment firm concerned is thus able to exercise its right of establishment or its freedom to provide services.

48. The Community definition of the term 'investment service' in Article 1 therefore has a direct effect on the scope *ratione materiae* of the directive. The definition is fundamental in the light of the 'essential harmonisation necessary and sufficient' of national laws, which the directive seeks to achieve. Consequently, as Testa and others and the Commission have, in my view, rightly argued, Member States cannot in principle depart from the definitions without prejudicing the content and objective of harmonisation.

49. Each of the three elements of the definition of the term 'investment service' as referred to in Point 3 of Section A of the Annex is essential in itself and forms a constituent part of the description of that Community concept which, as such, must be interpreted uniformly throughout the Community. In that respect, the directive does not allow the national legislatures any margin of discretion as regards content. Any different interpretation would be liable to jeopardise the harmonisation envisaged by the directive. It could in fact result in dissimilarity in the types of firm entitled to apply for Community authorisation in each Member State.

50. Any departure from that definition in national legislation would have been conceivable only if the directive itself had authorised it. However, the wording of the directive does not expressly provide for any departure from the fundamental definition of 'investment service' as set out in Point 3 of Section A of the Annex. Moreover, the directive also does not authorise Member States to apply a broader definition of 'investment service' in order to achieve a higher level of protection for investors.

51. In my opinion, the directive thus precludes a Member State's legislation which, in defining the term 'investment service', does not require that the management of portfolios of investments should be on a discriminatory, client-by-client basis and in accordance with mandates given by investors.

52. The referring court clearly assumes that the Italian legislation is not in accordance

with the definition contained in the directive. Nevertheless, the Italian Government and Consob, as well as the Commission, have argued that the applicable Italian legislation does indeed comply with the definition in Point 3 of Section A of the Annex to the directive. According to the Court's settled case-law, the transposition of a directive into national law does not necessarily have to be verbatim, but a general legal context may suffice, depending on the content of the directive in question, provided that it guarantees the full application of the directive in a sufficiently clear and precise manner. [10]

53. Those parties argue that the Italian definition contained in Article 1(3)(d) of Legislative Decree No 415/96, 'managing investment portfolios on an individual basis on behalf of third parties', must be read in the context of the decree. In spite of the words 'on an individual basis', the need for a mandate to be given by the client, with discretion for the investment firm, is present by implication in the Italian definition. The very existence of a contract giving a proper mandate is in likely to ensure that a qualifying and enduring relationship is established between the client and the investment firm under the best possible conditions and in such a way that the requirements and limits to which the management of the portfolio must be subject are clearly indicated. Moreover, the necessary presence of such a mandate is to be inferred from the requirements laid down in Article 17(2) (in providing investment services, firms may act on behalf of clients, provided that written consent exists), Article 18(1) (all contracts concluded under the legislative decree are to be drawn up in writing) and Article 20 (contracts for the management of investment portfolios must be drawn up in writing) of Legislative Decree No 415/96. The decree also has an annex in which the Annex to the directive is faithfully reproduced, including the definition of managing portfolios of investments.

54. The Commission and Testa and others also draw attention to the duty under Community law for the national court to interpret national law in conformity with the directive.

55. On that point, I think it sufficient to observe that, in the context of these proceedings for a preliminary ruling, the Court can leave the question regarding the precise and full transposition of the directive into Italian law to the national court. It is for that court to establish whether the activities undertaken by Mr Testa and Mr Lazzeri involve a form of investment portfolio management which, by reason of its characteristics, is consistent with the objectives of Community law and, therefore, with those of the Italian legislation.

10 — Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 35.

## V — Conclusion

56. In the light of the foregoing, I propose that the Court answer the questions referred by the Tribunale amministrativo regionale per la Toscana as follows:

The definition of 'managing portfolios of investments' within the meaning of Point 3 of Section A of the Annex to Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field must be interpreted as meaning that that provision precludes legislation of a Member State which does not require that the management of portfolios of investments should be on a discriminatory, client-by-client basis and in accordance with mandates given by investors.