OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 11 June 1998 *

1. 'Special difficulties arise, in the mystic twilight of VAT legislation, where there is what in modern jargon is called "a package" of services, some of which may, and others of which may not, be within a VAT exemption'. [1] The Court is asked in this case to interpret for the first time the scope of the 'insurance' exemption in Community VAT law, as well as to elucidate the correct approach to the VAT characterisation of supplies of services comprising several elements, which may individually merit different VAT treatment. [2] Essentially, the national court seeks particular guidance as to whether the various services involved in the supply of a credit-card protection plan may benefit wholly or in part from the insurance exemption.

I — The legal context

A — *Community provisions*

2. Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' shall be liable to VAT. Although the Sixth Directive does not define the notion of the 'supply of services', Article 6 provides that it 'shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5'. In the present case, although some of the elements of the 'package' of services at issue constitute goods, it has nevertheless not been contended that any component of the various services supplied may be regarded as constituting a 'supply of goods' for VAT purposes. [3] Accordingly, it is appropriate to treat the case as concerning only the supply of services.

3. Article 13 of the Sixth Directive provides for various exemptions from VAT liability under Article 2. Whereas Article 13A deals with 'exemptions for certain activities in the public interest', Article 13B concerns a number of other miscellaneous exemptions, among which is the 'insurance' exemption under sub-

* Original language: English.

1 — See the partially dissenting judgment, in the main proceedings, of Sir John Megaw in the Court of Appeal; [1994] STC 199, at p. 209.

2 — See Article 13B 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; OJ 1977 L 145, p. 1 (hereinafter 'the Sixth Directive').

3 — The goods at issue comprise adhesive stickers, pre-printed luggage labels and key tabs as well as a medical card for entering personal medical information. They are supplied in respect of Items 4, 7, 10 and 14, respectively, of the package; see further paragraph 12 below.

paragraph (a). Article 13B(a) is worded 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 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;

... .'

Furthermore, the terms of Article 6(4), according to which, 'where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself', are also relevant, particularly in respect of the third question.

4. Since the Sixth Directive contains no definition of the notion of 'insurance', and as Article 61(2) of the Treaty mentions 'insurance services' only in connection with liberalisation of capital movements, reference has been made to some of the relevant Community insurance directives. The First Council Directive 73/239/EEC of 24 July 1973 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 insurance (hereinafter the '1973 Directive') was intended to facilitate the provision of 'direct insurance' by insurance companies outside their home countries. [4] Although 'insurance' was not there defined, [5] Article 1 provided that the Directive would apply to 'the classes of insurance defined in the Annex ...'. Point A of the Annex, which deals with the 'classification of risks according to classes of insurance', includes the following heading:

'16. *Miscellaneous financial loss*

— other financial loss (non-trading)

— other forms of financial loss.'

4 — OJ 1973 L 228, p. 3; see Article 1.

5 — Articles 2 to 4 described the types of insurance not covered, none of which is relevant in the present case.

The 1973 Directive was amended by Council Directive 84/641/EEC of 10 December 1984 (hereinafter 'the 1984 Directive'). [6] Article 1 of the 1984 Directive replaced the original Article 1 of the 1973 Directive, and now reads:

'1. This Directive concerns the taking-up and pursuit of the self-employed activity of direct insurance, including the provision of assistance referred to in paragraph 2, carried on by undertakings which are established in the territory of a Member State or which wish to become established there.

2. The assistance activity shall be the assistance provided for persons who get into difficulties while travelling, while away from home or while away from their permanent residence. It shall consist in undertaking, against the prior payment of a premium, to make aid immediately available to the beneficiary under an assistance contract where that person is in difficulties following the occurrence of a chance event, in the cases and under the conditions set out in the contract.

The aid may consist in the provision of benefits in cash or in kind. The provision of benefits in kind may also be effected by means of the staff and equipment of the person providing them.

The assistance activity does not cover servicing, maintenance, after-sales service or the mere indication or provision of aid as an intermediary.

3. The classification by classes of the activity referred to in this Article appears in the Annex.'

Article 14 of the 1984 Directive provides for the addition to point A of the Annex of the following new heading of insurance class:

'18. *Assistance*

Assistance for persons who get into difficulties while travelling, while away from home or while away from their permanent residence.'

5. More relevant to the second part of the exemption regarding 'related services' contained in Article 13B(a) of the Sixth Directive is 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

6 — 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 insurance; OJ 1984 L 339, p. 21.

activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities (hereinafter 'the 1977 Directive'). [7] Article 2(1) of the 1977 Directive refers, at paragraph (a), to 'professional activities of persons who ... 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, in the administration and performance of such contracts, in particular in the event of a claim', while paragraph (b) refers to 'professional activities of persons instructed ... to act in the name and on behalf of, or solely on behalf of, one or more 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'. Article 2(2) states that the Directive 'shall apply in particular to activities customarily described in the [United Kingdom] as ... [those of an] insurance broker ... agent or sub-agent'.

B — *National provisions*

6. At the material time for the purposes of the main proceedings, the relevant legislation applicable in the United Kingdom was the Value Added Tax Act 1983 (hereinafter 'the VAT Act 1983'). Section 17 and Schedule 6, Group 2 of the VAT Act 1983 exempted, *inter alia*, from VAT:

'1. The provision of insurance and reinsurance by persons permitted, in accordance with Section 2 of the Insurance Companies Act 1982, to carry on insurance business.

2. ...

3. The making of arrangements for the provision of any insurance or reinsurance in Items 1 and 2.

4. The handling of insurance claims by insurance brokers, insurance agents and persons permitted to carry on insurance business as described in Item 1.' [8]

7. The 1973 Directive was transposed into the law of the United Kingdom by the Insurance Companies Act 1982 (hereinafter 'the

7 — OJ 1977 L 26, p. 14.

8 — Item 4 is not raised in the present case.

IC Act 1982'). [9] Heading 16 of point A of the Annex to the 1973 Directive was implemented by class 16 of Part I of Schedule 2 of the IC Act 1982. The 1984 Directive was transposed by the Insurance Companies (Assistance) Regulations, 1987, whose regulation 2(b) and schedule added a new class to Part I of Schedule 2 of the IC Act 1982 which transposes into United Kingdom law heading 18 added to the 1973 Directive by the 1984 Directive. [10]

8. Under Section 132 of the Financial Services Act 1986, insured persons may claim enforcement of insurance contracts entered into with persons who are not authorised to carry on insurance business. Thus, although only persons authorised under section 2 of the IC Act 1982 may lawfully provide insurance services, the absence of such an authorisation does not affect the enforceability of a contract of insurance underwritten by an unauthorised person, at least as against the insurer.

II — The factual context

A — *The card protection plan*

9. The appellant in the main proceedings, Card Protection Plan Ltd (hereinafter 'CPP'), provides a service, of the same name (hereinafter 'the Plan'), to holders of credit cards that offers protection against financial loss or inconvenience resulting from the loss or theft of their cards, as well as certain other items such as car keys, passports, or insurance documents. The service comprises, in particular, indemnification against financial loss arising from the unauthorised use of credit cards, the execution by CPP of the necessary notification formalities in the event of loss or theft of a card, and a number of forms of assistance, for instance medical, designed to operate where the loss or theft occurs away from the cardholder's home. For the element of indemnification against financial loss, CPP obtains block cover, via a broker (RK Harrison Insurance Brokers Ltd), from an insurance company. [11] At the material time, the insurer was the Continental Assurance Company of London plc (hereinafter 'Continental'). [12] Although express reference is made to CPP in the policy, it seems to be generally accepted, at least in the observations submitted to this Court, that it is its customers who are the named 'assureds' under the policy. When a customer purchases CPP's services, his name is added to the schedule of 'assureds'. CPP pays insurance premiums to Continental at the beginning of the policy year: necessary adjustments arising from cardholders entering and leaving the Plan during the course of the year are made at the end of that year.

10. In the event of a claim, the customer cardholder is required to give notice of the

9 — 1982 c 50.

10 — S. I. 1987 No 2130.

11 — It appears from the correspondence between CPP's VAT advisers and the Commissioners of Customs & Excise, which is annexed to CPP's written observations, that CPP has sought — presumably without success — to become a permitted provider of insurance under the IC Act 1982.

12 — The Continental policy referred to in the main proceedings ran from 1 September 1989 to 31 August 1990.

loss to CPP within 24 hours of discovering it. CPP handles claims for less than UKL 5 000 by virtue of an authority granted in the insurance policy. Continental either deals with larger claims itself or delegates authority on an ad hoc basis to CPP. If claims occur, it is Continental which provides the underlying finance, although CPP sends the cheque to the customer. [13]

11. The insurance cover provided in the policy of Continental is described in the schedule to that policy. It may be summarised as follows:

(A) An indemnity in respect of fraudulent use of cards (amount insured during the first 24 hours following discovery of the loss or theft UKL 750 for any one claim as agreed by underwriters);

(B) An indemnity in respect of costs of reuniting the cardholder with lost luggage, lost bags or property when tagged with labels issued by CPP (amount insured UKL 25 for any one claim);

(C) An indemnity in respect of the costs incurred in assisting police and/or making insurance claims on items of valuable property and/or important documents whose serial numbers have been registered with CPP (sum insured UKL 25 for any one claim);

(D) Provision of underwriters' representatives to provide 24-hour telephone advice on access to medical facilities including the arrangement of medical appointments overseas;

(E) An indemnity against any emergency cash advance following loss of cards limited to UKL 500 for any one claim repayable within 14 days;

(F) An indemnity in respect of the provision of an airline ticket from anywhere in the world to the cardholder's home following loss of cards (indemnity up to UKL 1 500 for any one claim repayable within 14 days).

12. In an advertising brochure CPP mentions, under 15 headings, the forms of service

13 — The Court has not been informed whether such cheques are drawn on CPP or Continental.

which potential customers may expect under the Plan:

'— Item 1: the maintenance by CPP of a computerised record of customers' credit cards;

— Items 2 and 3: analogous to point (A) of the policy;

— Item 4: in the event of loss, a 24-hour telephone line is available to receive loss notifications and to allow appropriate action to be taken to pass on the information to credit card issuers and also the supply of adhesive stickers bearing the 24-hour phone line number;

— Item 5: in the event of loss, assistance is provided to obtain replacement credit cards;

— Item 6: in the event of a change of address, assistance is provided in notifying card companies;

— Item 7: supply of pre-printed key tabs enabling them to be refound in the event of loss;

— Item 8: analogous to point (C) of the policy;

— Item 9: analogous to point (E) of the policy;

— Item 10: analogous to point (B) of the policy;

— Item 11: analogous to point (D) of the policy;

— Item 12: analogous to point (F) of the policy;

— Item 13: supply of an annual printout for the customer to check;

— Item 14: supply of a medical card for the entry on it of personal medical information;

— Item 15: car hire discounts.'

B — *The procedure before the national court*

13. From 1983 to 1990, the Commissioners of Customs & Excise (the relevant United Kingdom VAT authority, hereinafter the 'Commissioners') considered the services supplied by CPP to be exempt. However, the Commissioners altered their assessment by a letter of 23 February 1990 and informed CPP that a specimen supply of its services over a three-year period in consideration of an annual membership fee of UK £16 was subject to VAT at the standard rate. [14] Essentially, the Commissioners' new approach classified the Plan as comprising a 'package of services' concerning the registration of credit cards which services were all taxable, whilst Continental could not be regarded as supplying insurance to CPP's customers since 'there was no privity between it and those customers'.

14. This decision was challenged by CPP before the VAT Tribunal. On 14 December 1990, the VAT Tribunal, London, held that CPP's supply constituted a single supply of a card-registration service which was taxable at the standard rate and that the lack of privity of contract meant that Continental had not provided any insurance to the customer.

15. This decision was appealed to the High Court of England and Wales, Queen's Bench Division, which held (per Popplewell J.), on 1 July 1992, that the VAT Tribunal's finding regarding the supposed lack of privity of contract was incorrect and, in any event, irrelevant, since the policy effected by CPP with Continental operated to confer a direct right of insurance on CPP's customers. The High Court held that, even if the contract of insurance were ineffective, some of CPP's services would constitute 'the making of arrangements for the provision of insurance' within Group 2 of Schedule 6 of the VAT Act 1983. It concluded that two separate services were supplied by CPP: the supply of the exempt service of 'the making of arrangements for the provision of any insurance'; and the supply of taxable 'services of convenience'. It then directed that an enquiry be made as to the appropriate apportionment between exempt and taxable supplies. CPP appealed against the High Court ruling that the supplies at issue were not a single exempt supply of insurance, while the Commissioners cross-appealed contending that there was a single supply of a card-registration service. On 23 November 1993, the Court of Appeal of England and Wales, Civil Division, allowed the Commissioners' cross-appeal and dismissed the appeal. The Court of Appeal held that the Plan was 'a card registration service' and that the insurance elements were merely incidental to the supply of the card-registration service. Consequently, it held that the plan

14 — The membership application in question (of a certain Dr Howell) was made on 25 November 1989. It appears from a later letter of 15 August 1990 that the Commissioners took the view that CPP should have registered for VAT with effect from 1 August 1989.

was taxable at the standard rate. Balcombe L. J., with whom Butler-Sloss L. J. agreed, also expressed the view that Item 1 of Group 2 of Schedule 6 of the VAT Act 1983, in limiting the insurance exemption to authorised insurers, was compatible with Article 13B of the Sixth Directive. [15]

16. CPP sought leave to appeal to the House of Lords principally on the grounds that the Court of Appeal had failed: (i) to apply the correct test for identification of insurance services; (ii) to take into account the entire transaction when classifying the supply made; (iii) to apply the correct test for determining whether the transaction comprised one or more supplies; (iv) to give effect to the 'related services exemption' in Article 13B(a) of the Sixth Directive.

17. The Commissioners, in their response, contended that the correct test to be adopted towards the issue of single/multiple supplies was to determine what was supplied as a matter of fact and then to decide, essentially as a matter of common sense, whether it could appropriately be described as a single or composite supply, and, in the latter case, whether it could still be regarded as constituting a single economic supply. If CPP were to be regarded as having made two supplies (of a card registration service and insurance), they should none the less be regarded as comprising a single economic transaction under which the principal supply was that of a card registration service.

18. Leave to appeal to the House of Lords was granted by the Appeals Committee on 27 June 1994. The Judicial Committee of the House of Lords decided subsequently, by order of 15 October 1996, to make a reference to the Court. The House of Lords has described the essence of CPP's case as being whether its supplies constitute wholly or principally transactions related to insurance transactions for the purposes of Article 13B(a) of the Sixth Directive and whether any component of the Plan, not so classifiable, is not separable because it should be viewed as *de minimis* or ancillary having regard to the Plan as a whole. The following are the questions referred to the Court:

'(1) Having regard to the provisions of the Sixth VAT Directive and in particular to Article 2(1) thereof, what is the proper

15 — Sir John Megaw (see footnote 1 above) considered that CPP became the agent of its customers in arranging that an insurer would become directly liable to them. Although agreeing with Balcombe L. J. that it would be wrong to treat the totality of the Plan as being an arrangement(s) for the supply of insurance services, he thought that the proper approach to classification in cases where both exempt and taxable supplies are involved is to look primarily at the nature of the service supplied. He also expressed the view that 'as a matter of principle it would, at best, be rare' that a package of services need be divided 'where, as here, the payment for the whole of the supplies given in the package is one single individual sum'; [1994] STC 199, at pp. 209-210.

test to be applied in deciding whether a transaction consists for VAT purposes of a single composite supply or of two or more independent supplies?

(2) Does the supply by an undertaking of a service or services of the kind provided by Card Protection Plan (CPP) through the card protection plan operated by them constitute for VAT purposes a single composite supply or two or more independent supplies? Are there any particular features of the present case, such as the payment of a single price by the customer or the involvement of Continental Assurance Company of London plc as well as CPP, that affect the answer to that question?

(3) Do such supply or supplies constitute or include "insurance ... transactions including related services performed by insurance ... agents" within the meaning of Article 13B(a) of the Sixth VAT Directive? In particular, for the purpose of answering that question:

(a) does "insurance" within the meaning of Article 13B(a) of the Sixth VAT Directive include the classes of activity, in particular "assistance" activity, listed in the Annex to Council Directive 73/239/EEC (the First Council Directive on Non-Life Insurance), as amended by Council Directive 84/641/EEC?

(b) do the "related services of ... insurance agents" in Article 13B(a) of the Sixth VAT Directive constitute or include the activities referred to in Article 2 of Council Directive 77/92/EEC?

(4) Is it compatible with Article 13(B)(a) of the Sixth VAT Directive for a Member State to restrict the scope of the exemption for "insurance ... transactions" to supplies made by persons permitted to carry on insurance business under the law of that Member State?'

III — Observations submitted to the Court

19. Written and oral observations were submitted by CPP, the United Kingdom of Great Britain and Northern Ireland and the Commission; the Federal Republic of Germany submitted only written observations.

IV — Analysis

20. All of the questions referred by the House of Lords are linked in one way or another to the issue of whether the services provided by CPP are exempt from VAT by reason of their insurance content. The third and fourth questions raise specific issues concerning the interpretation of the insurance exemption. However, the first two questions regarding the treatment of those services as 'single composite supplies or two or more independent supplies' arise only because of the presumed presence of an exempt element.

21. Accordingly, I think it is important to consider, in the first instance, the implications of the fact that the Plan may comprise elements of insurance to such an extent that exemption from VAT is validly claimed in whole or in part.

A — *Question 3*

22. As the Court has emphasised, for example, in *Commission* v *Netherlands*, '... the Sixth Directive is characterised by its general scope and by the fact that all exemptions must be expressly provided for and precisely defined'. [16] In principle VAT should be imposed on all supplies of services for consideration by a taxable person and, as the Court has also repeatedly stated, the 'exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person'. [17]

23. The consequences of this principle of interpretation will depend on the words used to give effect to the exemption in question and, in particular, any conditions attached. For instance, Article 13A(1)(g) obliges Member States to exempt supplies of services 'clearly linked to welfare and social security work ... performed by bodies governed by public law or by other organisations recognised as charitable ...'. [18] The Court recalled in *Bulthuis-Griffioen* that the exemptions 'have their own independent meaning in Community law' and the same 'must also be true of the specific conditions laid down for these exemptions to apply and in particular of those concerning the status or identity of the economic agent performing the services covered by the exemption'. [19] Consequently, the Court held that since the exemption referred expressly to the concept of a 'body' or 'organi-

16 — Case 235/85 [1987] ECR 1471, paragraph 19.

17 — Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737. This principle has subsequently been consistently affirmed by the Court: see, most recently, Case C-346/95 *Blasi* v *Finanzamt München I* [1998] ECR I-481, at paragraph 18.

18 — Case C-453/93 *Bulthuis-Griffioen* v *Inspecteur der Omzetbelasting* [1995] ECR I-2341, paragraphs 21 and 22 (hereinafter '*Bulthuis-Griffioen*').

19 — Ibid., paragraph 18.

sation', it 'did not avail a trader who was a natural person'. [20] For similar reasons, the exemption expressed in Article 4(5) of the Sixth Directive for activities of, *inter alia*, bodies governed by public law applies only 'in respect of those [activities] which form part of their specific duties as public authorities', so that it did not apply to the official services of notaries. [21]

24. This does not mean, on the other hand, that a particularly narrow interpretation will be given to the terms of an exemption which have been unambiguously laid down. Thus, in *Muys' en De Winter's Bouw- en Aannemingsbedrijf Staatssecretaris van Financiën* and *SDC* v *Skatteministeriet*, where the Court considered the scope of some of the exemptions contained in Article 13B(d), [22] which, broadly speaking, concerns credit transactions, it held that, notwithstanding the strict-interpretation principle, '... in the absence of any specification of the identity of the lender or the borrower, the expression "the granting and negotiation of credit" is in principle sufficiently broad to include credit granted by a supplier of goods in the form of deferral of payment'. [23] It, thus, rejected in *Muys* the Commission's argument that the provision was limited to loans and credits granted by financial institutions. Similarly, in *SDC*, the Court emphasised the importance of 'the type of transaction effected' (paragraph 31) and, referring to *Muys*, rejected the contention that the benefit of the exemptions contained in points 3 and 5 of Article 13B(d) was limited to banks or financial institutions or otherwise dependent upon the specific legal form of the service supplier (paragraphs 34 to 35). However, as Advocate General Cosmas has recently stated, the Court has 'declined to apply an extensive interpretation of the exemptions permitted under the Directive where there are no interpretative elements to allow extension of the exemption permitted under the relevant provisions and in particular Article 13'. [24]

25. These principles are, in my view, relevant to the solution of most of the problems raised in this case. For example, they are relevant to the identity of the service-provider who enjoys the benefit of the insurance exemption, but also, more generally, to the questions raised as to the treatment of the Plan as one single service or as several. However, the first task is to interpret Article 13B(a) and, in particular, the term 'insurance and reinsurance transactions'.

(a) The Community notion of insurance

26. Although CPP and the Commission are correct in submitting that it is necessary to apply a uniform Community-law meaning to the notion of insurance for the purposes of

20 — See paragraphs 20 and 21.

21 — Case 235/85 *Commission* v *Netherlands*, loc. cit., paragraph 21.

22 — See, respectively, Case C-281/91 [1993] ECR I-5405 (hereinafter '*Muys*') and Case C-2/95 [1997] ECR I-3017 (hereinafter '*SDC*').

23 — *Muys*, paragraph 13.

24 — Case C-149/97 *The Institute of the Motor Industry* v *Commissioners of Customs & Excise*, Opinion of 14 May 1998, paragraph 44.

applying the exemption granted by Article 13B(a) of the Sixth Directive, the Community legislature has not chosen to provide any definition of the terms 'insurance ... transactions' or 'related services performed by insurance ... agents'. The legislative history, to which Germany refers in its observations, provides little assistance. [25] It has been stated 'that taxation of the insurance sector would have been particularly complex', since, though the 'pure insurance element of insurance premiums' could legitimately be taxed, 'it would be inappropriate to treat gross insurance premiums as normal taxable turnover since the insurer's net receipt is the premium less the actuarial cost of providing the insurance cover to the insured person'. [26] The same authors point out that insurance lends itself more to special taxes and that Article 33 of the Sixth Directive expressly permits Member States to introduce taxes other than turnover taxes on insurance contracts. Advocate General Jacobs has similarly suggested that 'insurance' is 'structurally unsuited' to subjection to turnover taxes. [27]

27. In order to interpret a provision of Community law, it is well settled that 'it is necessary to consider not only its wording but also, where appropriate, the context in which it occurs and the objects of the rules of which it is part'. [28] Since, as I have already pointed out, an exemption must be given an independent meaning in Community law, it follows that, in the absence of a definition, regard should be had, as the Commission proposes and the House of Lords implies, to general Community legislation concerning insurance. This conclusion applies without difficulty to the 1973 and 1977 Directives, which formed part of Community law at the time of the adoption of the Sixth Directive. The 1984 Directive may, however, have a significant bearing on the assessment of the plan. As I have pointed out in paragraph 4 above, that Directive amended Article 1 of the 1973 Directive so as to extend the scope of 'the self-employed activity of direct insurance' to include 'assistance activity', as described, which may 'consist of the provision of benefits in cash or in kind'. In my opinion, for the purposes of the exemption for insurance transactions expressed in Article 13B(a) of the Sixth Directive, the term *insurance* should be interpreted conterminously with the scope of the insurance directives for the time being in force. That is consistent with a purposive approach [29] and with the view adopted by the Commission in its Second Report on the application of the common system of value added tax, submitted in accordance with Arti-

25 — The Commission's proposal envisaged, at Article 14B(a) (see OJ 1973 C 80, p. 1), an exemption of 'insurance and reinsurance transactions and services relating thereto supplied by insurance brokers and insurance agents', which is almost identical to the text ultimately adopted.

26 — See Farmer & Lyal, *EC Tax Law* (Oxford, 1994), at pp. 181-182.

27 — Case C-38/93 *Glawe* [1994] ECR I-1679; see paragraph 9 of the Opinion, where he deals principally with taxes on betting and gaming.

28 — Case C-340/94 *De Jaeck* v *Staatssecretaris van Financiën* [1997] ECR I-461, paragraph 17.

29 — 'In interpreting a provision of Community law it is necessary to take account of how the law stands at the date when the provision in question must be applied'; see Case C-35/90 *Commission* v *Spain* [1991] ECR I-5073, paragraph 9.

cle 34 of the Sixth Directive. [30] I also believe that the inclusion of assistance services can be tested by a simple example. Assume a policy directly written by an authorised insurer provides cover against risks of simple direct financial loss but also against events giving rise to the right to assistance services: it would not, I think, be consonant with a 'straightforward application' of the exemption as enjoined by Article 13B or with convenience and simplicity of administration of the tax that exemption be provided for part only of the service. Consequently, I believe that the exemption must be interpreted in the light of all the insurance directives, including that of 1984.

(b) Related services performed by insurance brokers and agents

28. The exemption, as expressed in Article 13B(a), extends to both 'insurance and reinsurance transactions' and to 'related services performed by insurance brokers and insurance agents'. Having regard to the limitation to *insurance* brokers and agents imposed by the latter part of the exemption, I think it will be convenient to address Question 3(b) first before returning to the meaning of 'insurance transactions'.

29. As pointed out in paragraph 6 above, Section 17 and Group 2 of Schedule 6 of the VAT Act 1983 exempt, at Item 3 of the latter, persons who make 'arrangements for the provision of any insurance'. The exemption of such transactions has influenced the approach of some of the national courts which have considered the Plan. [31] The Court has, however, not been asked to consider whether such transactions are covered by the exemption granted in Article 13B(a) of the Sixth Directive by the House of Lords. [32] It is, thus, only necessary to construe the exemption in order to determine whether it would cover services such as those provided by CPP.

30 — COM (88) 799 final of 20 December 1988. Referring to the 'disparities' which had emerged regarding the application of the Sixth Directive to 'tourist assistance services', the Commission noted that, on referral of the matter to the VAT Committee, a 'large majority' felt that the provision of cover in respect of such risks, for instance the reimbursement of medical expenses or of travel expenses of the insured in the event of the death of a member of his family, should, save where supplied by automobile clubs, be regarded as 'insurance services coming under Article 13B(a) ...'; see p. 34.

31 — It would seem, however, that the High Court and the Court of Appeal adopted the view that Item 3 could be regarded as transposing the first part of the Article 13B(a) exemption. Only the High Court expressly addressed the possibility that the second part of the Article 13B(a) exemption might be applicable. Popplewell J. held, notwithstanding that CPP's services were related to insurance and that it might have acted as an agent on behalf of its customers in obtaining insurance, that its activities did not make it an insurance agent. In the Court of Appeal, Balcombe L. J. merely stated that '... if the insurance element were predominant in the package ... the supply would be exempt under item 3 ...'; [1994] STC 199, at p. 208.

32 — In their response before the House of Lords, the Commissioners contended (at point 4.8) that Item 3 exempts 'the making of arrangements for the provision of any insurance' by a person permitted to provide such insurance under section 2 of the IC Act 1982 and covers 'the services of brokers and others who act as intermediaries between the insurer and insured in putting an insurance policy into place'. If it were necessary to express a view on this matter, I would be inclined to regard the service of 'the making of arrangements for the provision of any insurance' as only capable of coming within the second part of Article 13B(a), namely if it is 'performed by insurance brokers and insurance agents'.

30. CPP submits that the notion of 'related services performed by insurance ... agents' must be given a Community-law meaning. In its view, it clearly acted as an insurance agent in connection with the formation of the insurance contract, while, in so far as it carried out claims notification, handling and settlement functions, it may be regarded as having undertaken the provision of 'related services' in an agency capacity. Finally, any other supplies may, according to CPP, be viewed as having been made by it in support of the insurance transaction in its capacity as an intermediary. In its written observations the United Kingdom submitted, in substance, that whether CPP acted as an agent or principal was a matter to be determined by national law. In its oral observations, the United Kingdom contended that the agreement between CPP and its customers provided no support for the view that CPP acted as a broker or agent. In this respect, its counsel stressed that only one single fee was provided to CPP by its customers in respect of the entire Plan. Furthermore, both counsel for the United Kingdom and the agent for the Commission, supported on this point by Germany, contended that the services provided by CPP could not be regarded as constituting a normal or characteristic activity of an insurance agent. The Commission asserted that CPP was not an insurance agent or intermediary 'in the strict sense' but, instead, the holder of a group policy on behalf of its customers.

31. It is clear from the wording of Article 13B(a) of the Sixth Directive that 'related services' are exempt only if provided by insurance agents or brokers. The expression 'related services' is broad enough to include any services that may be regarded as related to the provision of insurance. As it is clear that at least those components of the Plan comprised in the Continental policy constitute insurance, then some, at least, of its non-insurance services may reasonably be regarded as related to insurance. As the Commission correctly pointed out in its written observations, the circumstances of the instant case clearly involve a service of insurance provided by Continental and received by CPP's customers which is neither provided by Continental to CPP nor by CPP to its customers. Since Continental is the insurer and CPP's customers are the 'assureds', CPP would appear to play an intermediary role which is *related*, at least partially, to the provision of insurance. However, the crucial issue raised by the second part of the third question is whether CPP may be regarded, for the purposes of Article 13B, as having acted as an insurance agent or broker.

32. Since there is nothing in either the text of Article 13B or in its legislative history to indicate what particular notion of 'insurance brokers and insurance agents' the Community legislature had in mind when it adopted the Sixth Directive, it is again appropriate to refer to the relevant contemporaneous Community insurance legislation, namely the 1977 Directive. CPP contends in its written obser-

vations that its activities in connection with the provision of the Plan fall, in particular, within Article 2(1)(b) of the 1977 Directive. I do not agree. Although Germany may be correct in submitting that the Community notion of an insurance agent or broker cannot be confined to persons who hold express Member State authorisations to act as such, there is nothing in the 1977 Directive that would support the view that a legal person, like CPP, which, for the purpose of providing a specific package of services to its customers, negotiates through another legal person, who is clearly an insurance broker, to arrange a policy of insurance for the benefit of its customers, should be regarded as an insurance 'agent' or 'broker'. The authors of the Sixth Directive chose to refer separately to 'insurance agents' and 'insurance brokers', rather than to use a more general term such as insurance 'intermediaries'. In my view, they thereby described persons whose named professional activity comprises the bringing together of insurance undertakings and persons seeking insurance as provided by Article 2 of the 1977 Directive. [33] Although those parts of the activities of CPP, in arranging insurance and in settling claims, are akin to the normal activities performed by an insurance agent or broker, an undertaking like CPP cannot, in my opinion, be regarded as such an agent or broker. On the basis of the information contained in the order for reference, I agree with the Commission that its usual business does not seem to be that of an insurance broker or agent in the strict sense. The limitation of the exemption of 'related services' to 'insurance brokers and insurance agents' would be deprived of any meaning if any intermediary whatever which is incidentally involved in arranging insurance *ipso facto* came within the definition.

33. Consequently, the Court should answer the second part of the third question to the effect that the notion of 'related services performed by insurance brokers and insurance agents' does not extend to the incidental activity of arranging insurance as part of the business of providing a credit-card protection plan of the type at issue in the main proceedings. However, it is, of course, ultimately for the national court to determine the precise question whether CPP is an insurance broker or an insurance agent.

(c) The scope of the insurance-transactions exemption

34. It remains then to consider the scope to be given to the expression 'insurance transac-

33 — Quoted at paragraph 5 above. This view is supported by recital 8 in the preamble to the 1977 Directive which refers to the 'activity of agent' as including 'the exercise of a *permanent authority* from one or more insurance undertakings empowering the beneficiary, *in respect of certain or all transactions falling within the normal scope of the business of the undertaking or undertakings concerned*, to enter in the name of such undertaking or undertakings into commitments binding upon it or them ...' (emphasis added).

tions', as distinct from related activities. [34] As already suggested, I believe that it should be interpreted in the light of the 1973 and 1984 Directives, which do not, however, define the nature of insurance. The essentials of an insurance transaction are, as generally understood, that one party, the insurer, undertakes to indemnify another, the insured, against the risk of loss (including liability for losses for which the insured may become liable to a third party) in consideration of the payment of a sum of money called a premium: it is the giving of the indemnity that constitutes the insurance and, thus, the supply of the service. I believe that this definition provides the answer to the essential problem in the present case. The question has to be whether CPP, as a taxable person, supplies insurance services to subscribers to the Plan. The insurance service, as distinct from any 'related services', consists, as the Commission says, in the assumption by the insurer of a risk borne by the insured. In so far as the services provided in the Continental policy comprise insurance, they are not supplied by CPP.

35. CPP, in its written observations, analyses the several elements of the Plan in great detail and says what the customer receives has both the aspect and structure of insurance, but CPP also explicitly accepts that it was not itself 'promising to supply' the insurance cover which was to be supplied by Continental. The United Kingdom emphasises that CPP could not be supplying insurance services because it is not an authorised insurer, which is the issue raised by the fourth question. The Commission is correct, in my view, in stating that the insurance services in question were provided neither by Continental to CPP nor by CPP to its customers.

36. In truth, CPP's involvement in the provision of the Continental insurance services was, as the Commission says, only as intermediary (but not as an 'insurance agent'). It was not the supplier for the purposes of the Sixth Directive. It would not make any sense to construe Article 13B(a) as not exempting the 'related services' provided by an undertaking such as CPP, because it lacked the character of an 'insurance broker' or 'insurance agent', but then to treat it as the principal supplier of the main insurance element when, in respect of that element, its function was only that of intermediary.

37. I would draw support for the view I have just expressed from *Muys* and *SDC*, where the Court was called upon to interpret the

34 — No question has been referred in the present case regarding the notion of 'reinsurance services'.

'credit' and 'credit-transfer transactions' exemptions contained in points 1, 3 and 5 of Article 13B(d) of the Sixth Directive. [35] As in Article 13B(a), there is no reference to the identity of the service-provider in Article 13B(d). In *Muys* and *SDC*, the Court found that the 'credit' exemption was not limited to credit granted by financial institutions but also extended to that granted by a supplier of goods, while the 'credit-transfer transactions' exemption extended to operations carried out by a data-handling centre which were essential for effecting, *inter alia*, monetary transfers and payments. However, unlike the present case, where CPP does not itself provide an insurance service, the undertakings concerned in *Muys* and *SDC* were involved in providing credit or providing services essential for credit-transfer operations. The focus of the Court in *Muys* and *SDC* was, thus, on whether the type of transaction effected was covered by the exemptions at issue. Applying that logic to the present case, whatever CPP has provided through the Plan, it has not provided the insurance that was set out, at the material time, in what was clearly the insurance policy of Continental.

38. For the sake of completeness, I should add that the possible application of Article 6(4) of the Sixth Directive (quoted in paragraph 3 above), to which the Commission referred in its written observations and upon which CPP relied at the hearing, cannot, in my view, affect the above analysis. It is concerned with agency. CPP does not, as envisaged by Article 6(4), in its 'own name but on behalf of' Continental take part in the supply of the insurance. The reverse is actually the case. In this case, the insurance was supplied by Continental in its own name and not that of CPP.

39. Consequently, the first part of the third question should be answered to the effect that the services supplied by the provider of a credit-card protection plan, such as that provided by CPP in the main proceedings, cannot constitute the provision of insurance within the meaning of Article 13B(a) of the Sixth Directive, since the exemption in respect of insurance transactions contained in that provision covers only insurance provided by the person who undertakes the liability of indemnifying the insured in the event of materialisation of an insured risk.

B — *Questions 1 and 2*

40. By the first two questions, which should be taken together, the national court formulates, firstly, a general question concerning

35 — Loc. cit., footnote 22 above.

the identification of a transaction, for VAT purposes, as constituting a single composite supply or two or more independent supplies and, secondly, a very specific question concerning the application of that concept to the instant case.

41. It appears that this issue has been the source of much doubt and even confusion in United Kingdom courts and, hence, counsel for the United Kingdom explained, at the oral hearing, the need for clear guidance on this issue for future cases, regardless of the outcome of the present case.

42. I would immediately make two observations. Firstly, as the Commission says, the VAT legislation contains no provisions concerning the treatment of mixed transactions. The Sixth Directive does not envisage any mechanism for the separation of the elements of a single transaction so as to enable them to receive different VAT treatment. Secondly, the order for reference shows that the issue is raised in the present case only because of the presence of an insurance element, claimed to confer exemption, in whole or in part, on the transaction.

43. I would accordingly reformulate the first and second questions as asking what criteria are to be applied for the purposes of the Sixth Directive when a single transaction comprises the supply of several distinguishable services, one of which is the subject of the exemption of insurance transactions provided by Article 13B(a).

44. CPP argued for an analytical approach in preference to a so-called common-sense approach, which, it submits, would mask proper analysis. The Commission, though emphasising the perspective of the average consumer, is largely in agreement. Each element of the transaction should be ascertained so that, on a comparison, it can be seen whether one element is subordinate to or not dissociable from another. CPP relied, in particular, on the strict interpretation applied by Advocate General Mancini, in *Commission* v *United Kingdom*, [36] to the distinction between supplies of goods and services. In that case the United Kingdom was held to have exceeded the permitted scope of the exemption conferred by Article 13A(1)(c) on medical care services by also exempting related supplies of goods (medicines). CPP does not, thus, agree with the German Government's suggestion that, in cases where factors of equal weight contribute to the attainment of a single economic objective, they should be

36 — Case 353/85 [1988] ECR 817; Opinion at p. 829.

regarded as so interwoven as to recede behind the transaction as a whole.

45. The United Kingdom lays emphasis on common sense, meaning that the character of the whole transaction should be identified, and submits that a supplier who undertakes to perform a particular obligation in consideration of a single price should be regarded as making, at least at first sight, a single supply. [37] Germany, with whose observations on this point counsel for the United Kingdom agreed at the hearing, submits that it flows from Articles 2(1), 5(1) and 6(1) of the Sixth Directive that the supply of what comprises for economic purposes a single service should not be artificially divided up into individual components which are not economically independent. The United Kingdom suggested that consumers of food on board ships such as that at issue in *Faaborg-Gelting Linien* v *Finanzamt Flensburg* do not, for instance, receive the supply of food, a table or cutlery but, instead, the supply of what may best be described as restaurant services. [38] In the United Kingdom's view, a strict approach should be adopted as concerns arguments whose effect would result in splitting up unnaturally a single price among the component elements of a package of services so as to extend what would normally be regarded as the primary scope of a VAT exemption.

46. Several related arguments persuade me that the first two questions in this case should be answered in a way which would undoubtedly favour the treatment of the Plan as a single non-exempt service, although it is ultimately, of course, a matter for the national court to apply the answers to the facts of the case.

47. Firstly, I agree with the emphasis placed by the United Kingdom and Germany on the desirability of treating the transaction as involving a single supply. The Plan is marketed by CPP as a single useful service, though comprising a cluster of different elements. A single price is charged. The price or cost of the individual elements are not readily discernible. The case is different from the purchase in a supermarket of a bundle of individually priced goods, though a single sum is paid at the check-out. [39] Neither the Community nor the Member States have an interest in complicating the administration of the VAT system by artificially splitting the prices of services sold as one.

37 — In this respect the observations of the United Kingdom and Germany are not *ad idem*, since the latter contends, citing *Muys*, loc. cit., that the fact that a recipient has to pay a single price does not justify the presumption of a single supply.

38 — Case C-231/94 [1996] ECR I-2395.

39 — Indeed, modern information technology now installed in many supermarkets permits the customer to see readily how much VAT (and, often, at what rates) has been included in the total charged.

48. It has been generally accepted that the segregation of elements of a single supply would not be warranted if, for example, the exempt service was purely incidental to the main supply. The Commission gave, as an example of an incidental insurance supply, the provision of 'free' travel insurance as a bonus by some credit-card companies; the small annual fee paid for the use of the card could not, in its view, be regarded as including a payment for the insurance component. [40] However, once it is conceded that an ostensibly single transaction may comprise several elements, it will be difficult to draw the line. Accordingly, I would propose an interpretation to the effect that a single supply should be considered to have been given for a single price unless the exempt elements are clearly distinguishable in the price.

49. Apart from a general convenience argument, I would also draw attention to the requirement in the introductory words of Article 13B that Member States lay down conditions 'for the purpose of ensuring the correct and straightforward application of the exemptions ...'. I take the word 'straightforward' to refer to an objective of simplicity of application and administration of the exemption. I do not think that that objective would be served by costly and complex arguments regarding the relative values of different elements of a single service. [41] The final decision in this respect must, however, be made by the national court.

50. Accordingly, if the Plan is to be treated as a single supply, the question of whether it is exempt will need to be addressed. It follows, in my view, from the need for strict interpretation of the insurance exemption that the taxpayer should establish clearly the insurance character of the composite service, in this case the Plan. In my view, the most straightforward approach to this issue is to require that the service supplied be predominantly the supply of insurance services. [42] Since I have already expressed the opinion that insurance services are provided only by the insurer, it is likely in practice that this part of the exemption will enure to the benefit only of insurers or, in effect, their clients. That, however, is in my view fully in keeping with a straightforward interpretation of the

40 — Of course, on the definition of the scope of the insurance exemption that I have proposed above, the credit-card company could only seek to claim the benefit of the insurance exemption if it (or one of the companies in its group) undertook to underwrite the insurance component itself.

41 — The facts of the present case are distinguishable from those in Case 73/85 *Kerrutt* v *Finanzamt Mönchengladbach-Mitte* [1986] ECR 2219, where the Court held that the simplicity of administration objective could not justify grouping together in a single transaction for VAT purposes what are in reality separate taxable transactions; see paragraph 14. Unlike in *Kerrutt*, there is nothing unusual or artificial in this case about the grouping together of the various services included by CPP in the Plan.

42 — The principle of *accessorium sequitur principale* has been applied on several occasions by the Court; see, in particular, Case 126/78 *Nederlandse Spoorwegen* v *Staatssecretaris Van Financiën* [1979] ECR 2041, paragraph 11, and Case 173/88 *Skatteministeriet* v *Henriksen* [1989] ECR 2763, paragraph 14.

exemption. In simple terms, it was not intended to exempt insurance services except when provided by insurers.

51. The second question effectively asks the Court to decide the nature of the Plan. This is, of course, ultimately a question for the national court. It will have become apparent that, in my view, although the Plan constitutes a composite supply in the sense that it comprises several elements, that is not strictly relevant to the resolution of the central issue as to whether the insurance element of the Plan should lead to its exemption in whole or in part from VAT. CPP's function in the supply of the insurance element was as a non-exempt intermediary. [43]

52. Accordingly, I would suggest that the first and second questions be answered together to the effect that a service or services of the kind provided by CPP through the card-protection plan operated by it is (are) exempt from VAT pursuant to Article 13B(a) of the Sixth Directive only if the insurance component of the Plan is supplied by the insurer who undertakes the risk. Furthermore, the entire Plan is exempt from VAT only if insurance constitutes the predominant element in the Plan. If the insurance component is not predominant, it is exempt only if its price is clearly distinguishable in the price of the whole service.

C — *Question 4*

53. In the light of the answers proposed for the first three questions, there does not appear to me to be any need to answer the fourth. The exemption applies, in my view, only to insurance services provided by insurers. No question arises in this case of the unauthorised or unlicensed supply of insurance services. Continental, whose insurance policy is at issue, is clearly accepted as being authorised; CPP is not, but then it is not an insurer. The fourth question is, therefore, purely academic.

43 — The fact that CPP will be liable to pay VAT on supplying the Plan to its customers whilst unable to deduct the cost of the insurance component as a VAT input will not lead to an unfair windfall for the Commissioners, as CPP claims, since the supply of the insurance ostensibly to CPP by Continental will be exempt from VAT and CPP may be able to deduct other inputs incurred in respect of provision of the Plan.

V — Conclusion

54. In the light of the foregoing I recommend that the Court answer the questions referred by the House of Lords as follows:

(1) A service or services of the kind provided by Card Protection Plan ('CPP') through the card-protection plan ('Plan') operated by it is exempt from VAT pursuant to Article 13B(a) 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, only if the insurance component of the Plan is supplied by an insurer who undertakes the risk. Furthermore, the entire Plan is exempt from VAT only if insurance constitutes the predominant element in the Plan. If the insurance component is not predominant, it is exempt only if its price is clearly distinguishable in the price of the whole service;

(2) The services supplied by the provider of a credit-card protection plan, such as that provided by CPP in the main proceedings, cannot constitute the provision of insurance within the meaning of Article 13B(a) of the Sixth Directive since the exemption in respect of insurance transactions contained in that provision covers only insurance provided by the person who undertakes the liability of indemnifying the insured in the event of materialisation of an insured risk. Furthermore, the notion of 'related services performed by insurance brokers and insurance agents' does not extend to the activity of providing a credit-card protection plan of the sort at issue in the main proceedings;

(3) In light of the recommendations contained in points (1) and (2) above, there is no need to answer the fourth question referred in the present case.