Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 8 May 2012 [1]

Case C-44/11

Finanzamt Frankfurt am Main V-Höchst
v
Deutsche Bank AG

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

(VAT — Portfolio management services — Exemption — Principal and ancillary services — Place of supply)

1. Under the VAT Directive, [2] certain financial transactions are exempt from VAT. Where supplier and customer are not established in the same country, the place of supply of banking and financial transactions is that of the customer's business or residence.

2. The German Bundesfinanzhof (Federal Finance Court) wishes to know how those rules apply to a portfolio management service in which, within a chosen strategy, the customer gives the bank a free hand to buy and sell securities in his name and on his behalf, in exchange for a fee calculated as a percentage of the value of the securities. It also seeks guidance on whether the component elements of such services are to be treated independently or together and, in the latter case, which component is to predominate for classification purposes.

European Union ('EU') law

3. In 2008, the tax year in issue in the main proceedings, Article 56(1) of the VAT Directive provided, in so far as is relevant:

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

…

(e) banking, financial and insurance transactions, including reinsurance, with the exception of the hire of safes;

1 — Original language: English.

2 — Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

…'[3]

4. Under Article 135(1)(a) to (g) of the VAT Directive, Member States must exempt a number of activities of a financial nature:

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

(b) the granting and the negotiation of credit and the management of credit by the person granting it;

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

(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

(e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

(f) transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2); [4]

(g) the management of special investment funds [5] as defined by Member States;

…'.

5. Of those provisions, (f) and (g)[6] are relevant to the present case. Further exemptions under Article 135(1) are: (h) face value supplies of postage, fiscal and similar stamps; (i) betting, lotteries and other forms of gambling; (j) supplies of buildings with the land on which they stand; (k) supplies of unbuilt land other than building land; and (l) leasing or letting of immovable property.

6. Article 135(2)(d) excludes the hire of safes from the last-mentioned exemption in Article 135(1)(l). Such transactions are therefore subject to VAT.

7. In February 2008, the Commission submitted to the Council a proposal for the amendment of the VAT Directive, and a proposal for a regulation laying down implementing measures for it, as regards the treatment of insurance and financial services.[7] Those proposals, which define the terms used to designate financial services, continue to be discussed actively within the Council, where agreement has not yet been reached.[8] In presenting them, the Commission stated that the definitions of financial

3 — See, previously, Article 9(2)(e), fifth indent, 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 (OJ 1977 L 145, p. 1; the 'Sixth Directive'); see, now, Article 59(e) of the VAT Directive, which applies only to customers outside the EU.

4 — Article 15(2) refers to certain rights and interests in immovable property.

5 — Several language versions use a word equivalent to 'joint' or 'collective', rather than 'special', and it is clear that the provision concerns only joint funds (see, for example, Case C-169/04 *Abbey National* [2006] ECR I-4027, paragraph 53 et seq.); see further point 15 below.

6 — Previously Article 13B(d)(5) and (6) of the Sixth Directive.

7 — COM(2007) 747 final and COM(2007) 746 final, respectively.

8 — See Interinstitutional File 2007/0267(CNS) on http://register.consilium.europa.eu. The most recent Presidency progress report on the proposals for a Council Directive and Regulation as regards the VAT treatment of insurance and financial services (Council document 18650/11 of 14 December 2011) expresses a degree of satisfaction with progress already made and determination to pursue efforts to reach common agreement.

services were out of date and had led to uneven interpretation and application by Member States. Economic operators and tax authorities were confronted with considerable legal complexity, varying administrative practices and legal uncertainty, leading in turn to increased litigation and administrative charges.

National law

8. In 2008, Paragraphs 3a(3), 3a(4)(6)(a) and 4(8)(e) and (h) of the Umsatzsteuergesetz (Law on turnover tax) 2005 ('UStG'), read together, provided in essence, with regard to 'transactions in securities trading and the negotiation of such transactions, with the exception of the safekeeping and management of securities' and to 'management of investment fund assets under the Investmentgesetz [Law on investment] and of pension schemes under the Versicherungsaufsichtsgesetz [Law on supervision of insurance]', that: (i) such transactions were to be exempt from VAT; (ii) where the customer was a trader, the service was deemed to be supplied at the customer's place of business or permanent establishment, depending on the circumstances; and (iii) where the customer was not a trader and was resident or established in the territory of another country, the service was deemed to be supplied in that country.

9. However, according to an administrative instruction issued by the Federal Finance Ministry on 9 December 2008, Paragraphs 3a(3) and (4)(6)(a) of the UStG were not to be applied for determining the place of supply of asset management services. Nor was it possible to rely on Article 56(1)(e) of the VAT Directive, which did not indicate that it was intended to cover transactions other than those listed. As regards exemption, Article 135(1) of that directive was unambiguous and did not refer to asset management. Portfolio management as a single service was therefore liable to tax and not exempt under Paragraph 4(8)(e) of the UStG.

Facts, procedure and questions referred

10. Deutsche Bank provides services whereby investors instruct it to manage security holdings for them, at its own discretion and without obtaining prior instruction, but in accordance with a strategy chosen by the investor, and to take all appropriate measures in managing those holdings. Deutsche Bank may dispose of the securities in the name and on behalf of the investor. The investor pays an annual fee equivalent to 1.8% of the value of the assets managed, comprising a share for management equivalent to 1.2% of that value and a share for buying and selling securities equivalent to 0.6%. The fee also covers account and portfolio administration and commission on the acquisition of investment fund units. Investors receive regular progress reports and may terminate the instruction at any time with immediate effect.

11. In its provisional return for May 2008, Deutsche Bank assumed its services in connection with the management of security holdings to be VAT-exempt under Paragraph 4(8) of the UStG when provided to investors in Germany and the EU and, under Paragraph 3a(4)(6)(a), not taxable when provided to investors elsewhere. The tax authority disagreed, and the dispute is now before the Bundesfinanzhof in an appeal on a point of law.

12. The Bundesfinanzhof asks:

'1. Is the management of security holdings (portfolio management), where a taxable person determines for remuneration the purchase and sale of securities and implements that determination by buying and selling the securities, exempt from tax

— only in so far as it consists in the management of investment funds for a number of investors collectively within the meaning of Article 135(1)(g) of Directive 2006/112/EC or also

— in so far as it consists in individual portfolio management for individual investors within the meaning of Article 135(1)(f) of Directive 2006/112/EC (transactions in securities or the negotiation of such transactions)?

2. For the purposes of defining principal and ancillary services, what significance is to be attached to the criterion that the ancillary service does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied, in the context of separate reckoning for the ancillary service and the fact that the ancillary service can be provided by third parties?

3. Does Article 56(1)(e) of Directive 2006/112/EC cover only the services referred to in Article 135(1)(a) to (g) of Directive 2006/112/EC or also the management of security holdings (portfolio management), even if that transaction is not subject to the latter provision?'

13. Written observations have been submitted by Deutsche Bank, by the German and Netherlands Governments and by the Commission. The tax authority, Deutsche Bank, the German and United Kingdom Governments and the Commission made oral submissions at the hearing on 1 March 2012.

Assessment

Preliminary remarks

14. It is common ground that the services in issue do not constitute 'management of special investment funds' within the meaning of Article 135(1)(g) of the VAT Directive.

15. That provision concerns joint funds, in which many investments are pooled and spread over a range of securities which can be managed effectively in order to optimise results, and in which individual investments may be relatively modest; such funds manage their investments in their own name and on their own behalf, while each investor owns a share (one or more units) of the fund but not the fund's investments as such. The services in issue, on the other hand, concern generally the assets of a single person, which must be of relatively high overall value in order to be dealt with profitably in such a way; the portfolio manager buys and sells investments in the name and on behalf of the investor, who retains ownership of the individual securities throughout, and on termination of, the contract.

16. It is also common ground that the securities concerned are not 'documents establishing title to goods' or 'rights or securities referred to in Article 15(2)', transactions in which are excluded from the exemption in Article 135(1)(f) of the VAT Directive. Nor are the services confined to mere safekeeping of securities, also excluded from the exemption.

17. The central issue in the first two questions is whether the services concerned are 'transactions' in securities, 'including negotiation but not management', exempted by Article 135(1)(f).

18. According to the order for reference and Deutsche Bank's own observations, those services fall into three categories which may be summarised as: (a) deciding, on the basis of expert knowledge and observation of the markets, what securities should be bought or sold, and when; (b) implementing those decisions by actually buying and selling the securities;[9] and (c) a series of more administrative services connected with holding the securities.

9 — It is undisputed that the purchases and sales themselves are 'transactions … in … securities' exempt under Article 135(1)(f) of the VAT Directive. The service in issue here is that of effecting the transaction on the client's behalf.

19. By question 1, the national court wishes to know whether (a) and (b) together fall within the exemption under Article 135(1)(f) of the VAT Directive. In order to answer that question, it will be necessary to consider inter alia whether, 'viewed broadly, [they] form a distinct whole, fulfilling in effect the specific, essential functions of a service described in that provision'. [10]

20. In question 2 — still with a view to ascertaining the possibility of exemption under Article 135(1)(f) — the national court seeks guidance on the case-law concerning the VAT treatment of related services in cases where one service may be regarded as 'principal' and the other(s) as 'ancillary', so that together they are to be regarded as a single supply. [11] From its wording, the question appears to concern principally the relationship between the services under (a) and (b) above, the charges for which are reckoned separately by Deutsche Bank. However, the reasoning in the order for reference suggests that the national court is also concerned with the services under (c), the charges for which appear to be included within those invoiced for (a) and (b).

21. There is a clear and close link between those two issues. Indeed, they might be regarded as essentially a single question. I shall therefore begin by examining them together, thus dealing with one of the aspects of question 1 and answering question 2. I shall then address the main issue in question 1 and, finally, question 3, which concerns a different provision of the VAT Directive.

Relationship between the services described (questions 1 and 2)

22. All those submitting written observations agree that portfolio management, as described in the order for reference, should be regarded as a single economic operation or at least receive undifferentiated VAT treatment on the basis of the principal service provided. They accept that a breakdown is possible into components such as structuring the portfolio, assessing the markets, buying and selling securities, keeping accounts and so forth, but submit that the 'product' sold encompasses all those services, and the customer's interest lies in benefiting from a single supply rather than a multitude of component services. They further agree that the purely administrative components of the service are minor or ancillary and should not affect the overall classification.

23. I too agree.

24. It is settled case-law that, where a transaction comprises a bundle of elements, regard must be had to all the circumstances in order to determine whether there are two or more distinct supplies or one single supply. Although each transaction must normally be regarded as distinct and independent, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system. Moreover, in certain circumstances, several formally distinct services which could be supplied separately must be considered to be a single transaction when they are not independent. There is a single supply (i) where two or more elements supplied are so closely linked that they form a single, indivisible economic supply which it would be artificial to split, or (ii) where one or more elements constitute a principal supply, while others are ancillary. In particular, a supply is ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied. While it is for the national court to determine the factual situation in a particular case, the Court of Justice may provide that court with any guidance as to the interpretation of EU law which may assist it in adjudicating on the case. [12]

10 — See, for example, Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10099, paragraph 45 and case-law cited.

11 — See, for example, Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others* [2011] ECR I-1457, paragraph 54 and case-law cited.

12 — See, for example: Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraphs 19 to 23; Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraphs 21 to 23; Case C-276/09 *Everything Everywhere* [2010] ECR I-12359, paragraphs 21 to 26; *Bog and Others*, cited in footnote 11, paragraphs 51 to 55.

25. The referring court appears to consider that the service of buying and selling securities (which I have referred to as (b) in point 18 et seq. above) would fall to be regarded as ancillary to the asset management service (which I have referred to as (a)) were it not for the fact that, in *RLRE Tellmer Property*,[13] the Court had stressed that a cleaning service which it considered to be separate from the letting of residential property could be provided by a third party and/or invoiced separately.

26. It seems to me that the correct approach is not to begin by considering which of the two services I have referred to as (a) and (b) may be principal and which ancillary but rather to examine first whether they are so closely linked as to form, objectively, a single, indivisible economic supply which it would be artificial to split. In my view, they are thus closely linked.

27. The German Government has pointed out that, in the case-law, the assessment as to whether two or more elements form a single economic supply has been viewed from the standpoint of the typical or average consumer.[14] I agree with that approach. Even if, in some of those judgments, the Court also used the word 'objectively' in that context, the standpoint of an average consumer vis-à-vis a type of supply is by definition an objective criterion compared to the subjective view of a particular customer with regard to a particular transaction. I would add that, in *Bog and Others*, the Court noted that regard must be had to the 'qualitatively predominant elements' from the consumer's point of view.[15]

28. From the standpoint of a typical client for services such as those in issue — an individual having an appreciable capital available for investment but lacking the time and/or expertise required to manage it adequately on his own behalf — the bundled services which I have referred to as (a) and (b), as they are described in the order for reference, form a single, indivisible supply.

29. I do not assert that (a) and (b) are services so inseparable that neither can be offered alone. On the contrary, an investor wishing to know how best to manage his portfolio, but prepared to initiate the transactions himself, could seek an advisory service and thereafter take the actual decisions himself. Conversely, an investor knowing what purchases and sales he wished to make and when, but wishing to avoid the trouble of effecting the transactions, could engage an intermediary for the latter purpose alone. By contrast to both those situations, the portfolio management contract offered by Deutsche Bank, as described in the order for reference, is designed for those who seek a single service.

30. Moreover, even if they can be offered separately, neither (a) nor (b) can serve any coherent purpose in a vacuum. To decide on the best approach to the purchase, sale or retention of securities would be pointless if no effect were ever given to that approach; and to make — or not, as the case may be — sales and purchases without a rational and informed decisional process would be to leave matters largely to chance. The decision to buy or sell, or to refrain from so doing, is so intimately linked to the action advisedly taken, or not, that the two are, in effect and in the normal course of events, the two sides of the same coin. It is thus quite rational for an investor lacking the necessary resources himself to assign both the decision and its implementation to a trusted third party.

31. The mere fact that Deutsche Bank's standard contract specifies a separate percentage for (a) and for (b) does not alter my assessment. In *RLRE Tellmer Property*,[16] the Court was not using the fact of separate invoicing as a criterion for determining whether there was a single supply or separate supplies. Rather, it was pointing that fact out as confirming the difference in nature between letting apartments to tenants and cleaning the common areas of the apartment blocks in question. Moreover, in *Bog and*

13 — Case C-572/07 [2009] ECR I-4983, paragraphs 22 to 24.

14 — See Case C-349/96 *CPP* [1999] ECR I-973, paragraph 29; *Levob Verzekeringen and OV Bank*, cited in footnote 12 above, paragraphs 20 and 22; Case C-453/05 *Ludwig* [2007] ECR I-5083, paragraph 17; Case C-88/09 *Graphic Procédé* [2010] ECR I-1049, paragraph 20; and *Everything Everywhere*, cited in footnote 12 above, paragraph 26.

15 — Cited in footnote 11 above, paragraph 76. That dictum concerned, it is true, classification as a supply of goods or of services, but it seems to me that the same criterion is equally relevant to classification as a single supply or as separate supplies.

16 — Cited in footnote 13 above.

Others,[17] the Court stressed that, where a caterer provides food, crockery, cutlery, tables and waiting staff, the existence of a single transaction is independent of whether he issues a single invoice covering all the elements or separate invoices for different elements. And — although this is a point to be verified by the competent national court — Deutsche Bank stated at the hearing that its overall fee was split for historical reasons linked to the taxation of profits, so that the split did not reflect the relative values of the items in respect of which it was nominally charged.

32. If the services under (a) and (b), when bundled together, are to be regarded as a single, indivisible economic supply which it would be artificial to split — whilst still capable of being provided as separate services in other circumstances — they clearly form a principal supply to which the more administrative services which I have referred to as (c) are ancillary. Such services include, according to the case-file, making disbursements in connection with transactions, receiving interest from securities held and accounting for both to the client. They are offered in conjunction with the principal service as a matter of convenience — as a 'means of better enjoying' that service, in the wording of the case-law. They too should therefore receive the same VAT treatment.

33. The question is, however, whether services (a) and (b), taken together, fall within Article 135(1)(f) of the VAT Directive.

Classification of the services as regards Article 135(1)(f) (question 1)

34. Deutsche Bank and the Commission submit that the services in issue are exempt under Article 135(1)(f) of the VAT Directive; the tax authority and the German, Netherlands and United Kingdom Governments that they are not. The submissions address, inter alia, the principles governing the interpretation of the VAT Directive and, in that context, the purpose of the exemption in issue as one of the exemptions for financial transactions.

35. According to consistent case-law, the exemptions in Articles 131 to 137 of the VAT Directive are independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system as between Member States. The terms used are to be interpreted strictly, since the exemptions are exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, their interpretation must be consistent with the objectives pursued and must comply with the requirements of the principle of fiscal neutrality inherent in the VAT system, which precludes treating similar supplies, in competition with each other, differently for VAT purposes.[18] Strict interpretation thus does not mean that the terms used should be construed so as to deprive the exemptions of their intended effect.[19]

36. There is no clear indication in the preamble to the VAT Directive or to its predecessor the Sixth Directive, or in the drafting history of either, of the intended effect of exempting the financial transactions referred to in Article 135(1)(b) to (g) of the VAT Directive (previously Article 13B(d)(1) to (6) of the Sixth Directive). The Court has however stated that the purpose is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid

17 — Cited in footnote 11 above; see paragraph 57 and case-law cited.

18 — The notion of neutrality is used in two senses in the context of VAT: on the one hand, VAT is neutral in its effect on taxable persons, in that they must not themselves bear the burden of the tax; on the other hand, as here, it should not be imposed differentially so as to distort competition between comparable supplies.

19 — See, for example, Case C-540/09 *Skandinaviska Enskilda Banken* [2011] ECR I-1509, paragraphs 19 and 20 and case-law cited; *Everything Everywhere*, cited in footnote 12 above, paragraph 31 and case-law cited.

an increase in the cost of consumer credit.[20] More particularly, the purpose of the exemption under Article 135(1)(g) of transactions connected with the management of special investment funds is to facilitate investment in securities for small investors by means of investment undertakings. It is intended to ensure that the common system of VAT is fiscally neutral as regards the choice between direct investment in securities and investment through joint undertakings.[21]

37. The Court has not made any comparable statement as to the specific purpose of the exemption in Article 135(1)(f). It has however delimited the scope of the exemption. In order to fall within that scope, the services provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in the provision. Only transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities are exempted, not administrative services which do not alter that situation or operations involving the supply of financial information. 'Negotiation' refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the contractual provision of contractual services typically undertaken by the parties to such contracts. It is a service rendered to, and remunerated by, a contractual party as a distinct act of mediation.[22]

38. I have reached the view that the services in issue, viewed broadly, form a distinct whole. Does that whole fulfil in effect the specific, essential functions described in Article 135(1)(f)? It is important for the Court to provide a clear answer. Practice varies widely between Member States, with deleterious effects for the harmonisation of the common VAT system and for competition within the EU.

39. In the first place, as regards the nature of the 'distinct whole', the tax authority and the German, Netherlands and United Kingdom Governments take the view that the essence of portfolio management lies in the expertise which determines the structure of the portfolio and which underlies the decisions taken, as appropriate, to buy or sell securities or to leave them untouched. The exercise of that expertise may give rise to transactions which create, alter or extinguish parties' rights and obligations in respect of securities, but such transactions are merely incidental to the main function of ensuring the desired return on, and/or increase in the value of, the customer's investment.

40. For Deutsche Bank and the Commission, however, the essence of the service is the active buying and selling of securities in accordance with the chosen strategy. The expertise itself, although essential, is a mere prerequisite for that activity, whereas the investor's interest lies in seeing the necessary transactions carried out. Deutsche Bank adds that the contractual obligation is to apply the chosen strategy, not to obtain a defined income or increase in value. And, even where a decision is taken to leave a security untouched for the time being, the exercise of the expertise is still, potentially, *liable* to change the legal and financial situation as between the parties concerned.[23]

41. In accordance with my analysis of the relationship between the aspects of the overall service supplied, it is the service as a whole which must be examined in order to determine whether it falls within the scope of Article 135(1)(f) of the VAT Directive.

20 — See *Skandinaviska Enskilda Banken*, cited in footnote 19 above, paragraph 21 and case-law cited; Opinion of Advocate General Jääskinen, point 22 and case-law cited. In Case C-235/00 *CSC* [2001] ECR I-10237 (points 24 and 25 of the Opinion), Advocate General Ruiz-Jarabo found that the intention was to exempt 'transactions which, in view of their frequency and habitual nature, are a central component of the financial systems and, therefore, of the economic activities of the Member States'. Commentators have expressed the view that, at a detailed level, the exemptions in the Sixth Directive essentially reflected the national rules in force (particularly in France) before 1977 — see, for example, Amand, C., and Lenoir, V., 'Pro rata deduction by financial institutions — gross margin or interest?', *International VAT Monitor* 2006, p. 17; de la Feria, R., 'The EU VAT treatment of insurance and financial services (again) under review', *EC Tax Review* 2007, p. 74; Henkow, O., *Financial activities in European VAT*, Kluwer Law International, 2008, pp. 87-90.

21 — Namely, 'special investment funds' within the meaning of Article 135(1)(g). See *Abbey National*, cited in footnote 5 above, paragraph 62. The reference to *small* investors is omitted in the later judgment in C-363/05 *JP Morgan Fleming Claverhouse* [2007] ECR I-5517 (paragraph 45). The most recent presidency progress report on the proposed amending directive (see footnote 8 above) states that '[s]ome Member States … are of the opinion that the exemption should be limited to investment funds collecting savings of small investors'.

22 — See *CSC*, cited in footnote 20 above, paragraphs 25, 28, 38 and 39 of the judgment.

23 — See *Skandinaviska Enskilda Banken*, cited in footnote 19 above, paragraphs 31 and 32.

42. Part of that overall service involves transactions which *actually* create, alter or extinguish parties' rights and obligations in respect of securities. The remaining part (deployment of the relevant financial expertise), while *liable* to lead to actions which create, alter or extinguish such rights and obligations, is equally liable not to do so.

43. I agree with the tax authority and the governments which have submitted observations that it is the latter which defines the nature of the overall service from the customer's point of view. A customer who chooses a particular investment strategy is interested in seeing that strategy applied. Whether securities are actually bought or sold is less important to him than the assurance that his investment is, at any given moment, structured in accordance with that strategy. He wishes to be sure that any transactions which take place are carried out at the right moment, but also that there will be no buying or selling when it is preferable to sit tight. As was pointed out at the hearing, the preponderant role of the 'expertise', rather than the 'transactions', element of the service is confirmed by the fact that the fee is based solely on the value of the investment concerned, and is unaffected by the number or volume of transactions which may be carried out.

44. In the second place, it is common ground that, while the services in issue do not fall within Article 135(1)(g) of the VAT Directive (which exempts the management of special investment funds), they are essentially the counterpart of such management, but in respect of individual assets rather than joint funds. That agreement has none the less given rise to diverging lines of argument.

45. Deutsche Bank and the Commission point out that an investor who wishes his assets to be competently looked after has a choice between portfolio management of the kind in issue (at least as long as he has sufficient capital for such a service to be worthwhile) and investment in a joint fund (regardless of the amount of capital), both options being alternatives to direct investment in securities. Although several factors may influence his choice, a difference in VAT treatment might lead him to choose the solution which was not taxed. That would distort competition between similar services, contrary to the principle of neutrality of VAT. Since management of joint funds is exempt under Article 135(1)(g) and direct investment under Article 135(1)(f), individual portfolio management should also be exempt under the latter provision.

46. The German, Netherlands and United Kingdom Governments, by contrast, reason that an explicit exemption for the management of *joint* investment funds necessarily implies that *individual* asset management falls under the general principle that VAT is to be levied on all services supplied for consideration by a taxable person; and that, if asset management in general had been covered by Article 135(1)(f), there would have been no explicit exemption for joint funds in Article 135(1)(g). They also point to the Court's statement in *Abbey National* [24] that the exemption under Article 135(1)(g) is intended to facilitate investment in securities for *small* investors by means of investment undertakings; there is no intention to facilitate investment for those with sufficient capital to have recourse to portfolio management services.

47. Whilst I can fully appreciate the logic behind the position of Deutsche Bank and the Commission, and whilst I do not consider the outcome which they advocate to be unreasonable, I am inclined to take the view that, as it stands, Article 135(1)(f) of the VAT Directive does not exempt portfolio management services of the kind in issue. It is possible that a future amendment will settle the matter clearly in favour of exemption, but that is a matter for the Council, within which the Commission's proposals are still currently under discussion. [25]

48. My view is based on the following considerations.

24 — Cited in footnote 5 above, paragraph 62.

25 — See point 7 and footnote 8 above.

49. First, it is true that the service provided, viewed as a whole, encompasses transactions in securities, including their negotiation. Those aspects would, in isolation, be exempt under Article 135(1)(f). However, the service is characterised rather by its other element, namely the gathering and use of market intelligence, together with pre-existing knowledge and expertise, in order to make informed decisions as to the management of each portfolio of securities in accordance with the individual strategy chosen. It is common ground that the latter aspect, if envisaged as an independent service, is not capable of exemption under Article 135(1)(f).

50. Consequently, it does not seem possible to conclude that, viewed broadly, the services in issue form a distinct whole, the essence of which fulfils in effect the specific, essential functions described in that provision. The scope of Article 135(1)(f) is, on its face, limited to the carrying out or negotiation of transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities. [26] The service here in issue forms a *distinct* whole, and thus cannot be assimilated merely to one of its constituent elements. However, the fact that its predominant aspect is the acquisition and use of expertise to make informed decisions means that it does not fall within the specific, essential functions described in Article 135(1)(f).

51. Second, it is difficult to arrive at a clear purposive interpretation of Article 135(1)(f) from which it could be deduced that the provision — whether taken in isolation, in the context of the group of exemptions for financial transactions or in the context of the whole list of exemptions in Article 135 — is intended to cover portfolio management services of the kind in issue.

52. Taken individually, Article 135(1)(f) contains no indication of its purpose. The only clue — but not a helpful one — is that transactions in securities relating to tangible property are excluded from the exemption. The Court's rulings have simply stressed that the exemption is confined to the carrying out or negotiation of transactions liable to create, alter or extinguish rights and obligations.

53. As regards the general aims identified by the Court for the exemption of financial transactions, [27] the services in issue do not appear to present any difficulties connected with determining the tax base or the deductible amount (in contrast to the underlying transactions in securities, which are explicitly exempt under Article 135(1)(f)), nor would their taxation lead to any increase in the cost of consumer credit. Furthermore (again in contrast to the underlying transactions), portfolio management does not seem to form part of, in Advocate General Ruiz-Jarabo's words, 'transactions which, in view of their frequency and habitual nature, are a central component of the financial systems and, therefore, of the economic activities of the Member States'. [28] And, if the original aim was to perpetuate the exemptions previously in place in the Member States, [29] it may be noted that portfolio management was taxed in all the original Member States before 1972. [30]

54. When the list of exemptions in Article 135(1) is considered as a whole, it is clear that no common purpose can be inferred. The supplies concerned, in addition to the 'financial transactions' already considered, include items as diverse as postage stamps, gambling, supplies of land and the leasing and letting of immovable property.

26 — See point 37 and footnote 22 above.

27 — See point 36 above.

28 — See footnote 20 above.

29 — See footnote 20 above.

30 — See Hutchings, G., *Les opérations financières et bancaires et la taxe sur la valeur ajoutée*, Commission des Communautés européennes, Collection études, Série concurrence – Rapprochement des législations n° 22, Brussels, 1973.

55. Nor, despite the Commission's submission at the hearing, does the drafting history of Article 13B(d)(5) of the Sixth Directive strike me as particularly informative in that regard. The proviso 'This exemption shall not cover supplies of services relative to such transactions', absent from the original proposal, was indeed introduced,[31] apparently at the Parliament's behest, then removed again by the Council. In the absence of any more explicit indication, however, such tergiversation could be construed as consistent with either view.

56. Consequently — having regard to the need to construe exemptions strictly, as exceptions to the general rule that VAT is to be levied on all services supplied for consideration by a taxable person — I cannot conclude that the objective pursued by Article 135(1)(f) of the VAT Directive requires individual portfolio management to be included within the scope of the exemption for which it provides.

57. There remains none the less the issue of fiscal neutrality, as between Article 135(1)(f) and (g).

58. It is true that the Court has stated that the principle of fiscal neutrality, inherent in the VAT system, precludes treating similar, competing supplies differently for VAT purposes, and that the exemption under Article 135(1)(g) is intended to ensure such neutrality as regards the choice between direct investment in securities and investment through joint undertakings.[32]

59. I accept also that individual portfolio management enters into competition, at least to some extent, with both those modes of investment. As became even clearer at the hearing, however, the choice which any investor makes — when he has sufficient assets to be in a position to choose — is likely to depend on a considerable number of factors, of which VAT treatment will be only one.[33] And, even if VAT treatment may in some cases be a consideration, it is not clear that taxation, with its corollary of deductibility of input tax, will necessarily be significantly less advantageous to the customer, in the final event, than exemption, with input VAT irrecoverably embedded in the price of the services. As was pointed out at the hearing, both portfolio management and special investment funds attract large investors, who may be taxable persons enjoying a right of deduction.

60. Moreover, while the principle of fiscal neutrality in VAT may explain the relationship between the explicit exemptions for both direct investment and the management of joint investment funds, I do not accept that it can extend the scope of an express exemption in the absence of clear wording to that effect. As the German Government observed at the hearing, it is not a fundamental principle or a rule of primary law which can condition the validity of an exemption but a principle of interpretation, to be applied concurrently with — and as a limitation on — the principle of strict interpretation of exemptions. It is clear from the case-law that activities which are to some extent comparable and thus to some extent in competition may be treated differently for VAT purposes where the difference in treatment is explicitly provided for.[34] Moreover, if all activities partly in competition with each other had to receive the same VAT treatment, the final result would be — since practically every activity overlaps to some extent with another — to eliminate all differences in VAT treatment entirely. That would (presumably) lead to the elimination of all exemptions, since the VAT system exists only to tax transactions.

31 — See the proposed amendments in OJ 1974 C 121, p. 34, at p. 37.

32 — See point 36 above.

33 — The analogy, drawn by several parties, with the difference between bespoke tailoring and off-the-peg garments, goes some way to illustrating the partially competing situation as between the two investment choices, but it is something of an oversimplification.

34 — See, for example, Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 36 et seq., and Opinion of Advocate General Bot, points 47 to 54.

61. By contrast, the twin arguments of the German and Netherlands Governments, supported by the tax authority and the United Kingdom — that the exemption for the management of joint investment funds implies that individual asset management is not exempt and that, if asset management in general had been covered by Article 135(1)(f), there would have been no need to exempt management of joint funds — appear particularly convincing to me.

62. At the hearing, the Commission none the less suggested that, while the management of special investment funds (that is to say, the equivalent of the portfolio management at issue in the present case) is — on the Commission's interpretation — already exempted by Article 135(1)(f), the exemption under Article 135(1)(g) is necessary in order to exempt transactions such as the issue and redemption of shares (units) in such funds, where they are not traded on a stock exchange. However, I see no reason to assume that, just because such transactions are specific to joint investment funds and have no equivalent in individual portfolio management, they would not have been covered by the exemption under Article 135(1)(f) if that exemption in fact covered asset management services in general, regardless of the form of investment — as must be the case, if the Commission's interpretation is followed to its conclusion.

63. In the light of all the above, I am of the view that portfolio management services of the kind in issue in the main proceedings do not fall within the exemption provided for in Article 135(1)(f).

Place of supply (question 3)

64. At the material time in the main proceedings, Article 56(1)(e) of the VAT Directive provided that the place of supply of 'banking, financial and insurance transactions', when supplied to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, was to be, essentially, the place of the customer's business or residence.

65. The Bundesfinanzhof, together with all those who have submitted observations to the Court, takes the view that 'banking, financial and insurance transactions' within the meaning of Article 56(1)(e) include all the transactions listed in Article 135(1)(a) to (g). If, as I have concluded, portfolio management services of the kind in issue do not fall within any of those exemptions, it must be determined whether they too are none the less covered by Article 56(1)(e).

66. Nearly all of those submitting observations consider that the services in question fall within Article 56(1)(e). Their reasoning is based on the broad wording of the provision and on the absence of any reference either to Article 135 of the same directive or to any other provision of EU law which might limit the scope of the phrase.

67. The German Government alone disagrees. It refers to the judgment in *Swiss Re Germany Holding* [35] in which the Court stated that the sound functioning and uniform interpretation of the VAT system require that the concepts of 'insurance transactions' and 'reinsurance' in what were, at the relevant time, Articles 56(1)(e) and 135(1)(a) of the VAT Directive are not defined differently depending on whether they are used in one of those provisions or the other. That reasoning should in its view apply by analogy to 'financial transactions'. Only such an approach, applied uniformly, can provide sufficient legal certainty to avoid the risk of double taxation or non-taxation.

68. I am not convinced.

35 — Cited in footnote 10 above, paragraphs 31 and 32.

69. The reasoning in *Swiss Re Germany Holding* is linked to the fact that Articles 56(1)(e) and 135(1)(a) use essentially identical terms as regards insurance: 'insurance transactions including reinsurance' and 'insurance and reinsurance transactions'. Such identical terms must be interpreted uniformly in order to avoid double taxation or non-taxation. There is however no such parallel between 'banking' and 'financial' transactions in Article 56(1)(e) and any of the transactions listed in Article 135(1)(b) to (g). None of the latter provisions uses the words 'banking' or 'financial' at all. The transactions listed are clearly of a financial nature and many of them are likely to be carried out by banks, but not exclusively so, and they are far from being an exhaustive enumeration of all the transactions which can be carried out by a bank or which can be described as financial.

70. Moreover, if the scope of Article 56(1)(e) were precisely coextensive with that of Article 135(1)(a) to (g), it would serve little or no purpose. All the supplies covered by the latter are explicitly exempt from VAT. As no tax is either chargeable or deductible on them, their place of supply is largely irrelevant for VAT purposes.

71. In that regard, the German Government suggested at the hearing that, since the decision as to whether a supply is exempt lies with the authorities of the Member State in which the supply takes place, the place of supply must be determined first. That approach, however, appears to be circular, in that it requires a determination as to exemption (inclusion within Article 135(1)(a) to (g)) in order to establish the Member State whose authorities are responsible for determining whether the supply is exempt. Nor does it take account of the fact that, under Article 56(1)(e), the place of supply may be outside the Community. In any event, it seems implausible that the legislature would enact a specific rule for the sole purpose of determining the authority responsible for declaring a supply to be exempt, when that supply is exempt in all Member States.

72. Finally, a combined reading of Articles 56(1)(e) and 135(1)(l) and (2)(d) indicates that the hire of safes is regarded as falling within 'banking, financial and insurance transactions' for the purposes of Article 56, and within 'leasing or letting of immovable property' for the purposes of Article 135.

73. I infer that Article 56(1)(e) covers at least some transactions other than those in Article 135(1)(a) to (g). The question is whether they include portfolio management services of the kind in issue.

74. It seems to me that, consistently with the wording of Article 56(1)(e) and with the Court's case-law, that question calls for an affirmative answer. Portfolio management is a service of a financial nature. The wording of Article 56(1)(e) is broad, and excludes only the hire of safes from its scope. The Court has consistently held that Article 9(2) of the Sixth Directive (the fifth indent of which was identical to Article 56(1)(e) of the VAT Directive as applicable in the present case) is not to be interpreted narrowly.[36] There is consequently no reason to exclude any services of a financial nature other than the hire of safes (if, indeed, that is a service of a financial nature) from its scope. Nor, as the Commission has pointed out when stressing that the autonomous concepts in the VAT Directive must be interpreted in the context of the common VAT system alone, is there any reason to seek guidance in any other EU measure, such as, for example, Directive 2004/39,[37] referred to by the national court.

36 — See, for example, Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 21; *Levob Verzekering*, cited in footnote 12 above, paragraph 34 and case-law cited.

37 — Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

Conclusion

75. In the light of all the above considerations, I am of the opinion that the Court should answer the Bundesfinanzhof's questions to the following effect:

(1) Portfolio management services of the kind at issue in the main proceedings form a single supply for VAT purposes.

(2) Such services do not fall within the exemption provided for in Article 135(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

(3) In Article 56(1)(e) of Directive 2006/112, 'banking, financial and insurance transactions' are not confined to those listed in Article 135(1)(a) to (g) thereof but include, inter alia, portfolio management services of the kind at issue in the main proceedings.