# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 4 July 1996 *

1. The Østre Landsret, Denmark, has referred to the Court six questions for a preliminary ruling on the interpretation of Article 13B(d)3, 4 and 5 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (77/388/EEC) [1] (hereinafter 'the Sixth Directive').

2. The purpose of the proceedings before the Danish Court is to determine whether or not certain services performed by the plaintiff for a number of financial institutions (savings banks and banks) attract value added tax (hereinafter 'VAT'). To be specific, the court of reference wishes to know whether the rules on exemption from VAT set out in Article 13B(d)3, 4 and 5 of the Sixth Directive can apply to such services.

## The facts and the main proceedings according to the order for reference

3. Sparekassernes Datacenter (hereinafter 'SDC') is a VAT-registered legal person founded by Danmarks Sparekasseforening (Danish Association of Savings Banks). Under Danish legislation it is not itself a credit establishment or a financial institution. [2] Prior to 1993 it carried out a whole range of services, primarily for the said savings banks but also for other undertakings in the financial sector. [3]

4. Following the restructuring carried out in 1993, SDC established a limited company (SDC af 1993 A/S) which carries out all the transactions previously carried out by the plaintiff, and which therefore took over the services supplied to the financial institutions. For organizational reasons, SDC af 1993 A/S invoices the plaintiff which in turn makes out invoices for the members of the SDC association.

5. The facts of the dispute relate to the situation existing until the plaintiff's activities were reorganized in 1993. The last question referred to the Court (Question 6) deals with

* Original language: Spanish.

1 — OJ 1977 L 145, p. 1.

2 — Nevertheless, as the Danish Government admits in its observations (point 22), it is subject to Order No 820 of 12 December 1991, on the carrying out of systems auditing in joint data centres.

3 — The plaintiff provides services for 99% of Danish savings banks (percentage calculated on the basis of all the savings banks' balance-sheets) and for some banks.

the possible effects which restructuring might have for services supplied thereafter.

6. The members of the plaintiff institution are savings banks and banks. [4] According to the balance-sheet for the 1992 financial year, SDC's gross turnover amounted to DKR 650.2 million, of which DKR 378.2 million was 'income from data-handling'.

7. In July 1986 the plaintiff asked the appropriate authorities (Distriktstoldkammer) whether the part of its activities which might be defined as 'pure' credit transfers was exempt from VAT. Until then it had paid VAT on all its services.

8. On 23 September 1986 the Distriktstoldkammer decided that that part of the plaintiff's operations which consisted in effecting transfers between two financial institutions was exempt from VAT.

9. On 18 July 1988 the applicant applied for a refund of some DKR 229 million corresponding to the amount of VAT which, in its view, it had overpaid between 1 October 1981 and 31 March 1988, in respect of transfer of funds.

10. The Distriktstoldkammer, having regard to the large sum involved and the importance of the case, submitted the question to the higher administrative authority, the Told-og Skattestyrelse (Customs and Tax Directorate).

11. The latter decided on 20 April 1990 that only the credit transfer service 'as such' set out in Paragraph 4.7 of the plaintiff's 'products catalogue' (user's guidelines) could be regarded as covered by the VAT exemption rules set out in Paragraph 2(3)(j) of the Danish VAT Law transposing into Danish domestic law Article 13B(d) of the Sixth Directive.

12. As a result of that decision the Told-og Skattestyrelse ordered the repayment to the plaintiff of the VAT overpaid (DKR 61 022 170), to which was added interest amounting to DKR 13 376 520.

4 — In Denmark, according to the parties' written observations, the banks and savings banks are subject to the same legislation.

13. The plaintiff appealed against that decision to the Momsnævn (VAT appeal tribunal) which, as the administrative tribunal of last instance, decided by a decision of 14 February 1992 that none of the services performed by the plaintiff was exempt from VAT.

14. On 27 April 1992 the plaintiff appealed against the Momsnævn's decision to the Østre Landsret, the court of reference, which referred to the following questions to the Court of Justice:

'(1) Should Article 13B(d)3, 4 and 5 of the Sixth VAT Directive be interpreted as meaning that VAT exemption should be granted for services of a type described in Paragraphs 3 and 5 of the order for reference?

In that connection, is the granting of exemption from VAT under Article 13B(d)3, 4 and 5 precluded where a transaction within the meaning of that provision is performed, wholly or in part, electronically?

(2) The wording used in Article 13B(d)1 and 2 of the VAT Directive is "by the person granting [the credit]" (ved den person, som har ydet lånene) and "by the person who is granting the credit" (ved den person, de har ydet kreditten). That description is not employed by Article 13B(d)3, 4 and 5.

Should any importance be attached to that difference in the interpretation of Article 13B(d)3, 4 and 5?

(3) A. Is it significant as far as the application of Article 13B(d)3, 4 and 5 is concerned whether transactions are performed by financial institutions or by others?

B. Is it significant as far as the application of Article 13B(d)3, 4 and 5 is concerned whether the entire financial service is performed by a financial institution which has links with a customer?

C. If it is unnecessary for the application of Article 13B(d)3, 4 and 5 that the financial institution itself should perform the entire service, can the financial institution buy in transac-

tions wholly or in part from another person, with the effect that the services performed by that other person are covered by Article 13B(d)3, 4 and 5, or may particular requirements be made of that other person?

(4) How is the wording used in Article 13B(d)3, 4 and 5 "transactions ... concerning" to be interpreted?

This question seeks to ascertain whether the words "transactions ... concerning" are to be understood as meaning that VAT exemption should also be granted in cases where a person either performs only a part of the service or performs only some of the transactions within the meaning of the directive which are necessary for supplying the complete financial service.

(5) In the interpretation of Article 13B(d)3, 4 and 5, should significance be attached to the fact that the taxable person who requests tax exemption for transactions within the meaning of the provision performs those transactions on behalf of the financial institution in whose name the service is performed?

(6) Following the plaintiff's reorganization, is it significant, as far as application of Article 13B(d)3, 4 and 5 is concerned, that the services in question are now provided by a company which supplies the services to the associated financial institutions?

It will be noted that the said services are invoiced by the limited company to the plaintiff which in turn invoices its financial institution members.'

**Preliminary observation concerning the nature of the services performed by SDC and the scope of the questions raised**

15. The court of reference has expressed in the order for reference its view of the characteristics of the services which the plaintiff provides for its members or their customers. [5] That view, elaborated after an analysis of the evidence before the Court (above all documentary), [6] is the point of departure for a legal classification of the services

5 — For greater clarity I shall use 'members' of SDC to mean the banks and savings banks. I shall use 'customers' to mean the persons, legal or natural, who have commercial relations with those banks or savings banks.

6 — The basic document is the one entitled 'General description of SDC's activities'.

performed to establish whether or not they fall within the basis of assessment to tax.

16. In a system of judicial cooperation such as that laid down by Article 177 of the EC Treaty, the duty of evaluating the evidence produced in the main proceedings devolves logically and exclusively upon the national court. The Court of Justice accordingly 'may assume', as the order for reference literally states, that the plaintiff's services have the following characteristics:

— the plaintiff performs the services only upon request from a member savings bank, one of such bank's customers or others who, by agreement with the customer, are authorized to requisition, for example, specific payments;

— the request is made by the electronic transmission of information which may result in the immediate performance of a service or involve several successive services over a shorter or longer period;

— a customer can only transmit information after authorization by the financial institution, for example in the form of the issue of a cash card or a credit card;

— the plaintiff's name is not made known to the individual savings bank customers and the plaintiff has not entered into any legal obligation towards them;

— the plaintiff does not demand payment from the individual customers but only from its members;

— the plaintiff's services are essentially performed wholly or in part electronically.

17. The following are, according to the order for reference, the four spheres of activity in which the SDC performs its services:

— credit transfers;

— advice on management of securities; [7] [8]

7 — As to the scope of this heading, see points 74 to 79 of this Opinion.

8 — Translator's note: The phrase used in the Danish text is 'Rådgivning om *handel* med værdipapirer'.

— management of deposits, purchase contracts and loans;

— tasks concerning members' internal administration.

18. The purpose of the main proceedings at various instances before the Danish administrative and judicial bodies concerned only the repayment of the tax paid by the plaintiff by way of VAT in relation to the activity of 'transfers' of funds.

19. It is clear that the final decision of the Momsnævn, as the administrative tribunal of last instance, was to the effect that the plaintiff was not entitled to tax exemption for any of its services in general. However, that decision [9] was the final response — at administrative level — to an initial application claiming only repayment of the tax payments made by way of VAT applied to fund transfers.

20. In other words, SDC had not disputed before the Danish authorities (at least, so it seems from the account given by the court of reference of the background to the proceedings) [10] that it was obliged to pay VAT for the services concerning the spheres of activity other than the fund transfers.

21. In such circumstances, I do not think that an answer from the Court of Justice as to whether activities other than the said credit transfers of funds are subject to, or exempt from, VAT will be of much use to the court of reference.

22. In particular if, throughout the main proceedings, SDC did not claim reimbursement of the VAT payments relating to advice on management of securities, management of loans or deposits or transactions relating to its members' internal administration, I cannot see how a reply from the Court of Justice on the tax system relating to such transactions could help the Danish court.

23. In any event, the impact of this objection is limited, since the purport of the questions raised by the court of reference would, as I see it, make it possible to give a general answer of principle without the need to

9 — The Momsnævn's decision is an example of *reformatio in pejus* since, on the basis of an administrative appeal brought by a party who has obtained only partial satisfaction of his claim and considers himself aggrieved thereby, it makes the appellant's legal situation worse to the extent of depriving him even of the advantages allowed him by virtue of that partial satisfaction.

10 — Section 2 of the order for reference regarding the procedure followed before the national administrative authorities describes the various stages of SDC's claim in the terms I have summarized in points 7 to 13 of this Opinion.

detail separately each one of the various transactions mentioned.

24. For the sake of clarity, I shall set out the actual wording of the Community rule to be interpreted and then analyse the questions referred to the Court by dividing them into three groups:

(a) those referring to the persons covered by exemption (Questions 2, 3A and 6);

(b) those referring to the subject of transactions which are exempt (Questions 3B, 3C, 4 and 5);

(c) the one referring to the inclusion of SDC's specific transactions in the category of exempt transactions (Question 1).

**The Community provision to be interpreted**

25. Article 13 of the Sixth Directive sets out the exemptions which the Member States are required to introduce in their VAT legislation. The sections of the article requiring interpretation are as follows:

'B. Other exemptions

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:

[...]

(d) the following transactions:

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

[...]

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

4) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items; "collectors' items" shall be taken to mean gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

5) transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding:

— documents establishing title to goods,

— the rights or securities referred to in Article 5(3).'

26. It should, however, be pointed out that Article 28(3)(b) of the Sixth Directive allowed Member States, during the transitional period referred to in Article 28(4), to continue to exempt certain activities set out in Annex F under conditions existing in the Member State concerned.

27. The said activities — which, but for the last-mentioned provision would necessarily have attracted VAT — were:

(a) management of credit and credit guarantees by a person or a body other than the one which granted the credits (item 13 of Annex F);

(b) debt collection (item 14 of Annex F);

(c) the safekeeping and management of shares, interests in companies and associations, debentures and other securities or negotiable instruments, excluding documents establishing title to goods or securities referred to in Article 5(3) (item 15 of Annex F).

28. The transitional period during which the States were entitled by way of exception to continue the exemption finally came to an end either on 1 January 1990 (in the case of debt collection) or on 1 January 1991 (in the

case of the two other types of transaction). [11] As from those dates, therefore, the said transactions have been subject to the general rule set out in the Sixth Directive and therefore attract tax in the same way as the other taxable transactions.

**The persons covered by the transactions exempted by Article 13B(d)3, 4 and 5 of the Sixth Directive**

29. Three of the questions raised in the order for reference ask the Court of Justice about the persons covered by the exemptions in question and, as they deal with related matters I think it is appropriate to deal with them together.

30. The key question with regard to these aspects is Question 3A in which the court of reference asks whether there is any difference in the application of the exemptions according to whether the exempted transactions were performed by financial institutions or by others. Question 2 relates to the same problem, enquiring whether the fact that certain expressions in Article 13B(d)1 and 2 (referring to those effecting the transactions), which are not to be found in indents 3, 4 and 5, is of any relevance to this matter. Finally, Question 6 enquires whether it is significant that the services supplied by SDC are now provided through the intermediary of a limited company.

31. In general it seems clear to me that the provisions already quoted do not relate to any personal aspects concerning the exempt transactions. They are in fact rules drafted solely to take account of the objective nature of the transactions in question irrespective of who effects them.

32. It is clear that some of the transactions exempted (particularly some of those described in Article 13B(d)3 and 4) normally correspond to the field of banking which, in certain Member States, has been reserved by law exclusively to specified banking institutions or to financial intermediaries. But that is a matter of politico-economic choices made by the Member States in question and not of the application of the Sixth Directive.

33. In so far as persons other than banking institutions or financial intermediaries may, according to their own domestic law, effect the transactions envisaged in the indents already quoted, the exemptions in question

11 — That was provided by Article 1(2) of the Eighteenth Council Directive of 18 July 1989 on the harmonization of the laws of the Member States relating to turnover taxes — Abolition of certain derogations provided for in Article 28(3) of the Sixth Directive 77/388/EEC (89/465/EEC) (OJ 1989 L 226, p. 21).

will be fully applicable to them. There is, therefore, no reason why any natural or legal person, whether or not engaged in banking, should not enjoy the exemption concerned.

34. The Court reached the same conclusion in the judgment in Case C-281/91 *Muys* [12] with regard to another of the transactions covered by Article 13B(d) of the Sixth Directive, namely the granting of credits. The fact that such a transaction is exempt under indent 1 and not indents 3, 4 and 5 is immaterial here as the grounds of the judgment are entirely applicable by analogy to this case.

35. In paragraph 13 of the *Muys* judgment the Court stated that 'although the exemptions provided for in Article 13 are to be interpreted strictly (see Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737), nevertheless, in the absence of any specification of the identity of the lender or the borrower, the expression "the granting and the negotiation of credit" is in principle sufficiently broad to include credit granted by a supplier of goods in the form of deferral of payment. Contrary to the Commission's view, the wording of that provision in no way suggests that there is any limitation on the scope of Article 13B(d)1 only to loans and credits granted by banking and financial institutions'. [13]

36. Moreover, to return to the analysis of Article 13B(d)3, 4 and 5, a considerable number of the exempted transactions, according to those indents, does not even pre-suppose that a banking institution is involved. Although it is clear that, in the present legislation, deposit and current accounts or cheques are normally dealt with by banking institutions, they may be quite distinct from certain normal commercial transactions, as, for example, the issue of negotiable instruments. Similarly certain transactions relating to shares and debentures are frequently effected without banking institutions' being involved.

37. That being the case, it is understandable why indents 3, 4 and 5 contain no reference to the grantor, which occurs in other indents providing for exemption for 'the management of credit by the person granting it' (indent 1) or 'the management of credit

12 — [1993] ECR I-5405.

13 — The Court reinforces its argument by adding in paragraph 14 of the judgment: 'That interpretation is borne out by the objective of the common system introduced by the Sixth VAT Directive, which aims in particular to secure equal treatment for taxable persons. That principle would be disregarded if a purchaser were to be taxed on credit granted by his supplier, whereas a purchaser seeking credit from a bank or another lender received an exempted credit.'

guarantees by the person who is granting the credit' (indent 2).

38. Indents 1 and 2 deal with restriction of exemption to certain types of transaction: it is only when the management of credit or credit guarantees is performed by the person granting them that a right to exemption arises. That right does not exist therefore when the management is effected by a third party other than the one who granted the credit.

39. The fact that indents 3, 4 and 5 do not include a similar reference to the grantor confirms, if such confirmation is needed, the conclusion that these provisions do not have regard to the persons involved in the transactions, but set out the tax advantage only in objective terms by reference to the transactions as such.

40. Finally, the fact that those effecting the transactions in question may be associations, companies, natural persons or any other type of entity with legal personality makes no difference to the explanation I have just given. The problems concerning the involvement of a company, which the last question referred to the Court mentions, may be considered from the point of view of the purpose of the complex services and the interweaving of undertakings (to which I shall refer later) but disappear if viewed subjectively.

**The purpose of the exempted transactions according to Article 13B(d)3, 4 and 5 of the Sixth Directive**

41. The 'transactions' [14] to which subparagraph (d) refers are true legal operations of a contractual nature, either of a purely civil or — in the majority of cases — of a commercial character. If they involve a financial institution, a savings bank or a bank as a party to the relevant legal operations, their commercial nature is undeniable.

42. The Community legislature has granted the exemption at issue to a series of 'transactions' frequently encountered in legal dealings, since otherwise tax would have fallen upon both normal commercial activity

14 — The Spanish, French and Italian versions use the expressions 'operaciones siguientes', 'opérations suivantes' and 'operazione seguenti'; the English and Danish versions use the expressions 'following transactions' and 'følgende transaktioner' respectively. The German version uses the expression 'folgenden Umsätze'. The word 'transacción', of Latin origin, used in its meaning of contract or business deal (not in its meaning of result or action of settlement) is perhaps legally more precise than the generic expression 'operación' to describe what types of act are entitled to the exemption in question.

effected by means of the commercial instruments mentioned (cheques, negotiable instruments, current accounts and so on) and upon transfer of shares, interests in companies, debentures and other securities.

43. Exempted 'transactions', when those involved are financial institutions and their customers — and that is the hypothesis to which the order for reference repeatedly refers [15] —, are in reality bank contracts of a very different nature. In all of them the institution is required to perform a service for the customers in return for a certain remuneration. [16] The services may be performed once only or repeatedly without affecting entitlement to the exemption.

44. The important feature for settling the dispute is, in my view, that the exemption is granted to the 'transaction' effected between the institution and its customer, the only legal operation in which both take part. In principle, that transaction would be subject to VAT so that the amount of the tax would be passed on to the customer as the final consumer. The exemption is granted precisely in order to avoid such a clog on economic activity.

15 — In summarizing the SDC's arguments (section 6.1 of the order for reference), the court of reference states: 'The plaintiff claims that a very large part of the services (transactions) which it performs for the customers of financial institutions on behalf of the association's members (that is to say, financial institutions) are free of VAT ...'.

16 — It is immaterial whether the payment is made directly or indirectly: in any case the decisive feature in the operation is whether it is still performed in return for payment.

45. It must be stressed that the 'transaction' subject to VAT (and then exempted) is the legal operation effected between the customer and the banking institution. When there is, for example, an order for payment or a transfer the parties to the legal relationship are the customer who gives the order and the savings bank — or, in general, the financial institution — which accepts the order and performs a service for the customer consisting in the transfer of the funds to a third person.

46. That being so, it is irrelevant for the purpose of applying the exemption by what means or instruments the banking institution carries out its obligations derived from the legal operation entered into with the customer. Similarly it is irrelevant whether, in using such measures or instruments, the financial institution is in turn assisted by third parties.

47. In other words, the 'transaction', that is, the legal operation between the bank or savings bank and its customer, is one thing and the way in which the financial institution materially complies with its obligation to perform the service agreed is quite another. The only allusion to that legal operation in the Sixth Directive is the reference in Article 13B to 'exempt ... transactions'.

48. Through a number of the questions raised by the court of reference [17] there seems to be a certain ambiguity which needs to be clarified: there is not in the 'transactions' analysed an 'entire financial service' which may be broken down into various 'parts' or independent ancillary services so that each one of them may be attributed to different persons. On the contrary, there is a single financial service arising from the legal operation, binding the customer to his bank or savings bank, and that is the case irrespective of the procedures, whether internal or not, by which the banking institution in fact performs the service.

49. The court of reference itself recognizes that there is no legal link of any kind between the plaintiff and the customers of the financial institutions. SDC therefore supplies its services to those institutions alone and is under an obligation only to them, whilst the customers are not even aware of its name. There are therefore no 'transactions' of any kind between the plaintiff and the customers of the banking institutions.

50. The part played by the plaintiff is reduced to providing the associated banks and savings banks with a given electronic service [18] which, in view of the present state of computer technology, greatly facilitates the management of the business of banking: SDC therefore provides the associated banking institutions with a service basically consisting in the handling and electronic transmission of data. [19]

51. That 'service' is merely one of the instruments available to the banks and savings banks for carrying out the obligations agreed with their customers. But the genuine banking 'transactions' to which the exemption relates must not be confused with those I have just referred to. On the contrary, we are dealing with one technical method, amongst other possible ones, used by the financial institution for its own convenience.

52. The banks and savings banks have two choices for effecting electronic data-handling and transmission for the purpose of the actual execution of transactions of transfer, payment, management of current accounts and the like: either they use their own staff and equipment, as is done for other bank transactions, or they make a contract with a third party for the actual performance of some of those tasks.

17 — To be specific, in Questions 1, 3 and 4.

18 — In its observations the Commission emphasizes that according to Article 2 of the SDC's statutes its object is to handle data for its members and other associated institutions or companies by designing and operating automatic data processing systems.

19 — According to the order for reference (section 3.1) the services provided by SDC consist in a number of components which together make up the services which each individual financial institution wishes to have performed. The document entitled 'Overall description of SDC's business' states that 'each element of the service consists in activities intended for *obtaining data, processing them and transmitting them by electronic means*' (my emphasis).

53. In the second case, with which these proceedings are concerned, the legal relationship between the customer and the savings bank continues unaltered, just as if the bank had actually performed those tasks with its own resources. All that changes is the internal method of working of the financial institution itself, but that has no significance for the customer whose contract is exclusively with the bank or savings bank, which is solely liable to him.

54. Choosing one option or the other is a business policy decision which has the same fiscal consequences in this sector as in any other. If an undertaking engages the services of another undertaking to perform certain tasks instead of performing them itself with its own staff and equipment, it will have to pay the VAT relating to the performance of those services.

55. Consequently, it is impossible to accept the plaintiff's argument as to the alleged tax discrimination between banking undertakings which have their own data-handling resources and the others which are obliged to engage the services of a third person for such purposes. As I shall explain later, that is the logical consequence resulting from the tax structure specific to VAT.

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

57. So, paid employees who, under the direction of their employer and remunerated by him, perform their services for the company which engages them are not taxable persons. In the performance of such services there is no chargeable event subject to VAT: strictly speaking that is a phenomenon of non-liability, [20] resulting *a sensu contrario* from the positive configuration of the chargeable event for VAT and even from the very nature of that tax.

58. Business policy decisions may lead an undertaking to opt to carry out certain tasks with its own resources using its paid staff. In such a case, there is no chargeable event subject to VAT. It may, on the other hand, choose to contract with third persons, legally

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

distinct from the undertaking, for the supply of its services: in that case, the transaction is subject to VAT.

59. That system, which, moreover, is quite fundamental in the operation of VAT, is fully applicable to the case before the Court. A savings bank may materially execute legal operations agreed with its customers relating to transfer of funds or the like, either with its own employees, computers and electronic transmission systems or else by resorting for those purposes to another company to assist it. In the first case, no VAT at all is payable; in the second case, the performance of services supplied to the savings bank by an outside firm attracts VAT.

60. In relation to a similar problem, although with different aspects, the Court, in its judgment in Case C-4/94 *BLP Group* [21] came to a similar decision, distinguishing the tax consequences of traders' choices between exempt transactions and taxable transactions. Identical considerations may be applied to the cases, such as that now before the Court, in which the choice is not between exempt transactions and taxable transactions but between transactions not liable to tax and taxable transactions.

61. In other respects, the fact that the tasks performed by the outside undertaking on behalf of the banking institutions may be carried out in relation to the latter's commercial operations has no effect on the position I have just explained. All undertakings which supply their services to banking institutions to ease the normal course of their commercial business (that is, of their transactions with the customers) 'collaborate' in short in the financial operations of the banks and savings banks but that does not exonerate them from the payment of VAT.

62. The Danish Government rightly emphasizes that if the plaintiff's line of argument were to be followed any independent undertaking contracting with a banking institution to provide it with a service more or less linked to typical banking 'transactions' which the Sixth Directive regards as exempt would also be able to claim exemption, such as the telephone undertaking which is instrumental in transmitting the orders for transfer or the transport and security company which physically transports the funds from one branch to another and so on.

63. Such examples, and similar ones which might be added, show the need to keep the

21 — In paragraph 26 of that judgment [1995] ECR I-983 at p. I-1011 the Court stated: '... a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system. The principle of the neutrality of VAT, as defined in the case-law of the Court, does not have the scope attributed to it by BLP. That the common system of VAT ensures that all economic activities, whatever their purpose or results, are taxed in a wholly neutral way, presupposes that those activities are themselves subject to VAT (see in particular Case 268/83 *Rompelman* v *Minister van Financiën* [1985] ECR 655, paragraph 19).'

exemption within the confines of what constitutes its legal object: the financial operations and transactions [22] agreed between commercial entities. The use by a banking institution of the services of third persons to assist it (whether electronic data-handling or telephone, transport or courier undertakings) for the purpose of carrying out its own obligations derived from contracts signed with its customers, is a phenomenon which, by its very nature, is foreign to the exemption at issue.

**The inclusion of SDC's various transactions in the category of exempt transactions**

64. The description of the services supplied by SDC to its members, as previously summarized, means, if the conclusions I put forward are accepted, that they cannot be included in the category of exempt transactions at issue.

65. In fact, I have emphasized that SDC does not, properly speaking, effect transactions with the individuals and companies which are customers of the banks or savings banks. On the contrary, it merely supplies those financial institutions with certain technical resources or services for the better accomplishment of the typical banking transactions which they effect with their customers.

66. SDC's auxiliary or instrumental role as an undertaking external to the banks or savings banks is analogous to that of any other undertaking contracting with a financial institution to provide it with its expert services in the electronic data-handling sector. In so far as such services do not, in themselves, constitute any of the 'transactions' or legal operations referred to in Article 13B(d) of the Sixth Directive, they cannot benefit from the exemption granted by that provision.

67. These considerations must be applied to the specific case and related to each of the four types of transaction described in detail in section 3.1 of the order for reference.

68. With regard to credit transfers (section 3.1. A of the order for reference), which constitute the major part of SDC's operations, I have indicated that the transaction which is exempt is the legal operation agreed between the customers and the financial institution and not the instrumental services which third companies or persons make available to the savings bank or bank for effecting such a legal operation.

22 — In the sense mentioned in footnote 13.

69. Bank credit transfers, whose importance in the realization of the internal market has resulted in a legislative initiative from the Commission, [23] originate in an order given to a financial institution by a natural or legal person in favour of a beneficiary (who may be the person giving the order) for the purpose of putting a sum of money at the disposal of the latter.

70. Such a transaction constitutes, as I have said, a true contract with obligations for the customer and the financial institution, a contract whose conditions (as regards adequate financial coverage, time of performance, commissions due, interest and compensation in the event of breach of contract or excessive delay, the rates of exchange applicable to cross-border transactions and the like) are legally binding on both parties. [24]

71. The creditors and debtors in the credit transfers to which the order for reference refers are the customers (individuals and companies in their capacity of those giving the orders or beneficiaries) and institutions effecting the payments, accepting the risks and obligations appropriate to this type of contract. [25]

72. The institutions effecting the transfers offer their customers a specific financial service consisting in facilitating a movement of capital, a service which is exempted by the Sixth Directive. The fact that, for performing that service they are obliged to use certain technical or material means or the services of third persons (undertakings providing telecommunications, transport of money, postal services, computer services, legal advice and other services) must not lead to confusion between the exempt transaction as such and the technical or auxiliary services which make possible the accomplishment of this aspect of banking activity, to which that exemption does not extend.

73. In particular, the description of the credit transfers given in the order for reference makes it clear that SDC's instrumental function is data-handling on behalf of the

23 — Proposal for a European Parliament and Council Directive on EU credit transfers (OJ 1994 C 360, p. 13, as amended by OJ 1995 C 199, p. 16). This has now taken the form of Common Position (EC) No 32/95 adopted by the Council on 4 December 1995 in accordance with the procedure laid down in Article 189b of the Treaty with a view to adopting a directive of the European Parliament and of the Council on cross-border credit transfers (OJ 1995 C 353, p. 52).

24 — The Commission adopted Recommendation 90/109/EEC of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions (OJ 1990 L 67, p. 39) laying down a number of principles in order to provide greater transparency in customer information and standards of invoicing such transactions.

25 — During the hearing certain interveners tried to emphasize that the description of exempt transactions in Article 13B(d)3, 4 and 5 of the Sixth Directive was couched in purely objective terms and that such provisions did not require a nexus or direct link between the customers and the banking institutions. As I have already emphasized earlier in this Opinion on the subjective aspect of the exemptions at issue, there would be nothing from the point of view of the Sixth Directive to prevent undertakings other than financial institutions (including SDC) from effecting genuine payment transactions, that is to say, from performing the relevant financial service, assuming the appropriate duties and risks. It happens, however, that the part played by SDC, according to the background set out in the order for reference, is not that of a financial intermediary but of a data-processing undertaking providing the financial institutions with technical assistance.

financial institutions, but that it does not itself, legally speaking, effect the credit transfer. [26] It is therefore inappropriate to apply the exemption under discussion to these instrumental functions.

74. As regards the transactions involving advice on trade in securities (section 3.1. B of the order for reference), the explanation of SDC's operations made by the court of reference contains a certain ambiguity:

(a) in the summary list of transactions, section 3.1. B of the order for reference is limited, as I stated, to covering only transactions involving 'advice' on securities;

(b) on the other hand, in detailing the content of section 3.1. B, the order for reference mentions 'advice on *and trade in* [27] securities', [28] adding that 'the plaintiff sets up stock exchange transactions for the members' customers. Such transactions take place by way of purchase or sale of the members' own holdings'.

75. If SDC's operations in this field are confined to providing banks and savings banks with information or advice on the stock market, that service just is not included in the transactions which the Sixth Directive regards as exempt.

76. In fact, a type of service such as is described in the order for reference ('The plaintiff gives its members access to an advanced information and advice system concerning Danish bonds. The plaintiff enables its members to prepare investment proposals for customers on the basis of specific criteria, for example the amount to be invested and the terms involved') is not entitled to exemption under the Sixth Directive.

26 — The subject of the procedure does not extend to actual bank clearing transactions which may be carried out by electronic exchange of information. Inter-bank settlements are in fact often organized by a joint system of electronic clearance. The United Kingdom emphasized at the hearing that in that event payment transactions effected by and between banks, distinct in this respect from relations between financial institutions and customers, also have the benefit of the exemption at issue.

27 — My emphasis. By the expression 'management' used in this section of the order, the court of reference appears to be referring not to the typical operations of managing securities (including normally portfolio management and safekeeping, the collection of dividends or interest and similar tasks) but to negotiation and buying and selling. Management operations, properly so called, are referred to in section 3.1. C of the order for reference under the heading 'management of deposits'.

28 — Translator's note: The phrase used in the Danish text is 'Rådgivning om *handel* med værdipapirer'.

77. On the other hand, if SDC negotiated, purchased and sold securities for its customers' account, such a transaction would indeed be entitled to the exemption provided for in Article 13B(d)5 of the Sixth Directive.

78. However, that does not seem to be the position. Once again, SDC seems merely to provide its members (banks and savings banks) with the necessary technical support to enable them in their turn to effect the transactions of acting as intermediaries in the purchase and sale of securities for their customers' account.

79. In those circumstances and subject to a final legal clarification of those activities which it is for the court of reference to effect, it must again be stated that there is no possibility of declaring exempt the instrumental services which SDC puts at the disposal of the financial institutions in order that they may act as intermediaries in the purchase and sale of their customers' portfolios of securities.

80. With regard to the transactions of management of deposits, purchase contracts and loans (section 3.1. C of the order for reference), SDC accepts that such transactions have not been entitled to exemption since 1 January 1991, the date of expiry of the transitional period during which the States might by way of exception maintain the exemptions for the specific items referred to in Annex F to the Sixth Directive. [29]

81. The characteristics of these transactions (during the period prior to 1 January 1991) as described in the order for reference, raise certain doubts and do not make it possible to decide with certainty what legal system is applicable.

82. The court of reference in fact states that the transactions of 'management of deposits' carried out by SDC, referred to in section 3.1. C of the order for reference, involve keeping a register of customers' securities, checking and effecting entries and cancellations, transferring to customers' accounts income accrued and informing them in writing of any movements.

83. However, the legal person who appears to the customers as performing such operations is not SDC but the financial institution to which the customers have entrusted the management of their securities. SDC's function therefore seems to be providing the financial institutions with the technical support necessary for them to effect the management according to the conditions agreed with their customers.

29 — See paragraph 28 of this Opinion.

84. The same may be said with regard to the management of purchase contracts and loans, where the legal relationship established is that between the customers and the financial institutions. The latter retain responsibility for the management towards their customers, who are not even aware of SDC's action, which is restricted to supplying the banking institutions with the relevant data.

85. Finally, as regards what is referred to as 'tasks concerning members' internal administration' (section 3.1. D of the order for reference), the answer given by SDC to the question put to it by the Court of Justice regarding the content of its application for exemption confirms that the association at no time claimed to qualify for such exemption regarding those transactions. That makes it unnecessary to give any reply regarding the tax system applicable to them.

## Conclusion

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

(1) The exemptions provided for in Article 13B(d)3, 4 and 5 of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (77/388/EEC) do not make the transactions concerned necessarily dependent upon a part being played by a financial institution, bank or savings bank.

(2) When a financial institution which provides its customers with financial services plays a part in transactions which are exempt by virtue of the said provisions, the scope of the exemption is restricted to the corresponding legal operations carried out by the said institution with its respective customers but does not extend to the performance of auxiliary or instrumental services with which an external undertaking, distinct from the credit institution, may supply it in the form of electronic data-handling or, in general, of electronic transmission of information for the performance of the institution's own banking transactions.

(3) In particular, the exemption at issue does not extend to the performance of services of electronic transmission of information with which an external undertaking distinct from the financial institution may supply the latter to allow the performance of transactions of transfer of funds or other transactions referred to in Article 13B(d)3 and 4 of the said Sixth Directive or the transactions relating to securities covered by Article 13B(d)5 of the said directive.

(4) It is for the court of reference to determine whether, during the transitional period referred to in Article 28(3)(b) of the Sixth Directive with reference to Article 28(4) thereof, the plaintiff undertaking actually performed financial services consisting in the management of deposits of securities, the management of purchase contracts and the management of loans, or whether, on the contrary, it confined itself to supplying the financial institutions with the technical support necessary for carrying out such management tasks for their customers. Only in the case of the first of the two alternatives would it be entitled to the exemption at issue.