OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 26 September 2000 [1]

1. By order of 10 June 1999, the Regeringsrätten (Supreme Administrative Court), Sweden, referred a question to the Court for a preliminary ruling on the interpretation of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — uniform basis of assessment (hereinafter 'the Sixth Directive'). [2] Specifically, the Regeringsrätten asks whether a commitment assumed by an insurance company to run the business of a wholly-owned subsidiary would constitute an insurance transaction within the meaning of Article 13B(a) of the Sixth Directive.

Community legislation

2. The purpose of the Sixth Directive relating to turnover taxes was to harmonise national laws establishing the basis of assessment. Under Article 13 of that Directive, a number of transactions are not to be included in the calculation of the basis of assessment, and are therefore exempt from the tax. Article 13B(a) provides *inter alia* for exemptions in the case of 'insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents'. Neither Article 13 nor any other provision in the Sixth Directive defines 'insurance transactions'.

3. The second subparagraph of Article 4(4) of the Sixth Directive is also relevant. It concerns the identification of taxable persons and states that 'each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links'.

National legislation

4. Article 10 of Chapter 3 of the Mervärdesskattelagen (Swedish Law on VAT) gave

1 — Original language: Italian.
2 — OJ 1977 L 145, p. 1.

effect to Article 13 of the Sixth Directive. In the version published in the SFS,[3] Article 10 provides that the supply of insurance services is to be exempt from VAT and defines insurance services as services whose provision constitutes insurance business within the meaning of the Försäkringsrörelselagen (Law on Insurance Business).

5. In 1998 an amendment was introduced to the Mervärdesskattelagen in the form of provision for the registration of groups for tax purposes. In implementation of the second subparagraph of Article 4(4) of the Sixth Directive, Article 1 of Chapter 6a of the Mervärdesskattelagen now provides that for VAT purposes two or more economic operators may be regarded as a single trader, in which case the activities undertaken by the group are to be regarded as a single activity. Under Article 4 of Chapter 6, that is only possible by decision of the tax authorities authorising registration of the economic operators as a group. The main consequence of such registration is that business activities engaged in between undertakings belonging to the same group are not taxable.

6. It should also be borne in mind that since 1951 it has been possible in Sweden to obtain a preliminary opinion in matters of taxation (Förhandsbeskedsinstitut). The need for a preliminary opinion on a VAT matter is appraised by the Skatterättsnämnden (Revenue Law Board). Until 1998 the relevant application procedure was set out in Article 21 of the Mervärdesskattelagen and in the Lagen om Förhandsbesked i Taxeringsfragor (Law on Preliminary Opinions on matters of tax assessment). Since 1 July 1998 the relevant provisions in relation to VAT are to be found in the Lagen (1998:189) om Förhandsbesked i Skattefrågor (Law on Preliminary Opinions on tax matters).

7. In the present case, however, the provisions of the Mervärdesskattelagen apply, under which a preliminary opinion on all questions concerning VAT liability may be sought if, having regard to the applicant's interests, it is important for the purposes of the uniform interpretation or application of the legislation. Preliminary opinions may be challenged before the Regeringsrätten.

Facts and the question referred for a preliminary ruling

8. Försäkringsaktiebolag Skandia (publ) ('Skandia') is an insurance company, one

3 — Svensk Författningssamling (Official Compilation of laws, decrees and regulations), 1988:300.

of whose subsidiaries is Livförsäkringsaktiebolaget Skandia (publ) (hereinafter 'Livbolaget'). Livbolaget is wholly owned by Skandia.

9. Livbolaget is engaged in the business of life assurance, in particular, in the sectors of capital insurance and insurance provision for old age. Livbolaget and Skandia have studied the possibility of merging (in the broad sense) their insurance activities within a single company. One plan was to transfer Livbolaget's staff and operations to Skandia so that, in effect, Skandia would be conducting all Livbolaget's business, whether this consisted in the sale of insurance, the settlement of claims, the calculation of actuarial forecasts or capital management. In return, Skandia would receive from Livbolaget remuneration at market rates. Skandia would assume no liability in respect of those insurance activities. All risks would devolve wholly upon Livbolaget which would preserve its status of insurer for the purposes of Swedish civil law.

10. In 1996, in furtherance of that project, Skandia applied to the Revenue Law Board for a preliminary opinion on the question whether a commitment assumed by Skandia to run Livbolaget's business activities could be regarded as a supply of insurance services for the purposes of Article 10 of Chapter 3 of the Mervärdesskattelagen, thus qualifying for exemption from VAT.

11. Meanwhile, as stated in Skandia's submissions, the two insurance companies were embarking on the partial restructuring of their respective businesses, transferring certain operations, particularly capital management, from Livbolaget to Skandia. This entailed payment of SEK 20 million by way of VAT.

12. On 15 January 1996, the Revenue Law Board issued a negative opinion, which Skandia challenged before the Regeringsrätten. Skandia relied in these proceedings on an earlier opinion given by the Finansinspektionen (Finance Inspectorate) to the effect that the business activities to be carried out by Skandia for Livbolaget were to be regarded as insurance business for the purpose of the relevant Swedish legislation.

13. By judgment of 16 June 1997, the Regeringsrätten dismissed the action on

the ground, *inter alia*, that the exemption provided for in Article 10 of Chapter 3 of the Mervärdesskattelagen concerns insurance services in the strict sense, that is to say, services provided directly by an insurer to the insured and not, for example, computing services carried out for an insurance company by one of its subsidiaries. In the same judgment, the Regeringsrätten also stated that the fact that Article 13 of the Sixth Directive expressly uses the term 'insurance business' implied that the exemption must be limited to services provided to insured persons and cannot, therefore, encompass cooperative arrangements along the lines planned by Skandia and Livbolaget.

14. Skandia appealed on a point of law to the Regeringsrätten, relying on the judgment of the Court of Justice in *SDC*,[4] in which it was held that the exemption provided for in points 3 and 5 of Article 13B(d) of the Sixth Directive, in relation to various banking operations, was not subject to the condition that the service be provided by a specific type of institution which has a legal relationship with the end customer of the bank. Skandia maintained that in the light of that ruling the judgment of the Regeringsrätten ran counter to the Sixth Directive as interpreted by the Court of Justice and was accordingly flawed. Skandia therefore applied for amendment of the preliminary opinion and claimed that the judgment should be set aside in favour of a declaration that the commitment to be assumed by Skandia was to be regarded as the supply of an insurance service exempt from VAT.

15. Meanwhile, the Mervärdesskattelagen was amended to permit the registration of groups for tax purposes.[5] Skandia and Livbolaget thereupon became members of a group of companies which was registered on 27 January 1999, with the registration taking effect for VAT purposes on 1 January 1999. Skandia is listed as the principal company in this group.

16. Although, following registration of the group, transactions between Skandia and Livbolaget on which — according to the judgment of 16 June 1997 — VAT was payable are now *de facto* exempt, the Regeringsrätten takes the view that Skandia's appeal on a point of law has not been deprived of purpose. In the first place, the exemption obtained following registration of the group is not based on legislation which gave effect to Article 13B(a) of the Sixth Directive in Swedish law. Secondly, that exemption, unlike the exemption provided for by the Directive, does not arise automatically, but upon registration, which is subject to approval by the tax authorities. The Regeringsrätten therefore believes that the issue in point in the main proceedings must be considered in the light of Article 13B(a) of the Sixth Directive.

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

5 — On this point, see point 5 of the present Opinion.

However, since it is not clear from the case-law of the Court of Justice cited above whether or not the commitment that Skandia plans to assume in relation to Livbolaget is covered by the term 'insurance transactions' as used in Article 13B(a), the Regeringsrätten has referred the following question to the Court for a preliminary ruling:

'Does an insurance company's commitment, of the kind which Skandia plans to assume, to run the business of a wholly-owned subsidiary constitute an insurance transaction or insurance transactions within the meaning of Article 13B(a) 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?'

The question referred for a preliminary ruling

17. First of all, one brief remark. As I have just mentioned, [6] since 1 January 1999 VAT has not been payable on transactions between Skandia and Livbolaget because these are transactions between companies which are members of a group registered in accordance with Article 1 of Chapter 6a of the Mervärdesskattelagen. I agree with the national court and the Commission, however, that this does not mean that there is now no need to seek a preliminary ruling on this point. Indeed, if the Court were to decide that the business activities in question are insurance transactions within the meaning of Article 13B(a) of the Sixth Directive, the exemption from VAT would have to be recognised as a right deriving directly from Community law and its exercise could not be subject to the discretion of the national tax authorities. [7] Also, as Skandia notes in its observations, registration of the group took effect, for VAT purposes, only as from 1 January 1999, whereas in the case of transactions which qualify for exemption under Article 13B(a), companies may seek reimbursement of tax already paid on transactions concerning business transferred before that date. [8] To my mind, therefore, a ruling by the Court is still necessary so that the precise scope of the rights conferred in individual cases can be clearly and unambiguously delimited and legal certainty ensured. [9]

18. In essence, the national court is asking whether the business activities that Skandia

6 — See point 14 of the present Opinion.

7 — On this point, see, in particular, Case C-241/97 *Försakringsaktiebolaget Skandia* [1999] ECR I-1879, paragraph 50.

8 — See point 11 of the present Opinion.

9 — See, in particular, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23. See also Case 361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 24, and Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 15.

has undertaken to carry out for Livbolaget fall within the scope of Article 13B(a) of the Sixth Directive, thus qualifying for exemption from VAT.

19. The first point to note is that the question referred by the national court concerns solely the term 'insurance transactions'. It is common ground that the activities at issue in the main proceedings do not fall into any of the other categories provided for in Article 13. Above all, as Skandia itself makes clear, Skandia intends to run Livbolaget's business operations without assuming any related liability. That means that the service to be provided does not constitute 'reinsurance'. Reinsurance is commonly understood as indicating the situation where an insurer in turn insures himself against the risk of having to pay out compensation as provided for in the contract drawn up with his client. Thus, a reinsurer assumes, albeit indirectly, some of the risks which initially devolved wholly on the insurer. Secondly, the business operations at issue cannot be classed as 'related [insurance] services performed by insurance brokers and insurance agents'. Skandia cannot be regarded as a broker or an agent, since it has no legal relationship with the insured, that is to say — to all intents and purposes — with Livbolaget's clients. [10]

20. As regards the term 'insurance transactions', Skandia primarily argues that according to the case-law of the Court — in particular, the judgment in *CPP* [11] — in the absence of a definition of VAT liability, this must be extrapolated from the relevant Community rules, which are set out in the 'insurance directives', [12] since '[t]here is no reason for the interpretation of the term "insurance" to differ according to whether it appears in the directives on insurance or

10 — For a definition of 'insurance broker' and 'insurance agent', see Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities (OJ 1977 L 26, p. 14), and Commission Recommendation 92/48/EEC of 18 December 1991 on insurance intermediaries (OJ 1992 L 19, p. 32). From these texts it can be seen that, as a general rule, the business engaged in by brokers and agents entails putting insurance companies in touch with potential clients for the purpose of concluding insurance contracts, or bringing insurance products to the attention of the general public or even the collection of premiums. In all cases, however, it is clear that such business is characterised by a direct relationship with the insured.

11 — Case C-349/96 *CPP* [1999] ECR I-973.

12 — That term encompasses the following Directives: (a) First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3); (b) First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (OJ 1979 L 63, p. 1); (c) Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ 1992 L 228, p. 1).

in the Sixth Directive'. [13] Taking that as its premiss, Skandia goes on to refer to the opinion issued by the Finansinspektionen [14] to the effect that the services which Skandia plans to provide for Livbolaget constitute insurance transactions for the purposes of the Swedish law on insurance business practice, and concludes that since that was the instrument for transposing the Community directives into Swedish law, the business operations at issue must be regarded as exempt from VAT in accordance with Article 13B(a) of the Sixth Directive.

21. Secondly, Skandia points out that Article 8(1) of Directive 73/239/EEC concerning insurance, as amended by Article 6 of Directive 92/49/EEC, [15] requires companies intending to operate in that sector to limit their objects to the business of insurance and operations arising directly therefrom, to the exclusion of all other commercial business. Consequently, according to Skandia, an insurance company may engage only in insurance business and, by definition, all its business transactions constitute insurance transactions. Given, therefore, that the same meaning is to be attributed to the concept of insurance for the purposes of the general rules as for VAT liability, Skandia concludes that a company operating in the insurance sector must by definition be exempt from VAT under Article 13B(a) of the Sixth Directive.

22. While there is no doubt that, in principle, the term 'insurance transactions' in the Sixth Directive must be interpreted in the light of the Community insurance directives, Skandia's reasoning cannot be accepted. Skandia's first argument is based solely on the opinion given by the Finansinspektionen as to how the business operations at issue are to be classified for the purposes of the Swedish legislation on insurance. Even though this legislation served to transpose the Community directives into Swedish law, an opinion given by a national body concerning national legislation cannot be regarded as relevant for the purposes of the question referred by the national court for a preliminary ruling.

23. In my view, Skandia's second argument, too — concerning the restrictions placed by the insurance directives on the objects of insurance companies — is unfounded because it is based on false premisses. In fact, the purpose of those restrictions is to avoid any diversification of activity which might in some way increase the risks inherent in insurance business by compromising the company's ability to

13 — *CPP*, cited above, paragraph 18.

14 — See point 13 of the present Opinion.

15 — Both cited above.

meet its financial commitments in relation to the insured. [16] So far as regards Article 13B(a) of the Sixth Directive, however, it should be borne in mind that, according to the established case-law of the Community, all the exemptions provided for thereunder constitute independent concepts of Community law which must be placed in the general context of the common system of VAT. [17] In other words, Article 13B(a) must be interpreted in the light of Article 33 of the Sixth Directive, which gives Member States the option of maintaining or introducing taxes on insurance contracts. [18] Thus the purpose of the exemption is essentially to prevent the insured from having to pay a number of different taxes in respect of a single activity, that is to say, to prevent a situation in which the activity is subject both to VAT and other taxes. [19]

Consequently, it seems to me, above all, that the fact that the insurance directives place a limitation on the possible objects of insurance companies cannot support the generalisation that all transactions carried out by such companies are insurance transactions. *A fortiori*, that limitation cannot justify construing Article 13B(a) of the Sixth Directive as providing for the general and automatic exemption of insurance companies. Such an interpretation would go far beyond the purpose underlying introduction of the exemption, which can be summed up as the need to prevent multiple taxation of a single activity.

24. In order to answer the question referred by the national court, I believe reference must be made to *CPP*, cited above. In that judgment, the Court held that 'the essentials of an insurance transaction are, as generally understood, that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded'. [20] The Court went on to state that '[i]t is not essential that the service the insurer has undertaken to provide in the event of loss consist in the payment of a sum of money, as that service may also take the form of the provision of assistance in cash or in kind', adding that 'the expression "insurance transactions" is broad enough in principle to include the provision of insurance cover by a taxable person who is not himself an insurer but... procures such cover for his customers by

16 — See, in that regard, point 2 of the Opinion of Advocate General Alber in Case C-239/98 *Commission* v *France* [1999] ECR I-8936.

17 — See, on that point, Case 235/85 *Commission* v *Netherlands* [1987] ECR 1471, paragraph 18.

18 — Specifically, under Article 33(1) of the Sixth Directive, as amended by Directive 91/680/EEC (OJ 1991 L 376, p. 1), '[w]ithout prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, [the] Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts'.

19 — See *CPP*, cited above, paragraph 23.

20 — *CPP*, cited above, paragraph 17.

making use of the supplies of an insurer who assumes the risk insured'. [21]

25. To my mind, it is clear from those statements that, according to the Court, insurance services are characterised by their purpose and beneficiary; in other words, an insurance transaction necessarily implies the existence of a legal relationship between the person covering a risk (it being understood that this may be the insurer in the legal sense of that term or simply the person who procures such cover) and the insured, that is to say, the person whose risks are covered by the insurance.

26. It is true that, as Skandia maintains, [22] the Court held in *SDC* that with regard to points 3 and 5 of Article 13B(d) of the Sixth Directive, the identity of the end customer had no bearing on the question whether a transaction was exempted by that provision. However, the facts of that case were different. It is clear from the wording of the provision at issue in *SDC* that the exemption provided for applied to a whole series of operations involving certain banking transactions. The provisions at issue were therefore amenable to a broad interpretation, encompassing different types of transactions. In the present case, however, the exemption concerns solely insurance transactions. Accordingly, bearing in mind that, according to established case-law, 'the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person', [23] I would argue that the recipient of the service is of decisive importance for the purposes of defining the service at issue here, and that in consequence the criteria set out by the Court in *SDC* do not apply.

By way of confirmation of that point, it should be recalled that Article 13B(a) of the Sixth Directive expressly restricts the exemption for transactions 'including related services' to those performed by insurance brokers or insurance agents. If the term 'insurance transactions' ought properly to be construed in accordance with the principles set out in *SDC*, 'related

21 — *CPP*, cited above, paragraphs 18 and 22.

22 — See point 14 of the present Opinion.

23 — Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 17. See also Case C-346/96 *Blasi* [1998] ECR I-481, paragraph 18, and Case C-453/93 *Bulthuis-Griffioen* [1995] ECR I-2341, paragraph 19.

services' would be understood as implicit in the concept of insurance transactions, and the addition of that specification in Article 13B(a) would be wholly redundant.

27. In the present case, it is clearly for the national court, which is best placed to appraise the facts of the case, to establish whether or not the commitment to be assumed by Skandia *vis-à-vis* Livbolaget is covered by the term 'insurance transactions' as described above. I agree, therefore, with the Commission and the Swedish Government that the question should be answered in the negative. The services that Skandia plans to provide to Livbolaget do not display either of the two characteristics mentioned above, in that they do not entail risk cover and they are not provided for insured persons. They consist in activities of a practical nature involving a relationship exclusively between the two insurance companies, which is a relationship quite distinct from that pertaining between insurer and insured; at most, they could be regarded as a supply of services related to insurance transactions. However, as I have already pointed out,[24] such services are exempt from VAT only if provided by insurance brokers or insurance agents, and Skandia does not fall into either of those categories. In the final analysis, therefore, the activities at issue, bearing in mind also that they are remunerated at market rates, must be regarded as constituting a service effected for consideration within the meaning of Article 2(1) of the Sixth Directive, and accordingly subject to VAT.[25]

28. It remains for me only to adopt a position in respect of an argument put forward by Skandia by way of a subsidiary plea. Skandia maintains that the services that it plans to provide to Livbolaget should be regarded as a single supply incorporating different elements, the principal service being insurance transactions and the remainder being ancillary services. Skandia's defence maintains, moreover, that it follows from *CPP*[26] that, in the case of a single supply, the ancillary services must share the tax treatment of the principal service. Thus the business activities at issue should be considered collectively exempt from VAT. That argument cannot be accepted. Suffice it to note that, on the basis of the above considerations, the activities that Skandia plans to carry out for Livbolaget do not comprise any supply of services which can be regarded as 'insurance transactions' within the meaning of the Sixth Directive.

24 — See point 19 of the present Opinion.

25 — On this point, see, in particular, *SDC*, cited above, paragraph 45.

26 — Cited above, point 30.

Conclusion

For the reasons set out above, I would suggest that the Court reply as follows to the question referred by the Regeringsrätten:

A commitment assumed by an insurance company to run the business of a wholly-owned subsidiary does not constitute an insurance transaction within the meaning of Article 13B(a) of the Sixth Directive.