Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 8 November 2012 [1]

Case C-275/11

GfBk Gesellschaft für Börsenkommunikation mbH
v
Finanzamt Bayreuth

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

(Taxation — VAT — Directive 77/388/EEC — Article 13B(d)(6) — Exemption of the management of special investment funds — Directive 85/611/EEC — Undertakings for collective investment in transferable securities (UCITS) — Investment fund management companies — Definition of 'management' — Application of the exemption to third-party managers — A 'specific' business which 'viewed broadly' forms a 'distinct whole' — Levying of tax on unlawful commercial activities — Principle of fiscal neutrality)

1. Does the provision of advice on investment in transferable securities by a third party to an investment fund management company constitute 'fund management' for the purposes of the exemption laid down in Article 13B of Directive 77/388/EEC [2] on VAT? That is, in short, the question submitted by the Bundesfinanzhof (Federal Finance Court) in the present preliminary ruling proceedings.

2. In answering that question, the Court will have the opportunity of considering case-law that is settled but not without difficulties, according to which the exemptions in Article 13B of the Sixth Directive [3] are to be applied to services provided by a third-party manager 'if, viewed broadly, they form a distinct whole, and are specific to, and essential for, the management of those funds'. The general terms in which that case-law criterion is formulated means that its application to a case of this kind requires a special effort of interpretation.

1 — Original language: Spanish.

2 — 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').

3 — It should be noted that the provision applicable *ratione temporis* to this case is the Sixth Directive. However, it is perfectly possible to extend the line of reasoning followed to the present day, since Council Directive 2006/112/EC **of 28 November 2006 on the common system of value added tax** (OJ 2006 L 347, p. 1), which repealed the Sixth Directive, provides for the same exemption, using the same wording, in Article 135(1)(g).

I – Legal context

A – *European Union law*

3. The Sixth Directive provides in Article 13B for a number of exemptions from VAT, of which I would emphasise the following for the purposes of these proceedings:

‘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:

…

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

…

(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);

(6) the management of special investment funds as defined by Member States;

…’

4. Article 1(2) and (3) of the version of Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) in force between 1999 and 2002 defines such undertakings in these terms:

‘2. For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:

— the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and

— the units of which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings’ assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption.

3. Such undertakings may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).’

5. In 2002, a comprehensive reform of Directive 85/611 was adopted, which thoroughly amended the rules governing management companies.[4] As a result of that reform, Annex II defines the term 'management' of investment funds and of investment companies and inserts a number of examples. The new Article 5(2) of Directive 85/611 refers expressly to the non-exhaustive list of functions laid down in Annex II in the following terms:

'The activity of management of unit trusts/common funds and of investment companies includes, for the purpose of this Directive, the functions mentioned in Annex II which are not exhaustive.'

6. Annex II reads as follows:

'Functions included in the activity of collective portfolio management:

— Investment management.

— Administration:

  (a) legal and fund management accounting services;

  (b) customer inquiries;

  (c) valuation and pricing (including tax returns);

  (d) regulatory compliance monitoring;

  (e) maintenance of unit-holder register;

  (f) distribution of income;

  (g) unit issues and redemptions;

  (h) contract settlements (including certificate dispatch);

  (i) record keeping.

— Marketing.'

7. As a result of the 2002 reform, the European Union legislature also inserted into Directive 85/611 an Article 5g, pursuant to which Member States may permit management companies to delegate to third parties one or more of their own functions if certain conditions are satisfied. According to the article, it must be ensured, in particular, that the delegation of functions does not jeopardise supervision of the management company and that the functions are exercised properly.

4 — Directive 2001/107/EC **of the European Parliament and of the Council of 21 January 2002 amending Council** Directive 85/611/EEC **on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with a view to regulating management companies and simplified prospectuses** (OJ 2002 L 41, p. 20), and Directive 2001/108/EC **of the European Parliament and of the Council of 21 January 2002 amending Council** Directive 85/611/EEC **on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS** (OJ 2002 L 41, p. 35).

II – Facts

8. GfBk (Gesellschaft für Börsenkommunikation mbH) is a German undertaking the objects of which are the dissemination of information and advice relating to the stock market and the provision of advice and marketing in connection with financial assets.

9. In 1999, the services of GfBk were engaged by an investment fund management company ('the IMC'). In particular, GfBk undertook to advise the IMC 'in the management of the fund' and 'constantly to monitor the fund and to make recommendations for the purchase or sale of fund assets'. GfBk was also required 'to pay heed to the principle of risk diversification, to statutory investment restrictions ... and to investment conditions'.

10. According to the case-file, GfBk's remuneration was calculated as a percentage of the value of the special investment fund.

11. From 1999 to 2002, GfBk made recommendations concerning the purchase and sale of securities to the IMC by telephone, fax and web server. The referring court states that GfBk did not issue detailed reports but rather specific recommendations which the IMC entered in its order system. Once processed, those recommendations were analysed in order to check whether they contravened any statutory limits. At the end of the verification, the IMC would implement the recommendations, sometimes within a matter of minutes.

12. With regard to the period 1999 to 2002, the German tax administration took the view that the services provided by GfBk did not constitute the 'management of special investment funds' within the meaning of Article 13B(d)(6) of the Sixth Directive. Disagreeing with that interpretation, GfBk appealed against the decisions concerned until it exhausted the legal process before the Bundesfinanzhof, the court which has referred this question to the Court of Justice for a preliminary ruling.

III – The question referred for a preliminary ruling and the procedure before the Court of Justice

13. On 5 May 2011, the order for reference from the Bundesfinanzhof was received at the Registry of the Court; the order is worded in the form of three possible different replies:

'Is the service provided by the third-party manager of a special investment fund sufficiently specific and hence exempt from taxation only if

(a) the manager performs a management function and not only an advisory function, or if

(b) the service differs in nature from other services by reason of a characteristic feature for the purpose of exemption from tax under this provision, or if

(c) the manager operates on the basis of a delegation of functions under Article 5g of Directive 85/611/EEC, as amended?'

14. Written observations were submitted by GfBk, the German, Luxembourg and Greek Governments and by the European Commission.

15. At the hearing, held on 28 June 2012, GfBk, the German Government and the Commission put forward their respective views.

IV – Analysis of the question referred

16. Although the question referred by the Bundesfinanzhof takes the form of mutually exclusive replies, I believe that it should rather be construed as a series of three *arguments* that may be used to counter the application of the exemption in Article 13B(d)(6) of the Sixth Directive to advisory and information services on investments in transferable securities provided by a third party. The Court is asked, therefore, to take into consideration each of those arguments in order to arrive at the correct interpretation of the provision.

A – *The first argument: application of the concept 'management of special investment funds' to advisory and information services on investments provided by a third party*

17. By the first argument, the Bundesfinanzhof asks the Court about the classification of the service provided by GfBk, specifically the precise nature of this service, for the purposes of classifying it as the 'management of a special investment fund' and, therefore, as an exempt service pursuant to Article 13B(d)(6) of the Sixth Directive.

18. The fact is, and this is the first point I regard as appropriate, that the test the Court applies when examining whether an outsourced activity falls within the ambit of that exemption is complex. As I mentioned at the beginning of this Opinion, the difficulty in this case relates to the application of the case-law criterion that has been applied to cases of outsourced services, in accordance with which those services must 'viewed broadly ... form a distinct whole, and [be] specific to, and essential for, the management of [the] funds' in order to qualify for the VAT exemption.

19. All the parties have expressed a view on this point and have suggested different solutions. On the one hand, the Federal Republic of Germany, the Hellenic Republic and the Commission maintain that the advisory and information service provided by GfBk is neither sufficiently specific nor sufficiently distinct. On the other hand, GfBk and the Grand Duchy of Luxembourg argue that the service is specific and comprehensive and take the view that it is covered by the exemption. In support of the first solution, it is submitted primarily that the IMC assumes ultimate responsibility for decision-making, including legal responsibility. In addition, reference is made to the fact that the purchase and sale recommendations prepared by GfBk are mere indications which the IMC is freely entitled to reject. For their part, GfBk and the Grand Duchy of Luxembourg rely on the judgment of the Court in *Abbey National*,[5] in which it was held that certain services provided by third parties are covered by the exemption in Article 13B(d)(6) of the Sixth Directive.

20. In order to provide a reply to this question, it is particularly necessary to examine, first, the relevant case-law of the Court, most notably the judgment in *Abbey National*, many times cited by all those taking part in these preliminary ruling proceedings.

1. *Abbey National*

21. *Abbey National* settled a question referred for a preliminary ruling relating to services provided to an investment company by a third party; those services consisted of, inter alia, computing the amount of income and the price of units or shares, the valuation of assets, accounting, the preparation of statements for the distribution of income, the provision of information and documentation for

5 — Case C-169/04 [2006] ECR I-4027, paragraph 63.

periodic accounts and tax, statistical and VAT returns, and the preparation of income forecasts.[6] The judgment confirmed that that variety of services, which the Court included under the title 'administrative management',[7] came 'generally' within the scope of Article 13B(d)(6) of the Sixth Directive.[8]

22. In reaching that conclusion, the Court relied on a number of arguments equally applicable to the present case, as I will demonstrate below.

23. First, *Abbey National* examines the purpose of the exemption provided for in Article 13B(d)(6) of the Sixth Directive, which is 'to facilitate investment in securities for small investors'.[9] Therefore, the objective of the exemption is to ensure that the tax is fiscally neutral as between investors who manage their portfolios directly and those who gain access to collective investment through a management or investment company.[10]

24. Secondly, the judgment points out that 'management' of an investment fund, within the meaning of Article 13B(d)(6) of the Sixth Directive, encompasses not only tasks covered, *sensu stricto*, by that concept, in other words, tasks of portfolio management, but also tasks of 'administering undertakings for collective investment themselves'.[11] In order to determine which administrative services are specific enough to be covered by the definition of 'management' within the exact meaning of Article 13B(d)(6) of the Sixth Directive, the Court relies on Annex II to Directive 85/611. In its opinion, the annex sets out, under the heading 'Administration', which services of this kind are sufficiently specific for the purposes of the VAT exemption.

25. Thirdly, the judgment rejects the need for the management concerned to be performed exclusively by a specific person. On the contrary, the Court explicitly points out how the management of special investment funds under Article 13B(d)(6) of the Sixth Directive 'is defined according to the nature of the services provided *and not according to the person supplying or receiving the services*.'[12] Therefore, in keeping with the rulings of the Court in earlier judgments relating to other exemptions laid down in Article 13B(d),[13] there is nothing to preclude the management of special investment funds from being broken down into a number of separate services, without there being any reason why some of those services should not be provided by a third-party manager.[14]

26. Lastly, *Abbey National* relies on the earlier case-law relating to Article 13B(d) of the Sixth Directive to observe that, in any event, the services provided by a third-party manager 'must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in that same point 6', in other words, the management of a common fund.

6 — See *Abbey National*, paragraph 26.

7 — *Abbey National*, paragraph 66.

8 — *Abbey National*, paragraph 69.

9 — *Abbey National*, paragraph 62.

10 — Ibid.

11 — *Abbey National*, paragraph 64.

12 — *Abbey National*, paragraph 66 (emphasis added).

13 — See the following judgments: Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 66, in relation to point 5 ('transactions ... in shares, interests in companies or associations, debentures and other securities ...'); Case C-235/00 *CSC Financial Services* [2001] ECR I-10237, paragraph 23; Case C-453/05 *Ludwig* [2007] ECR I-5083, paragraph 36, in relation to point 1 ('the granting and the negotiation of credit and the management of credit by the person granting it'); Case C-175/09 *AXA UK* [2010] ECR I-10701, paragraph 27, in relation to point 3 ('transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments ...'); Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10099, paragraph 45, in relation to point 2 ('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') and also point 3; and Case C-350/10 *Nordea Pankki* [2011] ECR I-7359, paragraph 27, in relation to point 5.

14 — *Abbey National*, paragraph 67.

27. That test is not developed any further in *Abbey National* or in other judgments relating to other exemptions under Article 13B(d) of the Sixth Directive. However, it is possible to extract from those judgments a number of criteria following the solution reached by the Court in each case. Those criteria, capable of reflecting a rather more precise content of the rule of specificity and distinctness, are the following: the service provided by the third party must be intrinsically connected to the service provided by the management or investment company, and also have a significant degree of autonomy as regards its content. Furthermore, the outsourced service must be continuous or, at least, foreseeable over time. However, it does not appear to be relevant whether the outsourced service brings about a change in the legal or economic situation of the company which receives it.

28. Let us now see whether those tests, as deduced from the case-law laid down to date, are satisfied in the present case.

2. The activity of providing investment advice, in the light of the case-law

29. The Bundesfinanzhof seeks to ascertain specifically whether the activity carried on by GfBk is capable of being outsourced and, even if that is the case, whether it can fall within the exemption provided for in Article 13B(d) of the Sixth Directive. In that connection, it should be observed, as we have just seen in the above analysis of *Abbey National*, that outsourced services provided to a fund management company do indeed fall within the ambit of the exemption. The condition which the Court stipulates is that those services must, 'viewed broadly ... form a distinct whole, and [be] specific to, and essential for, the management of those funds'.

30. As I have stated in point 27 of this Opinion, the application of that criterion calls for account to be taken of a number of characteristics. I shall deal with them one by one, in addition to a number of arguments put forward by the Member States and the Commission, before reaching the conclusion that, in principle, subject to certain findings of fact which must be left to the referring court, the services provided by GfBk satisfy the conditions of the test of specificity and distinctness.

a) The intrinsic connection of the service to the activity of the fund

31. The condition of specificity and comprehensiveness laid down in *Abbey National* refers to an intrinsic connection between a service and the activity carried out by a common fund. In short, it is a question of identifying those services that are typical of a common fund and single it out from other economic activities. To give a simple example, the computation of units and shares or a proposal to purchase or sell assets are activities typical of an investment fund but not of a construction company. Clearly, there is nothing to preclude a construction company from carrying on financial investment activities but these activities will not be *characteristic* or typical elements of, and in that sense specific to, the business of construction.

32. However, a service of technical assistance for computer equipment, or even, as a number of Member States and the Commission pointed out at the hearing, a cleaning service, may be provided to a fund management company or to a construction company, without it being possible to argue that the service concerned is specific to either of those two businesses. These services would be, so to speak, neutral or fungible from the point of view of their content, since they can be provided completely without distinction to both types of company.

33. In the case of advisory and information services relating to the strict management of a fund or to the purchase and sale of assets, it is clear that this is an activity specific to a special investment fund. GfBk makes recommendations concerning transactions which the IMC may subsequently carry out, albeit in its capacity as such, in other words, as the manager of a special investment fund. Therefore, the services concerned are eminently characteristic of collective investment undertakings which, according to Directive 85/611, have as their sole object 'the collective investment in transferable

securities and/or in other liquid financial assets ... of capital raised from the public'.[15]

34. The circumstances of the case disposed of in *Abbey National* assist also in confirming the specific nature of the business carried on by GfBk. If the Court concluded that administrative and accounting activities have a specific nature for the purposes of the exemption laid down in Article 13 of the Sixth Directive, the same solution is called for in relation to an activity closely connected to the core of a fund's activities, such as the processing of information for the purposes of investment in capital. In so far as administrative activities, such as keeping the accounts, calculating income and the price of units or shares, or the valuation of assets, are specific and distinct, then I believe, a fortiori, that that classification applies also to a much more specific service, such as the provision of advice and information relating to the management of the fund and the purchase and sale of assets.

35. In response to that assertion, it could be countered, as the Federal Republic of Germany has done, that the activities of providing advice and information are not listed in Annex II to Directive 85/611. However, that argument must not succeed because Directive 85/611 states, in Article 5(2), that the list in the annex is 'not exhaustive'. In her Opinion in *Abbey National*, Advocate General Kokott put it very clearly when she stated that 'the concepts in Annex II to Directive 85/611 are regarded not as definitions of the management services of a common fund but as a description of the typical functions of the management company'.[16] Accordingly, in view of the predominantly illustrative nature of the annex, the fact that the services provided by GfBk are not explicitly referred to in that annex does not preclude their inclusion in the category of a specific service included in the activity of 'management' of a special investment fund.

b) Autonomy of the service vis-à-vis the activity of the fund

36. The case-law test of specificity and distinctness at issue in this case is concerned with the autonomy of the service too, in other words, with the capacity to assume responsibility for services which are sufficiently defined so that they do not become blurred with other services provided by the recipient of the service. To a certain extent, this condition concerns the decisive character of the service and this is why the Court has sometimes used the adjective 'essential' when referring to the requirement that 'viewed broadly' the service must form a 'distinct whole'.[17]

37. Accordingly, a service that, 'viewed broadly', forms a 'distinct whole' is one that, first, cannot be confused with other services already performed by the recipient of the service. For example, if a management company already carries on accounting activities and that is evidenced by the fact that it has an internal accounts department which covers the whole of the service, it would be difficult to differentiate an accounting service provided by a third party from the one already performed internally by the company. That observation confirms how the service provided by the third party would lose autonomy because the recipient of the service already performs that service itself.

15 — First indent of Article 1(2) of Directive 85/611.

16 — Opinion in *Abbey National*, point 79.

17 — Ibid.

c) Continuity of the service

38. Thirdly, the specific and distinct nature of the service must have some temporal permanence. In other words, the service must not be provided on a sporadic, occasional basis, for otherwise it will not be sufficiently significant to be covered by the exemption in Article 13B(d)(6) of the Sixth Directive. That does not mean that the service must necessarily be linear in time, because that could exclude outright all activities which are not provided on a regular basis. To my mind, what it means is that the outsourcing in question should reflect an operational choice on the part of the manager, which is therefore endowed with a certain degree of stability.

39. In the present case, it is for the referring court to determine whether the condition is satisfied. The analysis concerned requires an examination of the facts that will confirm whether the services provided by GfBk were provided on a permanent basis over time, in such a way that those services may be regarded as, to a certain degree, foreseeable and continuous. If the referring court concludes that the advisory and information services were provided exclusively by GfBk, or also by other third parties, on a permanent basis over time, that will confirm that the activity is sufficiently autonomous so that 'viewed broadly' it forms a 'distinct whole'.

d) Irrelevance of the criterion of a change in the legal and financial situation

40. Finally, it is necessary to deal with an argument put forward by the Federal Republic of Germany and the Commission, that the legally relevant decisions are not attributable to GfBk but rather to the management company, which would confirm that there is no specific and distinct 'management' for the purposes of Article 13B(d)(6) of the Sixth Directive.

41. That argument cannot be accepted, because it may be regarded as tacitly dismissed by *Abbey National*. In that case, as has been seen, the disputed services were all ordinary activities typical of the administration of a management company, but there was nothing to preclude their being classified as specific and distinct 'management' within the meaning of Article 13. That is consistent with the view that it is not essential for there to be a change in the legal or financial situation but rather an outsourcing, in *substantive* terms, of the activity of 'management'.

42. Indeed, Advocate General Kokott disagreed with the view of Advocate General Poiares Maduro in that regard,[18] and the Court followed the former's approach. In her Opinion in *Abbey National*, Advocate General Kokott ruled out the application of the criterion referred to (which the Court had already used in relation to other exemptions in Article 13B(d) of the Sixth Directive), referring to the more general wording of point 6, but arguing too that '[i]f the exemption were restricted to activities that affect the composition of the portfolio, only a minor part of the activity of common funds would be exempt from VAT'.[19] I agree with that reasoning and believe that *Abbey National* did not take into account the criterion of a change in the legal and financial situation.

e) Strict interpretation of the exemption provided for in Article 13B(d)(6) of the Sixth Directive

43. Finally, I must deal with a more general argument which is apparent from the observations submitted by the Federal Republic of Germany and the Hellenic Republic and which relates to the strictness of the interpretation of the exemptions in Article 13B(d)(6) of the Sixth Directive. That argument is based on settled case-law pursuant to which, in so far as they are exceptions to a general rule, the VAT exemptions must be interpreted strictly.

18 — See the Opinion of Advocate General Poiares Maduro in Case C-8/03 *BBL* [2004] ECR I-10157, point 33.

19 — Opinion in *Abbey National*, point 66.

44. This argument was previously dealt with correctly by Advocate General Kokott in her Opinion in *Abbey National*. In that Opinion, the Advocate General pointed out that, in some cases, a strict interpretation of Article 13 of the Sixth Directive could come into conflict with a settled practice in case-law, according to which it is desirable to give a uniform interpretation of the same concept in different legal acts. However, in the particular case of Article 13 of the Sixth Directive and Annex II to Directive 85/611, as far as the concept of 'management' is concerned, the Advocate General reached the conclusion that the tension was more imaginary than real. In her view, no provision of Directive 85/611 lays down a precise definition of the expression 'management of a common fund'. At the most, as I stated above, that directive refers to the list in Annex II merely by way of information, subject always to the fact that the courts may supplement the list in the light of the objectives and scheme of the European Union legal order.

45. Thus, the proposal I put before the Court does not constitute a broad interpretation of the term 'management of special investment funds'. On the contrary, the interpretation I propose is limited to giving meaning to the term 'management' in the context of the outsourcing of services, while at the same time ensuring an interpretation consistent with other instruments of European Union law. That is also the conclusion reached by the Court in *Abbey National*, in which it held that an interpretation of Article 13 of the Sixth Directive in harmony with Directive 85/611 supported the interpretation given until then of the term 'management', but did not, by any manner of means, constitute a broad interpretation of the terms of the exemption.

f) Recapitulation

46. For those reasons, having excluded the possibility that the interpretation proposed might constitute a broad interpretation of the exemption in Article 13B(d)(6) of the Sixth Directive, I believe that that provision must be interpreted as meaning that an advisory and information service provided by a third party, relating to the management of a special investment fund and the purchase and sale of assets, constitutes an activity of 'management' specific and distinct in nature, provided that the service is found to be autonomous and continuous in respect of the activities actually performed by the recipient of the service, a matter which it is for the national court to verify.

B – *The second argument: compatibility with a presumed principle of horizontal fiscal neutrality*

47. Next, the Bundesfinanzhof asks whether it is possible to differentiate a service of the kind provided by GfBk from other services by reason of any characteristic feature for the purpose of its exemption from tax. However, when setting out the reasons for this question in the order for reference, what the referring court in fact puts forward is an argument based on what could be described as a principle of 'horizontal' fiscal neutrality. That is to say, there is an infringement of the Sixth Directive as a result of the fact that tax-advantageous treatment is afforded to one person (the management company or the investment companies which access advisory services) but not to another (investors who make an investment directly, even though they also use advisory services). I believe, therefore, that when the Bundesfinanzhof refers in its question to a 'characteristic feature' of the service, it is seeking to bring to the attention of the Court that alleged discriminatory treatment.

48. The second part of the question referred for a preliminary ruling having been so construed, I believe that, in this case, there is no infringement of the principle of fiscal neutrality. Indeed, one of the objectives of the exemption in Article 13B(d)(6) of the Sixth Directive is specifically to facilitate investment in securities for small investors. Behind that exemption there is, in turn, the need to guarantee fiscal neutrality, for otherwise anyone using collective forms of investment (liable to VAT) would be penalised, to the benefit of direct investors (who carry out the service themselves). Given that one consequence of collective investment is to facilitate investment for small investors or investors without specialist knowledge in a particular market, the exemption entails a stimulus for

such collective investors, whom the legislature considered to be deserving of support. [20]

49. However that may be, and in any case, to argue that the application of the exemption to GfBk would amount to detrimental treatment for those private investors who gain access to its services directly, to the benefit of management companies, would lead to an endless chain of discrimination. As Advocate General Sharpston observed recently in *Deutsche Bank*, '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'. [21]

50. In the judgment in that case, the Court relied on that point in the Advocate General's Opinion and added further that the principle of fiscal neutrality 'is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions'. [22]

51. Accordingly, to my mind, accepting that GfBk is covered by the exemption in Article 13B(d)(6) of the Sixth Directive does not constitute a solution contrary to the principle of fiscal neutrality, this principle being understood to be a requirement not to discriminate between taxpayers in comparable positions.

C – *The third argument: the legal effects of a delegation of functions without authorisation, within the meaning of Directive 85/611*

52. Thirdly and finally, the Bundesfinanzhof asks the Court what effect an unlawful activity has on the interpretation of the exemption. According to the case-file, at the time the activity was carried on the IMC had not obtained the obligatory authorisation that would have permitted the delegation of the service to GfBk. The referring court considers that this situation is contrary to the version of Directive 85/611 in force at the time when the service was provided. In such a case, the referring court asks the Court whether that fact has any bearing on the interpretation of Article 13B(d)(6) of the Sixth Directive.

53. Only the Greek Government and the Commission have expressed a view specifically on that point. While the former merely argues that the exemption does not apply when the requirements of supervision laid down in Directive 85/611 are not satisfied, the latter refers to the case-law of the Court on the levying of VAT on unlawful activities. In the light of that case-law, the Commission concludes that whether the activity is classified as lawful or unlawful must not have any impact at all on the interpretation of Article 13B(d)(6) of the Sixth Directive.

54. I agree with the solution proposed by the Commission but, for the reasons which I shall explain below, I believe that it is unnecessary to examine in detail the case-law of the Court on the levying of VAT on unlawful activities. [23]

55. In order to address this final argument, it is necessary to point out that all delegations involve a transfer of decision-making power between individuals, giving rise to a relationship of principal and agent. By definition, delegation gives rise to the capacity of the agent to alter pre-established legal positions or to create new legal positions, even without the consent of the principal. That explains

20 — Opinion cited above, points 27 and 28.

21 — Opinion of Advocate General Sharpston in Case C-44/11 [2012] ECR, point 60.

22 — Judgment cited in the previous footnote, paragraph 45.

23 — See, inter alia, Case C-111/92 *Lange* [1993] ECR I-4677, paragraph 12, and Case C-283/95 *Fischer* [1998] ECR I-3388, paragraph 21.

why, when a management company delegates its own functions and transfers the capacity to make decisions to another person, the agent thereby assuming the power to alter a legal position, the legislation requires authorisation to have been given by the competent authorities before the delegation is made.

56. The situation of GfBk is completely different. At no time has it been delegated essential functions the conditions of which were previously set out in a mandate. Its business consists of the 'management' of a special investment fund, but this 'management', as provided for in Article 13B(d)(6) of the Sixth Directive, is clearly a broader concept not necessarily entailing the transfer of decision-making capacity and, consequently, the alteration of legal positions. I have already referred to that defining feature of the activity of 'management' in points 41 and 42 of this Opinion and I refer to the arguments set out therein.

57. Accordingly, in so far as the term 'management' in Article 13B(d)(6) of the Sixth Directive includes services that do not entail the alteration of legal positions, I believe that the fact that there is no authorisation allowing for the delegation to GfBk does not place conditions on the application of the exemption in that article.

V – Conclusion

58. In the light of the foregoing considerations, I invite the Court to reply in the following terms to the question referred for a preliminary ruling by the Bundesfinanzhof:

Article 13B(d)(6) 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 must be interpreted as meaning that an advisory and information service provided by a third party, relating to the management of a special investment fund and the purchase and sale of assets, constitutes an activity of 'management' specific and distinct in nature, provided that the service is found to be autonomous and continuous in respect of the activities actually performed by the recipient of the service, a matter which it is for the national court to verify.

The proposed interpretation of Article 13B(d)(6) of Directive 77/388 is not affected if a requirement of horizontal fiscal neutrality is taken into account.

Article 13B(d)(6) of Directive 77/388 must be interpreted as meaning that, in so far as the term 'management' includes services that do not entail the alteration of legal positions, the fact that there is no authorisation allowing for the delegation to GfBk does not place conditions on the application of the exemption in that article.