



**LUND UNIVERSITY**  
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**The scope of the VAT exemption applicable to insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents.**

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## 1 Abbreviation list

The Sixth Directive	Sixth Council Directive 77/388/EEC 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
RVD- VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
ECJ/ the Court	European Court of Justice
BTA	Border Tax Adjustments
VAT	Value Added Tax
AG	Advocate General
EU	European Union
PEICL	The Principles of European Insurance Contract Law
TFEU	Treaty on the Functioning of the European Union
The 1977 Directive	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
Directive 73/329/EEC	First 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), as amended by Directive 84/641/EEC of 10 December 1984 (OJ 1984 L 339, p. 21)
Directive 77/92/EEC	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)
The insurance Mediation Directive (2002/92/EC)	Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation

## 2 Introduction

### 2.1 Background

According to Art.1(2) of the 2006/112/EC (RVD)<sup>1</sup>, VAT is a “general tax on consumption”, designed to have a broad base, thus being applied to most of the goods produced and distributed and services provided within the EU. VAT is a neutral tax<sup>2</sup> characterized by its effectiveness in the prevention of double taxation, since it is calculated on each transaction “on the price of the goods or services at the rate applicable to such goods or services” after the “deduction of the amount of VAT borne directly by the various cost components”<sup>3</sup>. Consequently, the final VAT charged, consists of the sum of the VAT paid at each stage of production and distribution. According to Sijbren Cnossen<sup>4</sup> “a well-designed VAT does not distort trade and investment and is highly successful in applying appropriate BTAs”<sup>5</sup>.

Interestingly, during the first decade of implementation of the VAT mechanism (1968-1978) the basic VAT Directive contained limited provisions on exemptions, while at the same time it gave Member States the freedom to determine the “other exemptions” which were considered necessary<sup>6</sup>. It was not until the late 1970s, when the VAT exemption for insurance and reinsurance transactions was introduced by the sixth VAT Directive (under Art. 13(B))<sup>7</sup>. Accordingly, this exemption was carried over into Art. 135(1)(a) of the 2006 Recast VAT Directive which provides that: “Member States shall exempt the following transactions: insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents”.

As it becomes evident from the rich case law of the ECJ, insurance services are difficult to tax in terms of VAT, since they include many complex economic and legal concepts, thus escaping the harmonized core of the VAT and raising many juridical and administrative issues within the EU. Joep Swinkels<sup>8</sup> argues that: “[t]he European legislature has never clearly indicated the ground for introduction of the exemption for insurance transactions in the Sixth Directive”<sup>9</sup>. In an attempt to justify the VAT exemption for insurance the ECJ pointed out that: “if “insurance transactions” refers solely to transactions performed by insurers themselves, the final consumer might have to pay, in the case of block policies, not only that tax (i.e. tax on insurance

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1 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11 November 2006.

2 For the “principle of fiscal neutrality” see also: C-45/95 (Commission v Italy) para.15, C-155/01 (Cookies World) para.60, C-141/00 (Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften in Berlin) para.30, C-481/98 (Commission v France) paras. 21,22

3 Art.1(2) of the 2006/112/EC (RVD)

4 Sijbren Cnossen is advisor at CPB and professor in the economics faculty of the University of Pretoria.

5 Sijbren Cnossen “Three VAT Studies” December, 2010, p.24.

6 Art. 10(1) &(3) of the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax, OJ 71 (1967), English Special Edition OJ 1967 of November 1972.

7 Sixth Council Directive 77/388/EEC 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, OJ L 145, 13 June 1977, pp. 1–40.

8 Tax adviser (Amsterdam) and free-lance publicist

9 Joep Swinkels, “EU VAT Exemption for Insurance Transactions”, International VAT Monitor July/August 2007 IBFD, p.262

contracts) but also VAT. Such a result would be contrary to the purpose of the exemption provided for by Article 13(B)(a) of the Sixth Directive”<sup>10</sup>. In fact, Article 401 of the VAT Directive provides the possibility for Member States to “maintain or introduce” taxes on insurance contracts under the condition that “the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers” Consequently, according to the ECJ the main reason for the exemption of insurance transactions from VAT is the prevention of their double taxation, since otherwise they would be subject to both VAT and national tax on insurance premiums.

Admittedly, the introduction of an exemption for insurance transactions through the provision of Art.135 (1)(a) RVD had an impact on the function of the VAT mechanism and has been the main cause for unresolved legal and economic issues. It could be argued that the main legal challenge is the definition of the scope of the VAT exemption for insurance services. This is indeed a very demanding task given the wide variety of variables that form the concept of insurance services (nature of main and related services, service providers and the contractual relationship between the involved parties). It is settled case law that the VAT exemption of insurance services must be regarded as an independent concept of EU law and be interpreted accordingly so as to “avoid divergences in the application of the VAT system from one Member State to another”<sup>11</sup>. Moreover, according to the ECJ: “It is also settled case-law that 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 VAT is to be levied on all services supplied for consideration by a taxable person”<sup>12</sup>. Consequently, any attempt to define the scope of the exemption would need to respect not only the fundamental legal principles but also the independent character and the special status of the provision. Towards that direction and in view of the uneven approaches by Member States and their national courts regarding the application of the VAT exemption of insurance services, the Commission has proposed the clarification and broadening of the rules governing the aforementioned exemption<sup>13</sup>. However, it seems that this proposal has not been particularly fruitful so far, as it constitutes a source of confrontation between the Council and the Member States. Despite the difficulties, it would be intriguing to present the proposed reforms and attempt to assess their impact on the VAT treatment of insurance services.

Of course, except for the legal issues raised by the VAT exemption for insurance services that will be discussed in this Thesis, there are also significant economic disadvantages to be reported. One of the most important flaws is the “hidden VAT” phenomenon in the cost structure of insurance services. Providers of insurance services are not able to deduct input VAT on services and products which are supplied to them, since the services they do supply are VAT exempt. Consequently, there is a missing link in the VAT chain, causing the VAT cost for insurance services to be reflected on the charges to customers, which cannot credit any input VAT against their output VAT, since (in principle) they are not supposed to have borne any. The

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10 Case C-349/96 (Card Protection Plan Ltd v Commissioners of Customs and Excise),para.23

11 Case C-349/96 (Card Protection Plan Ltd v Commissioners of Customs and Excise),para.15

12 Case C-359/97 (Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland),para.64

13 Proposal for a Directive (COM/2007/747) amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services.

“hidden VAT” phenomenon results in major market distortions and is contrary to the principle of fiscal neutrality, which is the cornerstone of the VAT structure.

## 2.2 Purpose

It is evident that the scope of the VAT exemption of insurance transactions is rather unclear, thus creating many “grey zones” and an atmosphere of legal uncertainty within the EU.

This Thesis aims to present and clarify the rules governing the scope of the VAT exemption for “insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents” as stipulated in Art 135(1)(a) of the RVD. It is obvious from the wording of the provision that it is necessary to define the terms “insurance” and “reinsurance” and describe clearly the scope and borderlines within a transaction can be characterized as such. Moreover it is of equal importance to analyze the roles and responsibilities of “insurance brokers” and “insurance agents” and clarify the meaning and substance of “related services”. Consequently, this Thesis aspires to create a road map for the VAT treatment of all the relevant types of insurance contracts by giving answers to the questions:

- Which are the subject and nature of VAT exempt “insurance and reinsurance transactions”?
- Which are the subject and nature of “related services performed by insurance brokers and insurance agents”?

## 2.3 Method and material

In order to answer the aforementioned questions, this Thesis will focus on analyzing the relevant ECJ’s case law and assessing the Court’s consistency in the interpretation of the VAT and Insurance Directives<sup>14</sup> regarding the VAT exemption of insurance services. Admittedly, there have been many requests to the ECJ by the national courts to deliver preliminary rulings regarding the context of Art 135(1)(a) RVD. As a result there is available rich case law for review, including the following cases: C-349/96 (CPP), C-40/99 (Skandia), C-8/01 (Taksatorringen), C-472/03 (Arthur Andersen), C-13/06 (Commission v Greece), C-124/07 (J.C.M. Beheer BV), C-242/08 (Swiss Re) and C-224/11 (BGŽ Leasing) which will be analyzed and commented according to the academic needs of this Thesis.

Furthermore, the current Thesis will examine the provisions of the VAT Directive, the “insurance directives”<sup>15</sup> and the alternative proposal titled “Principles of European Insurance Contract Law” (PEICL) presented by the Project group on a “Restatement of European Insurance Contract Law” aiming to establish a European insurance contract law. At the same time this Thesis will present the Commission’s initiatives

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14 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, Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, 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 (Solvency I), Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

15 Ibid 14

towards the amendment of Art 135(1)(a), as expressed by the latest Proposal (COM/2007/747)<sup>16</sup>.

The method employed by the author of this Thesis in order to achieve the aforementioned objectives will be the traditional legal dogmatic method and the methods of interpretation used will be the literal, purposive and contextual.

## **2.4 Delimitations**

As discussed, this Thesis will focus on the definition of the scope of Art. 135(1)(a) RVD. Consequently, this Thesis will not address other issues connected to the aforementioned exemption such as: the clarification of the place of supply of the “insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents” or the exposition of the VAT grouping rules regarding insurance transactions. Furthermore, despite the divergences that might be observed in the application of the VAT exemption for insurance transactions between Member States, there will not take place an in depth analysis of the various national law provisions adopted by each Member State. However, a creative comparison will be attempted, whenever necessary, so as to exemplify the inconsistencies and highlight the need for the introduction of common concepts and harmonized terminology in the field of insurance services.

## **3 Case law analysis**

### **3.1 Introduction**

Article 135(1)(a) RVD is providing a VAT exemption for insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents. It would be fair to comment that the current provision is rather vague and could be described as a complex equation composed by five different variables: the scope of “insurance” and “reinsurance” transactions, the definition of “related services” and the concepts of insurance “brokers” and “agents”. Interestingly, there seems to be no precise justification in the travaux préparatoires<sup>17</sup> to the VAT Directive for the introduction of this exemption. Furthermore, there is no definition of the aforementioned concepts within the text of the VAT Directive, thus making it difficult to decide upon its scope of application. According to Paul Farmer and Richard Lyal the exemption provided by Art.135(1)(a) RVD “could only be justified by general considerations of a social, political or administrative simplification character concerning value added tax”<sup>18</sup>.

In an attempt to clarify that issue it could be considered useful to resort to independent (i.e. not included in VAT Directive) interpretations of the terms “insurance” and “reinsurance” transactions. According to Black’s Law Dictionary insurance is defined as “contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising

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<sup>16</sup> Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, Brussels, 30 September 2011, 14964/11 FISC 122.

<sup>17</sup> As commented by Advocate General Maduro in para.13 of his Opinion Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.)

<sup>18</sup> Paul Farmer and Richard Lyal, “EC Tax Law”, Oxford, 1994, p. 181 as found in Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), Opinion of Advocate General Maduro, delivered on 12 January 2005, para.13



from the occurrence of some specified contingency”<sup>19</sup>. Furthermore, according to the same source, reinsurance is interpreted as “insurance of all or part of one insurer’s risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium”<sup>20</sup>. Regarding the terms “insurance broker” and “insurance agent” it would be useful to elaborate on the definitions given in horizontal legislation<sup>21</sup> (i.e. “EU legislation in other areas than VAT, which could be relevant for interpreting the VAT Directive”<sup>22</sup>), primarily in the 77/92/Directive (Art. 2(1)(a)&(b)<sup>23</sup>) and secondary in its replacement (the Insurance Mediation Directive 2002/92/EC, Art.2(5)<sup>24</sup>). Finally, concerning the definition of “related services” it must be assessed whether their scope is directly connected to the status of insurance “agents” and “brokers” (as their performers) in conjunction with their actual relation to “insurance” and “reinsurance” transactions.

Nevertheless, it is not always clear how those general definitions could be applied to the VAT Directive, so as to define the scope of Art.135(1)(a) RVD, given the fact that it is introducing an exemption to the VAT mechanism. It must, therefore, be considered that a definition of its scope should be based upon the rules of strict interpretation and in respect of its independent character within the EU law, thus fulfilling the requirements of the settled case law<sup>25</sup>. Subsequently, in order to achieve a definition of the scope of the VAT treatment of insurance transactions, capable of contributing to the sound function of the VAT mechanism, it would be of great importance to focus on the relevant case law of the ECJ. The Court of Justice has defined the scope of insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents, in a number of judgments concerning among others: the protection of credit cardholders, the supply of administrative and “back office” services, the transfer of a portfolio of reinsurance contracts, the insurance of leased items, the provision of road assistance and damage assessment services and the concept of sub-agent services. Those cases will be presented and analyzed on this chapter in chronological order (in order to illustrate the evolution of the ECJ’s case law) and to the extent they contribute to the purpose of

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19 Bryan A. Garner, “Black’s Law Dictionary”, 8th Edition, Thomson West, 2004, ISBN 0-314-15199-0, p.814

20 Bryan A. Garner, “Black’s Law Dictionary”, 8th Edition, Thomson West, 2004, ISBN 0-314-15199-0, p.1312

21 Interestingly, there is no clear reference in horizontal legislation under discussion to the terms “insurance” and “reinsurance” transactions.

22 Claus Bohn Jespersen, “Intermediation of Insurance and Financial Services in European VAT”, Kluwer Law International, 2011 (Eucotax Series on European Taxation), p.61

23 The 77/92/EEC Directive is describing in Art.2(1)(a) insurance brokers as: “persons who, acting with complete freedom as to their choice of undertaking, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance and insurance or reinsurance undertakings, carry out work preparatory to the conclusion of contracts of insurance or reinsurance and, where appropriate, assist in the administration and performance of such contracts, in particular in the event of a claim” and in Art.2(1)(b) insurance agents as: “persons instructed under one or more contracts or empowered to act in the name and on behalf of, or solely on behalf of, one or more insurance undertakings in introducing, proposing and carrying out work preparatory to the conclusion of, or in concluding, contracts of insurance, or in assisting in the administration and performance of such contracts, in particular in the event of a claim”.

24 In the 2002/92/EC Directive the terms “insurance broker” and “insurance agent” have been replaced by the concept of “insurance intermediary”. According to Art.2 (5) of the aforementioned Directive “‘insurance intermediary’ means any natural or legal person who, for remuneration, takes up or pursues insurance mediation”.

25 See to that effect Case C-349/96 (Card Protection Plan Ltd v Commissioners of Customs and Excise), para.15 and Case C-359/97 (Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland), para.64

this Thesis. Furthermore, they will form the basis of the final conclusions regarding the scope of the VAT exemption in question, which will be presented on chapter six.

### **3.2 Protection of credit cardholders - Case C-349/96 (Card Protection Plan)**

In the landmark CPP case, the ECJ was confronted with complex issues, regarding the nature, scope and VAT treatment of insurance transactions. In fact, an analysis of the Court's judgment in case C-349/96, could be described as an introduction to the most important characteristics related to the VAT exemption of insurance transactions as defined in Art. 135(1)(a) RVD. Accordingly, in order to answer the four questions referred by the House of Lords for a preliminary ruling, the Court of Justice had to perform an analysis of the term "block policy", attempt a definition of "insurance transactions" and provide a number of tests so as to determine the existence of a single composite supply or the provision of a series of separate insurance services.

According to the facts of the case, Card Protection Plan Ltd (CPP) was a UK Limited company, offering credit cards holders "on payment of a certain sum", a "card protection plan" in order to secure them against financial loss and inconvenience resulting from the loss or theft of their cards or of certain other items"<sup>26</sup> (including car keys, passports and insurance documents). The aforementioned plan comprised of a number of goods and services, which were offered as a combination package. A number of those goods and services were relative to the concept of insurance<sup>27</sup>, while others were of a more general character<sup>28</sup>. The two main legal issues identified in CPP case were whether the "block policy" held by CPP "constituted insurance transactions or related services of insurance agents"<sup>29</sup> and whether the "protection plan" effected by CPP constituted a single composite supply or a number of separate supplies.

#### **3.2.1 The concept of "block policy"**

According to the main proceedings: "[i]n so far as this card protection plan provides for indemnification of the cardholder against financial loss in the event of loss or theft, CPP obtains block cover from an insurance company"<sup>30</sup>. Consequently, it would be important to distinguish the main characteristics of the term "block policy" arranged by an insurance broker (Continental Assurance Company of London ('Continental')) under the operative instructions of CPP. The main characteristics of block policy in terms of VAT would be: the existence of a contractual relationship between the block policyholder (CPP) and the actual insurer (Continental), which makes CPP eligible to provide insurance cover to its customers for a certain fee and subject to certain terms. Furthermore, the holder of a block insurance policy is acting "in its own name and on its own account"<sup>31</sup> while offering insurance cover to its customers, which constitute third parties to the actual insurer. It is, therefore, obvious that there exist two parallel contractual relationships: on the one hand between CPP and Continental and on the other hand between CPP and its customers<sup>32</sup>.

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26 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.7

27 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.9

28 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.10

29 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.13

30 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.8

31 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.21

32 See also Notice 701/36 Insurance, HMRC, February 2013, p.4-5

The ECJ attempted to determine the VAT status of the “protection plan” offered by CPP by seeking an interpretation of the expression “insurance transactions”. Accordingly, the Court admitted that neither the Sixth Directive nor the 73/329 Directive<sup>33</sup> defined the term “insurance transactions”<sup>34</sup>. As a result the Court adopted the definition referred in paragraph 34 of the Opinion delivered by Advocate General Fennelly on 11 June 1998: “[t]he essentials of an insurance transaction are, as generally understood, that one party, the insurer, undertakes to indemnify another, the insured, against the risk of loss in consideration of the payment of a sum of money called a premium”<sup>35</sup>. Subsequently, the ECJ concluded that the “protection plan” offered by CPP to its customers, constituted an insurance transaction, within the meaning of Art. 13B(a) Sixth Directive (now 135(1)(a) RVD)<sup>36</sup>. The Court justified its decision by recognizing that despite the need for strict interpretation of VAT exemptions and the status of independent concepts Community law, attributed “to exemptions provided for by Article 13 of the Sixth Directive”<sup>37</sup>, “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”<sup>38</sup>. Additionally, the Court broadened even more the scope of the provision by indicating that it is not necessary for the supplied service to constitute solely a payment “of a sum of money”, since it can also “take the form of the provision of assistance in cash or in kind”<sup>39</sup> as defined in the annex to Directive 73/239. Moreover, the Court laid emphasis on the fact that Member States “may not restrict the scope of the exemption for insurance transactions exclusively to supplies by authorized insurers under the national law”<sup>40</sup>, since such a restriction would be in contrast to the principle of fiscal neutrality. The aforementioned remarks have been significant for the evolution of case law in the field of the VAT exemption of insurance transactions, since the Court changed its priorities and, using a more systematic approach, laid emphasis on the nature of the transaction (“*natura negotii*”) rather than the quality of the supplier of insurance services. As a result, CPP constituted a taxable person which supplied VAT exempt insurance services to its customers, without being itself a qualified insurer and irrespective of the fact that “the actual insurer (Continental) provided insurance cover directly to CPP’s customers”<sup>41</sup>, since it assumed the risk. “Given that risk assumption is essential for insurance transactions, the ECJ determined that it is important for the service provider to have a contractual relationship with the insured persons”<sup>42</sup>.

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33 First 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), as amended by Directive 84/641/EEC of 10 December 1984 (OJ 1984 L 339, p. 21)

34 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.17

35 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), Opinion of Advocate General Fennelly delivered on 11 June 1998, para.34

36 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.25

37 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.15

38 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.22

39 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.18

40 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.36

41 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.21

42 B. Carvalho; M. Lamensch; S. van Thiel, “European Union - The VAT Exemption for Insurance-Related Services of Brokers and Agents: The Case of the “Call Centre””, EUROPEAN TAXATION, IBFD (20 December 2010) p.22

### 3.2.2 The nature of supplies

After the clarification the tax treatment of the “credit card protection plan” offered by CPP, the Court indicated that it is a responsibility of the national courts to determine: “whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies [...] or whether one of those two supplies is the principal supply to which the other is ancillary”<sup>43</sup>. However, the Court provided a number of general criteria in order to serve as guidance for the assessment procedure to be conducted by the national courts. Towards that direction, the ECJ set the basic principles for the assessment, according to which: “every supply of a service must normally be regarded as distinct and independent” and that supplies constituting “a single service from an economic point of view should not be artificially split”, thus threatening the sound function of the VAT system<sup>44</sup>.

According to the ECJ, the first test procedure requires that national courts will determine the nature of the service supplied to the customer by defining the “essential features of the transaction”<sup>45</sup>. As a result, the courts must initially decide if the customer is receiving a single supply (probably composed by a number of variable elements) or more than one distinct and independent supply. Accordingly, in the case of multiple distinct supplies, the part of consideration connected with the VAT exempt transaction will not be liable to tax<sup>46</sup>. On a second level, the national courts must define whether one or more components are in position of constituting the main supply, whilst any other components can be characterized as ancillary to the aforementioned principal service. According to the settled case law: “[a] service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied”<sup>47</sup>. In the case of existence of a principal supply (connected with ancillary supplies) the VAT treatment of the total supply will be that of the principal supply. Subsequently, the national courts must perform a comprehensive analysis of the objective and subjective characteristics of the transactions and should not base their judgments solely on the pricing variable of this complex equation, since “, the fact that a single price is charged is not decisive”<sup>48</sup>.

### 3.2.3 The Opinion of Advocate General Fennelly

Interestingly, the ECJ refrained from analyzing the possibility of characterizing the services supplied by CPP as “related services performed by insurance brokers and insurance agents”, thus including them in the scope of the VAT exemption provided by Art. 135(1)(a). On the other hand, AG Fennelly attempted an approach towards the scope of “related services” concluding that their VAT exemption can only be achieved if they are “provided by insurance agents or brokers”<sup>49</sup>. In lack of any comprehensive definition of “insurance agents and insurance brokers” within the

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43 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.32

44 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.29

45 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.29

46 “then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event”.C-349/96, para.31

47See joined Cases C-308/96 and C-94/97 Commissioners of Customs and Excise v Madgett and Baldwin [1998] ECR I-6229, paragraph 24

48 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.31

49 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), Opinion Of Advocate General Fennelly delivered on 11 June 1998, para.31

Sixth Directive, the AG delivers his personal view of the definitions provided within Art. 2(1)(b) of the 1977 Directive<sup>50</sup>. Accordingly, he indicates that it would be more appropriate to describe the professionals effecting “related services” as “intermediaries whose named professional activity comprises the bringing together of insurance undertakings and persons seeking insurance as provided by Article 2 of the 1977 Directive”<sup>51</sup>. The Advocate General concludes that CPP cannot be regarded as an agent or broker, since the services it provided lacked the required professional character and could only be characterized as “incidental”<sup>52</sup>.

### 3.2.4 Conclusions

It is evident that the ECJ’s ruling in the CPP case has set the standards for the treatment of many legal issues connected with the VAT exemption provided by Art. 135(1)(a) RVD. Admittedly, many arguments presented by the Court in the aforementioned case, have been repeated and “recycled” through the relevant case law. It could be argued, that the main contributions of C-349/96 were the introduction of the two central characteristics of “insurance transactions”: “the assumption of risk” and the “contractual relationship” between the insurer and the insured. Furthermore, the Court clarified that the deciding aspect for the determination of an “insurance transaction” is not the quality of the insurer, but the nature of the transaction, thus redefining the scope of the relevant VAT exemption. Finally, the Court indicated that “[t]here is no reason for the interpretation of the term ‘insurance’ to differ according to whether it appears in the directive on insurance or in the Sixth Directive”<sup>53</sup>, thus acknowledging the active role of “horizontal legislation” in the interpretation of VAT provisions.

### 3.3 Administrative Services - Case C-240/99 (Försäkringsaktiebolaget Skandia)

The ECJ’s ruling in case C-240/99 (Skandia) laid once more emphasis on the two main characteristics of insurance transactions, which could be substantially defined as “the risk assumption” and the requirement of a “direct contractual relationship” between the insurer and the insured part. Additionally, the Court’s ruling reiterates “the identity of the person supplied with the service”<sup>54</sup> as an important factor of insurance transactions. As to the facts of the case, Skandia was a Swedish insurance company, which owned by 100% a subsidiary company under the name Livförsäkringsaktiebolaget Skandia ('Livbolaget'). “Livbolaget engaged in the business of life assurance, in particular, in the sector of capital insurance and insurance provision for old-age”<sup>55</sup>. Livbolaget and Skandia were considering a merger (in the broad sense) of their insurance activities into a single company. While analyzing the possible solutions towards the aforementioned merger, they examined the possibility of transferring Livbolaget's staff and operations to Skandia. That

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50 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

51 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), Opinion Of Advocate General Fennelly delivered on 11 June 1998, para.32

52 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), Opinion Of Advocate General Fennelly delivered on 11 June 1998, para.33

53 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.18

54 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.41

55 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.8

decision would result in Skandia operating instead of Livbolaget in a wide range of insurance business including “the sale of insurance”, “the settlement of claims”, “the calculation of actuarial forecasts” and “capital management”<sup>56</sup>. At this point it must be pointed out that Skandia would assume no risk regarding the insurance services provided. Quite on the contrary, “all risks would devolve wholly upon Livbolaget which would preserve its status of insurer for the purposes of Swedish civil law”<sup>57</sup>.

The main legal issue of the current case was “whether a commitment assumed by an insurance company to carry out, in return for remuneration at market rates, the activities of another insurance company, which is its 100% subsidiary and which would continue to conclude insurance contracts in its own name, would constitute an insurance transaction within the meaning of Article 13B(a) of the Sixth”<sup>58</sup> (now 135(1)(a) RVD).

It became obvious that the legal issue of the case was restricted solely to definition of the scope of the VAT exemption for insurance transactions. Admittedly, Skandia’s lack of liability, ruled out the slightest possibility of a VAT exemption for reinsurance transactions. Interestingly, Skandia decided to acknowledge in the proceedings before the Swedish Courts that the service which it planned to provide to Livbolaget would not constitute “related services performed by insurance brokers and insurance agents”<sup>59</sup>. Consequently, the ECJ was not presented with the aforementioned claim, possibly to the detriment of the claimant.

In the legal assessment of the services provided by Skandia, the Court observed once again the lack of definition of the term “insurance transactions”<sup>60</sup>, while reiterating the view expressed in the 18<sup>th</sup> paragraph of case C-349/96 (CPP) that the term “insurance” should have a unified definition in the directives on insurance and the VAT Directive. The Court attempted a parallel analysis of the effects of the definitions and delimitations provided by the insurance directives on the VAT Directive by declaring that “the fact that an insurance company must not engage in business [...] does not mean that all the transactions carried out by that company constitute, for tax purposes, insurance transactions in the strict sense, as referred to in Article 13B(a) of the Sixth Directive”<sup>61</sup> (now 135(1)(a) RVD)). Moreover the ECJ held the Opinion that an extensive interpretation of “insurance transactions”, as proposed by Skandia, would result in loss of balance within the provision of Art 135(1)(a), as “‘related 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”<sup>62</sup>.

The ECJ drew a distinction line between Skandia and SDC<sup>63</sup> cases, regarding the necessity of legal relationship between the insurer and the insured. According to the

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56 Ibid.

57 Ibid.

58 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.18

59 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.20

60 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.22

61 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.34

62 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.42

63 According to Skandia, for the purposes of the exemption of insurance transactions provided for by Article 13B(a) of the Sixth Directive, it is not necessary for a transaction to be carried out by a company which has a legal relationship with the insurer’s end

Court (and in consistency with its judgment in CPP case) Skandia did not provide VAT exempt “insurance services” since it “would have no contractual relationship with persons insured with Livbolaget and would assume no liability in respect of the insurance business carried out”<sup>64</sup>. Consequently, the administrative services provided by Skandia lacked “the contractual relationship” element and the “risk assumption”, namely the two main characteristics of the hard core of “insurance transactions”. It also appears (in connection with the ECJ’s ruling in CPP, para.17) that the Court regards the identity of the person which is supplied with the service, as an equally important factor for the definition of the VAT exempt services<sup>65</sup>. As a result, in its ruling, delivered on 8<sup>th</sup> of March 2001 the Court rejected the claim that the services provided by Skandia to Livbolaget constitute a VAT exempt insurance transaction.

Skandia played a major part in the gradual formation of a stable and harmonized “insurance transactions” concept within the VAT Directive by the ECJ. It could also be examined as an “alter ego” of CPP case, in the sense that CPP was offering VAT exempt insurance services without being itself an insurer, while the administrative services provided by Skandia did not qualify as such, yet it was typically an insurance company. Moreover, as commented by Claus Bohn Jespersen: “One can only guess, why Skandia acknowledged before the Swedish Supreme Court that it could not be seen as supplying services as an agent or a broker. With respect to the services Skandia carried out in terms of sale of insurance, it could definitely be argued that that element constituted intermediation of insurance”<sup>66</sup>.

### **3.4 Damage assessment - Case C-8/01 (Assurandør-Societetet, acting on behalf of Taksatorringen v Skatteministeriet)**

The ECJ’s ruling in Taksatorringen, can be the cause for many interesting remarks, regarding the essence and roles of the insurance agents and insurance brokers and the use and usefulness of horizontal legislation for the interpretation of the VAT Directive. According to Lasok & Millet “[w]here there is a close connection between two provisions of secondary legislation, it is proper to take into account the interpretation given to one when construing the other”<sup>67</sup>. According to the facts of the case, Taksatorringen was an association of approximately 35 small or medium-sized insurance companies in Denmark, operating within the motor-vehicle insurance business<sup>68</sup>. The purpose of that association was “to assess damage to motor vehicles in Denmark on behalf of its members”<sup>69</sup>. The members of the aforementioned association were “required to use the services provided by Taksatorringen in respect

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customer in analogy to the Court’s interpretation of points 3 and 5 of Article 13B(d) of the Sixth Directive in case C-2/95 SDC para.59

64 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.40

65 Case C-240/99 Försäkringsaktiebolaget Skandia (publ), para.41

66 Claus Bohn Jespersen, “Intermediation of Insurance and Financial Services in European VAT”, Kluwer Law International, 2011 (Eucotax Series on European Taxation), p.197

67 Lasok & Millet in “Judicial Control in the EU”, p.396 as found in Claus Bohn Jespersen, “Intermediation of Insurance and Financial Services in European VAT”, Kluwer Law International, 2011 (Eucotax Series on European Taxation), p.61

68 Case C-8/01 (Taksatorringen v Skatteministeriet), para.7

69 Case C-8/01 (Taksatorringen v Skatteministeriet), para.8

of damage to motor vehicles incurred within Denmark”<sup>70</sup>, whereas the expenses for its function were apportioned on a pro rata basis<sup>71</sup>.

The main legal issue of the Taksatorringen case was “whether or not Article 13B(a) of the Sixth Directive (now 135(1)(a)RVD) was to be construed as meaning that motor vehicle damage assessments carried out, on behalf of its members, by an association whose members are insurance companies are insurance transactions or related services performed by insurance brokers or insurance agents”<sup>72</sup>. However, according to the Opinion of Advocate General Mischo, delivered on 3 October 2002, the aforementioned legal issue is more complex and must, therefore, be analyzed “in relation to two concepts appearing in Article 135(1)(a)RVD, namely those of insurance transactions and related services performed by insurance brokers and insurance agents”<sup>73</sup>.

The Court rejected the first claim of Taksatorringen, (that the vehicle damage assessment services constituted VAT exempt insurance transactions), by resorting to the typical analysis of Art 135(1)(a) VAT, established throughout the relevant case-law. Consequently, the Court recognized the lack of definition of the term “insurance transactions” within the VAT Directive<sup>74</sup>, reiterated its interpretative approach towards the term by mentioning the main characteristics of insurance services (as it had already done in Card Protection Plan, paragraph 17, and Skandia, paragraph 37) and admitted that the expression “insurance transactions” is “broad enough” to include the provision of insurance cover by taxable persons other than insurers<sup>75</sup>. Finally, the ECJ referred to the implication of the “existence of a contractual relationship”<sup>76</sup> between the insurer and the insured person as a necessary part of the insurance transaction in conjunction with the risk assumption. Consequently, the Court concluded that Taksatorringen does not provide VAT exempt insurance transactions, since it “does not have any contractual relationship with the insured parties”<sup>77</sup>. At this point it is important to notice that the ECJ is constructing case by case a solid legal theory regarding the interpretation of Art.135(1)(a), aiming at the highest possible harmonization and the replacement of the missing clarifications of the provision, by means of legal analysis.

The ECJ has also rejected the second claim of Taksatorringen (that the services offered were related services performed by insurance brokers and insurance agents). Interestingly, Taksatorringen attempted to prove its status as insurance agent/broker by making reference to Article 2(1)(b) of Council Directive 77/92/EEC<sup>78</sup> according to which: “an insurance agent or broker performs an activity which constitutes, inter alia, assisting in the administration and performance of insurance contracts, in particular in

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70 Ibid.

71 Case C-8/01 (Taksatorringen v Skatteministeriet), para.9

72 Case C-8/01 (Taksatorringen v Skatteministeriet), para.26

73 Case C-8/01 (Taksatorringen v Skatteministeriet), Opinion of Advocate General Mischo, delivered on 3 October 2002 para.29

74 Case C-8/01 (Taksatorringen v Skatteministeriet), para.38

75 Case C-8/01 (Taksatorringen v Skatteministeriet), para.40

76 Case C-8/01 (Taksatorringen v Skatteministeriet), para.41

77 Case C-8/01 (Taksatorringen v Skatteministeriet), para.42

78 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)



the event of a claim, in the name of or on behalf of one or more insurance companies”<sup>79</sup>. In reply to the aforementioned argument, the ECJ referred directly to the AG’s Opinion. Essentially, AG Mischo challenges the effectiveness of horizontal legislation, by questioning the necessity of interpretation of the VAT Directive “in the light of a directive relating to the free movement of persons”<sup>80</sup>. Additionally, the AG disagrees with the distinction made between insurance brokers and insurance agents (in Art.135(1)(a)), since “a broker is truly an insurance agent in that his task is to act on behalf of a person seeking insurance in finding an insurance company that will offer cover exactly suited to his needs”<sup>81</sup>. Regarding the characteristics of insurance agents and insurance brokers the ECJ, in agreement with the AG, concludes that: “this expression refers only to services provided by professionals who have a relationship with both the insurer and the insured party”<sup>82</sup>. Moreover, both the Court and the Advocate General highlighted the importance of the ability to render the insurance company liable “in relation to an insured person who has submitted a claim”<sup>83</sup> as a determining criterion for the recognition of an insurance agent (a requirement not met by Taksatorringen). Interestingly, the Opinions of Advocate Generals (in CPP and Taksatorringen cases) seem to expose an attempt of harmonization, regarding the basic characteristics of insurance agents and insurance brokers. According to Claus Bohn Jespersen: “[b]y using the term “professionals” AG Mischo seemed to have agreed with Fennelly in CPP also using the term “professional” to define the character of the person covered by the exemption, i.e. the insurance broker or insurance agent”<sup>84</sup>. Consequently, the ECJ declared that the services provided by Taksatorringen were irrelevant to the professional activities of insurance agents and insurance brokers<sup>85</sup>, thus making them ineligible for the VAT exemption of Art. 135(1)(a).

### **3.5 “Back office” activities - C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.)**

The Court’s judgment in Arthur Andersen case could mainly be described as an opportunity for further clarification of the role and characteristics of insurance agents and insurance brokers. Furthermore, it has revealed a possible twist in the Court’s evaluation of the impact of horizontal legislation (i.e. the 77/92/EC Directive) on the interpretation of the concepts of VAT Directive. As to the facts of the case, Andersen Consulting Management Consultants (“ACMC”) was a Dutch private company, part of the Arthur Andersen & Co. Accountants c.s., established in Rotterdam<sup>86</sup>. On 26 May 1997, Universal Leven NV (‘UL’), “a company active on the life assurance market through insurance agents, and ACMC concluded a collaboration agreement, which provided that ACMC would perform on behalf of UL ‘back office’

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79 Case C-8/01 (Taksatorringen v Skatteministeriet), para.29

80 Case C-8/01 (Taksatorringen v Skatteministeriet), Opinion of Advocate General Mischo, delivered on 3 October 2002 para.89

81 Case C-8/01 (Taksatorringen v Skatteministeriet), Opinion of Advocate General Mischo, delivered on 3 October 2002 para.86

82 Case C-8/01 (Taksatorringen v Skatteministeriet), para.44

83 Case C-8/01 (Taksatorringen v Skatteministeriet), para.45 & Opinion of Advocate General Mischo, delivered on 3 October 2002 para.91

84 Claus Bohn Jespersen, “Intermediation of Insurance and Financial Services in European VAT”, Kluwer Law International, 2011 (Eucotax Series on European Taxation), p.211

85 In para.44 of Case C-8/01 (Taksatorringen v Skatteministeriet) the ECJ characterized the role of insurance broker as “no more than an intermediary”.

86 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.8

activities”<sup>87</sup>. Those activities would be provided by an internal department of ACMC which operated under the name “Accenture Insurance Services” (‘AIS’), sharing the same building with UL. Those “back office” activities included: “the acceptance of applications for insurance, the handling of amendments to contracts and premiums, the issuing, management and rescission of policies, the management of claims, the setting and paying of commission to insurance agents, the organization and management of information technology, the supply of information to UL and to insurance agents and the drafting of reports for insured parties and third parties, such as the Fiscale Inlichtingen- en Opsporingsdienst (Tax inquiry and inspection service)”<sup>88</sup>. Furthermore, according to the roles distinction of the collaborating parties, ACMC mainly made the (binding for UL) decisions regarding the risk acceptance, with the exception of cases where medical examination proved necessary (when decisions were made by UL). The insurance contracts would be concluded in the name of the UL, which would also undertake the insurance risk. ACMC was bound by an “exclusivity clause”, thus preventing it from providing “back office” activities for third parties<sup>89</sup>.

The legal issue in need of clarification was whether the “back office” activities provided by “AIS” in accordance with the agreement between ACMC and UL could be characterized as “related services performed by insurance brokers and insurance agents”, thus falling within the scope of the VAT exemption provided by Art. 13B(a) of the Sixth Directive(now Art. 135(1)(a) RVD).

In its judgment, delivered on 3<sup>rd</sup> of March 2005, the ECJ agreed with the national court that the aforementioned “back office” activities did not constitute VAT exempt insurance transactions, because there was no contractual relationship between ACMC and the insured parties<sup>90</sup>, “since the insurance contracts are underwritten by UL”<sup>91</sup>. The Court repeated the need of strict interpretation of the terms “used to specify the exemptions provided for by Art.13 of the Sixth Directive”, since the latter constitute independent concepts of EU law, in order to secure the sound function of the VAT mechanism<sup>92</sup>. Furthermore, the Court answered the first half of the referred question, by indicating that since ACMC was bound by an exclusivity clause, it lacked the “complete freedom as to its choice of undertaking”<sup>93</sup> and could not be characterized as an insurance broker.

The Court also rejected the claim that the “back office” activities performed by ACMC constitute the services of an insurance agent (as described in Art 2(1)(b) of 77/92 Directive). The ECJ agreed with the Opinion of Advocate General Maduro<sup>94</sup> that ACMC could not be recognized as an insurance agent, based solely on the fact

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87 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.9

88 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.10

89 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.12

90 See, to that effect, Case C-240/99 (Skandia), para.41 and 43

91 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.22

92 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.24 and 25

93 Art. 2(1)(a) of 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

94 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), Opinion of Advocate General Poiares Maduro, delivered on 12 January 2005,para.31

that it had the power to render the insurer (UL) liable. Interestingly, the fulfillment of such a criterion would suffice for the characterization of Arthur Andersen as an insurance agent, according to the provisions of Art2(1)(b) of the 77/92/EC Directive<sup>95</sup>. However, in the present case the Court declared that the “[r]ecognition of a person as an insurance agent presupposes an examination of what the activities in question comprise”<sup>96</sup>. Consequently, the Court indicated that in spite of the contribution of the services provided by ACMC to “the essence of the activities of an insurance company”, they “do not constitute services that typify an insurance agent”<sup>97</sup>. In fact, according to the Court, ACMC rendered certain services (such as the handling of aspects relating to reinsurance and the supply of information to insurance agents) that were “not part of the activities of an insurance agent”<sup>98</sup>, while at the same time some “essential aspects of the work of an insurance agent (such as the finding of prospects and their introduction to the insurer)”<sup>99</sup> were clearly missing.

The Court concluded by characterizing the “back office” activities as “a division of UL’s activities” and the collaboration agreement between the parties as “as a contract for subcontracted services under which ACMC provides UL with the human and administrative resources which it lacks, and supplies it with a series of services to assist it in the tasks inherent in its insurance activities”<sup>100</sup>.

### 3.5.1 The Opinion of Advocate General Maduro

In his Opinion, delivered on 12 January 2005, the Advocate General Maduro, exposed the lack of justification for the VAT exemption provided by Art 135(1)(a) by the preparatory work (*travaux préparatoires*) and the parallel absence of definitions of the concepts used in the aforementioned provision. Interestingly, the AG challenged the interpretation of the concepts of insurance brokers and insurance agents by an “automatic cross-reference”<sup>101</sup> to the definitions laid down in Directive 77/92. Furthermore, the AG decided to elaborate on the definition of “insurance agent” as expressed in the settled case law<sup>102</sup> (C-8/01 Taksatorringen), as he implied that it emphasized excessively “on the external action of the insurance agent”<sup>103</sup>. The AG indicated, regarding findings of Taksatorringen case, that “the power to render the insurer liable cannot be the decisive criterion for classifying a person as an insurance agent”<sup>104</sup>. Consequently, “the essential criterion is thus not simply the nature of the internal activities he performs but, first and foremost, his position with regard to the

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95 See note 23.

96 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.32

97 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.34

98 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.35

99 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.36

100 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.37

101 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), Opinion of Advocate General Poiares Maduro, delivered on 12 January 2005, para.22

102 “In this judgment, the Court stated that the concept of ‘related services performed by insurance brokers and insurance agents’ within the meaning of Article 13B(a) of the Sixth Directive ‘refers only to services provided by professionals who have a relationship with both the insurer and the insured party, it being stressed that the broker is no more than an intermediary”

103 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), Opinion of Advocate General Poiares Maduro, delivered on 12 January 2005, para.24

104 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), Opinion of Advocate General Poiares Maduro, delivered on 12 January 2005, para.31

persons that he puts into contact”<sup>105</sup>. The AG concluded his analysis by presenting his own definition of the term “insurance agent” within the framework of Art 135(1)(a) by maintaining that: “[t]he activity of insurance agent should therefore be viewed as a supply of services on a professional basis, which begins and ends in itself and which thus has an independent substance distinct from the business of the insurer”<sup>106</sup>.

### 3.5.2 Conclusions

The combination of the Court’s ruling and the Opinion of the Advocate General in the Arthur Andersen case could be described as an important step in terms of defining the scope of Art. 135(1)(a). In that case, the ECJ focused on the examination of the activities performed by a taxable person for its characterization as a “broker” or an “agent”. Moreover, the Court defined, in a more detailed manner, the essential aspects of the work of an insurance agent, which were described as “finding of prospects and their introduction to the insurer”<sup>107</sup>. Finally, according to Ben Terra and Julie Kajus: “the ECJ, without saying it in so many words, finds that the definition of the activities covered by the insurance exemption, which creates an exception to the principle of subjection to VAT, fulfills different objectives than Directive 77/92/EEC and accepts that “all contact with the legal and practical reality in the field of insurance law is lost”, which for insurance companies is reason enough to flag at half-mast.”<sup>108</sup>

### 3.6 Road assistance services - Case C-13/06 (Commission of the European Communities v Hellenic Republic)

In case C-13/06, the ECJ had the opportunity to redefine the scope of insurance transactions in connection to the provision of road assistance services by a non-insurer. According to the facts of C-13/06 the European Commission started an infringement process against the Hellenic republic, “having noted that, pursuant to Article 15(42) of Greek Law No 2166/1993<sup>109</sup>, car accident or breakdown services supplied by ELPA to its members in return for the payment of a fixed annual subscription gave rise to the levy of VAT on that subscription”<sup>110</sup>. Consequently, the European Commission considered the road assistance services eligible for the exemption provided by Art Article 13B(a) of the Sixth Council Directive<sup>111</sup> (now Art 135(1)(a) RVD), “since the risk covered refers to the uncertain event of an immobilization of a vehicle at an unspecified place following a breakdown occurring during the period covered by the relevant subscription”<sup>112</sup>. On the other hand, the

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105 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), Opinion of Advocate General Poiares Maduro, delivered on 12 January 2005, para.25

106 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), Opinion of Advocate General Poiares Maduro, delivered on 12 January 2005, para.33

107 Case C-472/03 (Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s.), para.36

108 Ben Terra; Julie Kajus, “A Guide to the European VAT Directives”, IBFD, 2011, Chapter 15.2.2.1 – Exemptions – Insurance and Reinsurance Transactions, p.874

109 Article 15(42) of Greek Law No 2166/1993 (FEK A’ 137/24.8.1993) provides:

‘...natural and legal persons supplying road assistance shall be subject to VAT in respect of the consideration they receive, either in the form of a subscription fee or as a one-off payment for the supply of road assistance services or other related individual services’. Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.3

110 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.4

111 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’).

112 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.7

Greek Government supported the opinion that the aforementioned transactions are not to be included in the independent concept of the VAT exemption provided by Art 135(1)(a)<sup>113</sup> and as a result they must give rise to the levy of VAT.

At this point it must be pointed out the ELPA (Automobile & Touring Club of Greece) is not an insurer<sup>114</sup> and does not act as an insurance agent or broker. In fact it is a specialized body that is designed so as to provide its members “for the payment of a fixed annual subscription”<sup>115</sup> with road assistance services in the case of vehicle immobilization. It is, therefore, evident that the core of the service provided by ELPA in the case of the materialization of the risk described in the contract (vehicle breakdown/accident), is not the payment of a sum of money, but the provision of on the spot assistance or possibly the conveyance of the vehicle to a repair spot (provision of assistance in cash or in kind).

In its judgment, the ECJ was consistent with the settled case law (especially Case C-349/96, Card Protection Plan). Consequently, it reiterated the view that the exemptions provided for in Art 135(1)(a) “constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system as between Member States”<sup>116</sup> and must, therefore, be interpreted strictly. However, according to the Court, the expression “insurance transactions” is broad enough to include taxable persons that are themselves not characterized as insurers<sup>117</sup>, thus accepting an extension of the scope of Art 135(1)(a) to the provision of road assistance services by bodies such as ELPA. Moreover, defining the terms of reciprocity between the contracting parties, the ECJ declared that “it is not essential that the service the insurer has undertaken to provide in the event of accident/loss consists of 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 listed in the annex to First Council Directive 73/239/EEC”<sup>118</sup>. It becomes obvious that, in the particular case, the ECJ has chosen to rely on horizontal legislation<sup>119</sup>, by admitting that “there is no reason for the interpretation of the term ‘insurance’ to differ according to whether it appears in Directive 73/239 (Council Directive 73/239)<sup>120</sup> or in the Sixth Directive”.

The ECJ’s ruling in case C-13/96 is an important step towards the definition of the borderlines of the VAT exemption provided by Art 135(1)(a), since the Court has once again laid emphasis on the nature of the transaction rather than the characteristics of the taxable person. Moreover the ECJ’s decision to adopt, in the current case, a harmonized interpretation of “insurance” by escaping the narrow margins of the VAT Directive and expanding to other relative EU legislation sources

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113 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.6

114 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.13

115 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.4

116 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.9

117 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.13

118 Case C-13/06 (Commission of the European Communities v Hellenic Republic), para.11

119 Claus Bohn Jespersen, “Intermediation of Insurance and Financial Services in European VAT”, Kluwer Law International, 2011 (Eucotax Series on European Taxation), p.61

120 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, as amended by Council Directive 84/641/EEC of 10 December 1984 (OJ 1984 L 339, p. 21)

(Council Directive 73/239), proves that the grey zones of the specific VAT provision are not yet sufficiently defined, despite the settled case law.

### **3.7 Sub-agent services - Case C-124/07 J.C.M. Beheer BV v Staatssecretaris van Financiën**

The J.C.M. Beheer BV case offers an insight to the recent case law developments, regarding the scope of VAT exemption for “related services performed by insurance brokers and insurance agents”<sup>121</sup>. J.C.M. Beheer BV (“Beheer BV”) is a Dutch company which “acts as a sub-agent on behalf of VDL Polisassuradeuren BV (‘VDL’) a company incorporated under Netherlands law which itself acts as an insurance broker and insurance agent”<sup>122</sup>. Beheer BV is offering two types of services simultaneously. On the one hand it “carries out in the name and on behalf of VDL concern the conclusion of insurance contracts, the processing of transfers of insurance policies, the issue of such policies, the payment of commissions and provision of information to the insurance company and policyholders”<sup>123</sup>. In return for its services, Beheer BV receives 80% of the commissions paid by the insurance companies to VDL. On the other hand Beheer BV also “offers and concludes new insurance policies independently and on its own initiative”<sup>124</sup>.

The main legal issue to be resolved in the current case was whether the services provided by Beheer BV could be assessed as falling within the scope of the VAT exemption provided by Art13B(a) of the Sixth Directive (now 135(1)(a) RVD), despite the fact that “the appellant in the main proceedings is only in an indirect relationship with one of the parties to an insurance contract, in the conclusion of which it has been instrumental through the intermediary of another taxable person who is himself in a direct relationship with that party and to whom that appellant is contractually bound”<sup>125</sup>.

In response to the question referred by the “Hoge Raad der Nederlanden”, the ECJ restated<sup>126</sup> the need to examine the nature of the activities performed by the taxable person, so as to recognize it as an insurance broker or insurance agent. However, in a rather swift manner, the Court concluded that Beheer BV was involved in activities that were characteristic of an insurance broker or agent<sup>127</sup>. Furthermore, the Court pointed towards that lack of any indication, both in the Sixth Directive and the 77/92/EEC Directive, “concerning the relationship between an insurance broker or agent with the parties to an insurance contract in the conclusion of which he has been instrumental”<sup>128</sup>.

Interestingly, in the course of its analysis, the Court seemed to disregard its own case law. While the ECJ had ruled<sup>129</sup> that the VAT exemption of ‘related services

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121 According to Art.135(1)(a) RVD

122 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.7

123 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.9

124 Ibid.

125 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.16

126 See, to that effect Case C-472/03 (Arthur Andersen), para.32

127 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.18

128 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.19

129 See to that effect Case C-8/01 (Taksatorringen), pra.44 and C-472/03 (Arthur Andersen), para.32

performed by insurance brokers and insurance agents<sup>130</sup> is only provided for services performed “by professionals who have a relationship with both the insurer and the insured party”<sup>131</sup>, it adopted the view that Beheer BV should be granted the benefits of the VAT exemption provided by Art 13B(a). However, it was obvious from the facts of the case that Beheer BV had no “formal” relationship with the insurers “on whose behalf VDL acts”<sup>132</sup>.

The Court argued that despite the lack of direct relationship with the insurers, Beheer BV had an indirect relationship with them, “through its contract with VDL, which itself has a contractual relationship with the insurers”<sup>133</sup>. In support of its argument, the ECJ indicated that in the settled case law it “did not limit the nature of that relationship to a specific form”. Furthermore the ECJ maintained that in the “Taksatorringen” and “Arthur Andersen”<sup>134</sup> cases, “did not seek to analyze the relationship of those taxable persons with the insurers and the insured parties”<sup>135</sup>. According to Ben Terra and Julie Kajus: “this seems a nice way of saying that the statement in Taksatorringen and Arthur Andersen that the expression “related services” refers only to services provided by professional who have a relationship with both the insurer and the insured party was phrased in too absolute terms<sup>136</sup>”. Finally, the ECJ stated that, according to the settled case law<sup>137</sup>, it is possible for insurance agents and brokers to break down their activity “into separate pieces”, each one of which could be eligible for the VAT exemption of Art.135(1)(a) RVD<sup>138</sup>.

### 3.7.1 Conclusions

The ruling of the Court in favor of Beheer BV could be characterized as unexpected in terms of the settled case law. Admittedly, Beheer BV did not fulfill the standards set by the ECJ in the cases of Taksatorringen and Arthur Andersen so as to be deemed as insurance broker or agent. The appellant in the main proceedings, might be exercising typical activities of an insurance broker or agent, but lacked the direct contractual relationship with both the insurer and the insured party. It became, therefore, obvious that (given the chance of the “Beheer BV” case) the Court decided to become less demanding and allow broader access to the VAT exemption for insurance transactions. According to Claus Bohn Jespersen “it could be argued that the ECJ’s judgment in Beheer is a consequence of applying the principle of natura

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130 As provided by Art13B(a) of the Sixth Directive (now 135(1)(a) RVD)

131 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.20

132 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.23

133 Ibid.

134 See to that effect Case C-8/01 (Taksatorringen), pra.44 to 46 C-472/03 (Arthur Andersen), para.36

135 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.23

136 Ben Terra; Julie Kajus, “A Guide to the European VAT Directives”, IBFD,2011, Chapter15.2.2.1– Exemptions – Insurance and Reinsurance Transactions, p.877

137 See, to that effect, with regard to Article 13B(d)(3) of the Sixth Directive, Case C-2/95 (SDC), para.64; with regard to Article 13B(d)(6) of the Directive, Case C-169/04 (Abbey National), para.67; and with regard to Article 13B(d)(1) of the Directive, see Case C-453/05 (Ludwig), para.34

138 Case C-124/07( J.C.M. Beheer BV v Staatssecretaris van Financiën), para.27

negotii and disregarding the principle of strict interpretation inasmuch as the latter constitutes restraining the scope of the provision”<sup>139</sup>.

### **3.8 Transfer of a portfolio of reinsurance contracts - C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften)**

In its judgment of 22 October 2009 the ECJ has set the framework for the treatment of the transfer of portfolio or reinsurance contracts, while at the same time provided a interpretative approach of the concept of reinsurance. According to the facts Swiss Re Germany Holding GmbH (Swiss Re) is a German company operating at the life reinsurance business. In 2002, Swiss Re concluded an agreement with the Swiss insurance company S (‘company S’), regarding the transfer of a portfolio consisting of 195 life reinsurance contracts<sup>140</sup>. Under the aforementioned agreement, company S “was obliged to obtain the consent of the insured parties in order to accede to those contracts and to assume all the rights and obligations arising from them”<sup>141</sup>. Accordingly the German tax authorities considered the transfer of portfolio as a supply of goods and issued a VAT prepayment notice.

The main legal issues to be resolved in C-242/08 were the status and VAT treatment of a transaction involving the transfer of a portfolio of life reinsurance contracts by a company established in one Member State (Germany), to an insurance company established in a non-Member State (Switzerland) in terms of the place of supply and according to the provisions defining the VAT exemptions<sup>142</sup>. The Court of Justice began its legal analysis by clarifying that the aforementioned transaction constitutes a supply of services (within the meaning of Art 24(1) RVD<sup>143</sup>), since “life reinsurance contracts cannot be regarded as tangible property”<sup>144</sup>. Additionally, the ECJ clarified that such a transfer cannot “by its nature” be regarded as a banking transaction<sup>145</sup>.

In one of the highlights of this judgment, the Court emphasized on the importance of the uniform interpretation of the terms “insurance” and “reinsurance” within the VAT Directive, regardless their multiple roles in VAT provisions such as defining the “place of supply” or the “VAT exemptions” (Articles 59(e) of the RVD and 135(1)(a) of the RVD respectively)<sup>146</sup>. It is, therefore obvious, that the lack of a clear definition of both insurance and reinsurance transactions concerns the ECJ, since it could hinder the “sound functioning” of the VAT ecosystem. In the next step of its legal analysis the ECJ consistent to the relative case law<sup>147</sup> defined the basic characteristics of the terms “insurance” and “reinsurance” thus attempting to classify the transactions in question. According to the Court, insurance transactions means: “that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialization of the risk covered, with the service agreed when the contract

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139 Claus Bohn Jespersen, “Intermediation of Insurance and Financial Services in European VAT”, Kluwer Law International, 2011 (Eucotax Series on European Taxation), p.226

140 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.12

141 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.13

142 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.21

143 “‘Supply of services’ shall mean any transaction which does not constitute a supply of goods.”

144 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.25

145 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.30

146 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.31

147 See Case C-349/96 (CPP) para. 17; Case C-24/99 (Skandia) para.37 and Case C-8/01 (Taksatorringen) para.39



was concluded”<sup>148</sup>. Furthermore, as defined by the Court in paragraph 38 of its ruling, “reinsurance” means that transaction “by which an insurer concludes a contract in which it undertakes to assume, in return for payment of a premium and within the confines of that contract, the debts resulting, for another insurer, from its undertakings in the insurance contracts which it concluded with its own policyholders”. However, in the present case became obvious that, since company S assumed all the rights and obligations of Swiss Re, the transferor company did not maintain any legal relationship with the reinsured clients. Consequently, the Court ruled that the transfer for consideration of a portfolio of life reinsurance contracts lacks the basic characteristics of insurance and reinsurance transactions as defined by Article 9(2)(e), fifth indent (now Article 59(e) of the RVD) and Article 13B(a), of the Sixth Directive (now Article 135(1)(a) of the RVD) “and on this basis rejected both the claim for an exemption and the request to apply the special place of supply rules based on the notion of “insurance services””<sup>149</sup>.

Finally, the Court reiterated<sup>150</sup> the view that every service supply “must be regarded as distinct and independent and that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to disturb the functioning of the VAT system”<sup>151</sup>. As a result the ECJ rejected, to the detriment of Swiss Re, the concept of artificial split of the transfer of a portfolio of life reinsurance contracts into two distinct services<sup>152</sup>. In particular the aforementioned transfer could not simultaneously constitute and combine the concepts of: “a dealing” (as defined by Article 13B(d)(2) of the Sixth Directive (now Article 135(1)(c) of the RVD)) and “a transaction concerning debts” (according to Article 13B(d)(3) (now Article 135(1)(d) of the RVD)). Admittedly, the ECJ’s view is very important, as it acts as a preventive measure against the misuse of the VAT exemptions by contracting parties, thus securing a level playing field within the VAT system.

### **3.9 Insurance of leased items - Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie)**

BGŻ Leasing (BGŻ) is one of the most recent additions to the case law of the ECJ, since the Court’s judgment was delivered on 17<sup>th</sup> of January 2013. C-224/11 is a rather interesting case, especially considering its impact on the rapidly growing leasing industry. BGŻ is a Polish company, offering leasing services. According to the contract terms and conditions signed between the lessor (BGŻ Leasing) and the lessee (the clients)” the items leased by the lessor remain its property throughout the duration of the lease”<sup>153</sup>. Furthermore the lessee pays a rent to BGŻ in addition to all the relevant expenses to the leased item. An important fact of the case is that BGŻ requires that the cars leased, must be insured. For that purpose, BGŻ offers its clients the option to arrange the necessary insurance coverage through an insurance provider. “If they wish to take up that offer, B.G.Ż. Leasing subscribes to the corresponding insurance with an insurer and re-invoices the cost of that insurance”<sup>154</sup>. In case the

148 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.34

149 B. Carvalho; M. Lamensch; S. van Thiel, “European Union - The VAT Exemption for Insurance-Related Services of Brokers and Agents: The Case of the “Call Centre””, EUROPEAN TAXATION, IBFD(20 December 2010), p.26

150 See also Case C-349/96 CPP, para. 29

151 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.51

152 Case C-242/08 (Swiss Re Germany Holding GmbH v Finanzamt München), para.52

153 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.17

154 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.19

clients did not desire to receive insurance services through BGŻ, they were free to opt for an insurance provider of their choice.

### **3.9.1 The status of the supplied services**

In BGŻ, the Court of Justice had to clarify two distinct but equally interesting legal issues. Accordingly, the first question concerned the VAT treatment of the aforementioned transactions (leasing and insurance services) as a single supply of services (where a single rate of VAT should be applied) or as independent transactions, thus requiring separate assessment. In a very interesting analysis, the ECJ considered that according to the second subparagraph of Article 1(2) RVD<sup>155</sup> and the settled case law<sup>156</sup> every supply of a service must in principal be regarded as “distinct and independent”<sup>157</sup>. Interestingly, the Court seems to be repeating many of its findings in the landmark CPP case (C-349/96), thus recalling that in order to determine the status of the services supplied (single service or multiple independent services), “it is necessary to examine the characteristic elements of the transaction concerned”, while taking into account all the relative circumstances, since “there is no absolute rule for determining the extent of a service for VAT purposes”<sup>158</sup>. At a second stage, the Court indicated that the supply under question is clearly composed of two distinct elements: the “leasing service” and the “supply of insurance”<sup>159</sup>, both of which are “likely to be supplied together”<sup>160</sup>, since there is a natural link between the car lease and the insurance of the leased item which is justified and caused by the former transaction. However, such a link does not seem an effective criterion so as to define the status of the two elements of supply. As an alternative stage, the ECJ considered whether the supply of leasing services could be characterized as a principal supply in connection to which the insurance services would be ancillary. Nonetheless, this didn’t prove to be accurate, since the insurance “constitutes essentially an end in itself for the lessee and not only the means to enjoy that service under the best conditions”<sup>161</sup>. Finally, the Court considered additional factors so as to reach a conclusion, namely the optionality and the pricing aspects of the services provided. The ECJ concludes that despite the requirement for insurance cover of the leased item, the lessee has the option of choosing an insurance company, while at the same time the separate invoicing and pricing are strong, yet not decisive, indications of the independent character of services<sup>162</sup>. Consequently, the Court ruled that “the supply of insurance services for a leased item and the supply of the leasing services themselves must, in principal, be regarded as distinct and independent supplies of services for VAT purposes”<sup>163</sup>.

### **3.9.2 The VAT treatment of the insurance services for a leased item**

The second issue of the BGŻ case was the VAT was mainly “whether Article 135(1)(a) of the VAT Directive must be interpreted as meaning that a

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155 “On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components”.

156 See case C-349/96 (CPP), para.29, and Case C-242/08 (Swiss Re Germany Holding), para.51

157 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.31

158 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.27-28

159 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.34

160 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.35

161 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.42

162 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.43-44

163 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.50

transaction under which the lessor ensures the leased item with a third party and re-invoices the cost of that insurance to the lessee constitutes an insurance transaction exempt with the meaning of that provision”<sup>164</sup>. In order to address the second question referred by the Naczelny Sąd Administracyjny, the Court of Justice revised all the relevant findings derived from the settled case law<sup>165</sup>, regarding the scope, status and interpretation of Art. 135(1)(a), including the definition of “insurance transactions”<sup>166</sup>, the need of strict interpretation of the VAT exemptions, which constitute an independent concept of the Community law and the emphasis on the nature of the transaction rather than the quality of the insurer<sup>167</sup>. Consequently, the ECJ ruled that the transaction under question constitutes an insurance transaction within the meaning of Article 135(1)(a) RVD. It could be argued that one of the most decisive factors for that decision, was the effect of the principle of fiscal neutrality, which “precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes”<sup>168</sup>. Accordingly, a different treatment between directly supplied insurance services to the lessee by an insurance company and the insurance cover “through the lessor which procures it from an insurer and re-invoices its cost to the lessee for the same amount”<sup>169</sup> would be contrary to the very purpose of the VAT mechanism. Moreover, in case Member States decide to introduce “a tax on insurance contracts” (in accordance with Art.401 RVD<sup>170</sup>), the final consumer (i.e. the lessee), in circumstances similar to the ones referred in the main proceedings, could be burdened not only with IPT on the insurance, but also with VAT. Of course, the latter would be contrary to the character of the VAT exemption as provided by Art 135(1)(a) RVD. Finally, it must be pointed out, that the Court’s ruling could not be applied under all circumstances, as it was based on the hypothesis that: “the lessor invoices the lessee for the exact amount of the insurance”<sup>171</sup>. Accordingly, the Court seems to focus on the fact that the services were recharged at cost. That assumption could lead to a different VAT treatment of the aforementioned transactions, in the event of an addition of a profit margin. In that case, “the consistency of this interpretation could be questioned in light of the definition of the economic activity of Article 9 of the VAT Directive 2006/112: “(. . .) any economic activity, whatever the purpose or results of that activity””<sup>172</sup>, thus creating divergences, instead of promoting the neutral character of the VAT mechanism.

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164 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.51

165 See to that effect: Case C-349/96 (CPP), para.15, and Case C-240/99 (Skandia), para.23

166 “The Court first provided a definition of that expression in CPP, where it held that the essential characteristics of an insurance transaction are that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialization of the risk covered, with the service agreed when the contract was concluded”. Case C-224/11 (BGŻ) para.55

167 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.56-59

168 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.65

169 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.66

170 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.67

171 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.68

172 Michel Lambion, “Tax Planning International: Indirect Taxes, International Information for International Business”, BNA, VOLUME 11, NUMBER 3,p.5 ISSN 1741-0886

#### 4 Extended Warranty

A rather general issue but still closely connected with the VAT exemption provided by Art 135(1)(a) RVD is the VAT treatment of extended warranties. In fact, since the scope of the aforementioned provision appears to be relatively wide, it could be assumed that a number of similar-to-insurance services could automatically qualify as VAT exempt under their general characterization as “insurance” or “reinsurance” transactions. Before attempting an analysis it would be useful to provide a definition of the terms “warranty” and “extended warranty”. According to Laurence P. Simpson, “[a] warranty relates to the present or past, and is an independent promise designed to protect the promise from loss in the event that the facts warranted are not as the promisor states them to be when the contract is made”<sup>173</sup>. Furthermore, according to the definition provided by Black’s Law Dictionary, an extended warranty constitutes: “an additional warranty often sold with the purchase of consumer goods [...] to cover repair costs not otherwise covered by the manufacturer’s standard warranty, by extending either the standard-warranty coverage period or the range of defects covered”<sup>174</sup>.

Admittedly, a comparative presentation of the VAT treatment of extended warranty by national courts within the EU, would highlight the lack of harmonization and the existence of divergences between Member States. An example of the aforementioned phenomenon is the binding ruling (V2517-10) issued on the 22th of November 2010 by the Directorate General of Taxes of the Ministry of Economy and Finance of Spain (DGT) on a case concerning the “VAT treatment of the separate sale of extended warranties covering products previously sold” by a car dealer. According to the aforementioned ruling, extended warranty constitute separate supplies, which should be VAT exempt, as falling within the scope of “insurance transactions”. DGT based its ruling on the ECJ case law<sup>175</sup> and concluded that extended warranties share common aspects with insurance transactions as they both include: “premium (payment of a price), risk (breakdown or malfunction), and service/indemnification (repair or replacement). Therefore, it should be VAT exempt like an insurance transaction, even if the lender is not an insurance company”<sup>176</sup>.

On the other hand, within the same year (10<sup>th</sup> of February 2010), a German court delivered a different judgment on the same topic. By its decision (No.XI R 49/07) the Bundesfinanzhof indicated that the “so-called “extended warranty packages” provided by car dealers to their customers for a separate price on top of the purchase price for automobiles are subject to VAT”<sup>177</sup>. The Bundesfinanzhof indicated that the provision of the extended warranty could not be regarded as a “separate supply of insurance services”, since according to the court “the element of insurance is not predominant”. As a result the supply of extended warranty was absorbed by the supply of automobiles, thus constituting a single supply.

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173 Laurence P. Simpson, “Handbook on the Law of Suretyship 23 (1950) as found in Black’s Law Dictionary, Bryan A. Garner, 8th Edition, Thomson West, 2004, ISBN 0-314-15199-0, p.724

174 Bryan A. Garner, “Black’s Law Dictionary”, 8th Edition, Thomson West, 2004, ISBN 0-314-15199-0, p.1619

175 See to that extent cases C-349/96 (CPP) and C-240/99 (Skandia)

176 Natalia Pastor Caballero, “Spain VAT exemption on extended warranties”, ©KPMG International Cooperative (“KPMG International”), 2011. (<http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Global-indirect-tax-brief/Documents/issue-22-countries/gitb-22-spain.pdf>), last visited on 07/05/2013

177 Sonja Mühleisen, International VAT Monitor July/August 2010, IBFD, p.312-313

It is evident that it would be very difficult to propose a uniform VAT treatment of extended warranty within the EU. In an attempt to shed more light to that issue, it would be appropriate to consider the guidelines<sup>178</sup> agreed on “VAT arrangements applicable to transactions linked to the additional guarantee offered when durable goods are sold” by the VAT Committee. According to the aforementioned guidelines: “[t]he delegations were unanimous in their view that an additional guarantee offered by a seller of durable goods was not covered by the exemption provided for in Article 13(B)(a) of the Sixth Directive (now 135(1)(a) RVD). The sum paid by the purchaser for the additional guarantee had to be taxed either by including it as an incidental expense in the taxable amount for the product sold in accordance with Article 11(A)(2)(b) (now Art. 78(b) RVD) or as a separate service provided under a maintenance contract. A repair carried out by the seller under an additional guarantee was not subject to VAT since it had already been taxed when the product was sold or when the maintenance contract was concluded”. Of course, the aforementioned guidelines are only views of the VAT Committee and should be treated mainly in view of their advisory role, rather as an official interpretation of the EU law.

In addition to the Guidelines of the VAT Committee, it would be also useful to take into account the settled case law of the ECJ (mainly cases C-349/96 (CPP), C-224/11 (BGŻ) and C-540/09 (SEB)). In the first two cases, the Court of Justice established a number of criteria and contributing factors in order to help the national courts decide whether a transaction constituted a single composite supply or a number of separate supplies (which also seems to be the issue in the case of extended warranty). According to the Court, the starting point of such an analysis would be the fact that “for VAT purposes every supply must normally be regarded as distinct and independent”<sup>179</sup>. However, in case of a doubt regarding the status of the performed supplies, it would be essential to “examine the characteristic elements of the transaction concerned”<sup>180</sup>, so as to determine if the customer receives a single service (where the extended warranty is inseparable part of the supply) or multiple, independent services (where the extended warranty could be regarded as a separate insurance transaction). At a second level it must be assessed if the supply of extended warranty constitutes for the customers “an aim in itself” or “a means of better enjoying the principal service supplied”<sup>181</sup>. In the second case, the supply of extended warranty could be considered as ancillary to the principal supply. Additionally, the “separate invoicing and pricing”<sup>182</sup> of supplies in combination with optionality and the level of customer awareness<sup>183</sup> could be used as strong indicating elements of the final assessment. Finally, in Case C-540/09, Advocate General Jääskinen indicated that “underwriting guarantee services”<sup>184</sup> cannot be considered to be an insurance

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178 GUIDELINES RESULTING FROM THE 31ST MEETING of 27-28 January 1992, XXI/732/92

179 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.29

180 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.32 and Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.27-28

181 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.41 and Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.30

182 Case C-224/11 (BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie), para.45

183 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.31

184 “Share underwriting guarantee services generally refer to a situation where an underwriter guarantees, for a certain fee, to purchase or subscribe (in the case of a new issue of shares) the parts of the shares which cannot be sold or subscribed on the market. The aim of such services is, therefore, to ensure that the share issue or sale will be fully subscribed or purchased, and that

transaction within the meaning of Article 13B(a) of the Sixth VAT Directive” (now 135(1)(a)RVD) , since “no *a priori* assumption of a final loss can be attributed to such a situation”, thus reintroducing (initially introduced by AG Fennelly in CPP) the connection between insurance transactions and the “loss element”<sup>185</sup>.

It could be argued that the VAT treatment of extended warranty is a complex issue which should mainly be treated ad hoc. The author of this Thesis supports the idea that extended warranty should not be treated as an independent supply, since customers aim primarily to the acquisition of the product or service covered by the extended warranty and not towards acquiring the warranty itself. It could, therefore, be maintained that the extended warranty is just “a means of better enjoying the principal service supplied”<sup>186</sup>. Consequently, the extended warranty should be regarded ancillary to the main supply and therefore be liable to VAT. According to the latest edition of the Commission’s proposal for an implementing Regulation regarding the VAT treatment of insurance and financial services: “warranties or guarantees provided in relation to a supply of goods or services by the supplier or manufacturer of those goods or services” shall not be covered by the definition of “insurance and reinsurance” provided for in point (a) of Article 135(1) of Directive 2006/112/EC<sup>187</sup>. Admittedly, the Commission’s proposal is still under constant evolution, so the aforementioned view is not binding. Nevertheless, it could still function as a precursor for the future developments regarding the VAT treatment of extended warranties.

## 5 Future Developments

### 5.1 The Principles of European Insurance Contract Law (PEICL)

In view of the difficulties related to the definition of the scope of VAT exemption for insurance transactions, it would be useful to consider an alternative approach towards insurance contract law within the EU. It could be argued that the introduction of a single European regime of insurance contract law, would also (even indirectly) facilitate the achievement of a harmonized VAT treatment of insurance transactions within the EU, by minimizing the divergences between the Member States.

Admittedly, the lack of a common legal framework regarding the supply of insurance services within the EU makes the cross-border provision of financial services unattractive for both insurers and policyholders. On the one hand, insurers wishing to provide cross-border services are required to comply with the mandatory rules of 27 (at the moment) different legal systems, as according to Art. 7 of the Rome I Regulation (593/2008) “the insurance contract shall be governed by the law of the country where the insurer has his habitual residence”. On the other hand, policyholders have limited access to foreign insurance products, which restricts the

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the issuer will receive a certain amount of capital”. Case C-540/09 (Skandinaviska Enskilda Banken AB Momsgrupp v. Skatteverket), Opinion of Advocate General Jääskinen, delivered on 16 December 2010, para.2

185 Case C-540/09 (Skandinaviska Enskilda Banken AB Momsgrupp v. Skatteverket), Opinion of Advocate General Jääskinen, delivered on 16 December 2010, para.31-33

186 Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.30

187 Art.2 of Proposal for a Council Regulation laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, Brussels, 30 September 2011, doc 14965/11 FISC 123

competition between the Member States and deprives the insured clients of the possibility of achieving lower insurance premiums. The aforementioned facts are also confirmed by the relevant statistics<sup>188</sup> and acknowledged by the European Commission<sup>189</sup>.

In order to cover the lack of European insurance contract law, the Project Group aiming at a “Restatement of European Insurance Contract Law” has processed and introduced the “Principles of European Insurance Contract Law” (PEICL). PEICL consists of thirteen chapters organized in three main parts, which are also translated in 12 different EU languages<sup>190</sup>, so as to facilitate its application within the EU. According to Helmut Heiss, “[t]he overall purpose of the work is to provide the European legislator with a model law designed to overcome the existing barriers to an integrated European insurance market”<sup>191</sup>. According to Art.1:101 PEICL, “[t]he PEICL shall apply to private insurance in general, including mutual insurance”, while reinsurance will be excluded from its scope of application. Furthermore, the basic rules included in PEICL (as specified by Art 1:103(1) PEICL) will have a mandatory character, so as to act as substitutes to the mandatory rules of national law and raise the bars preventing the “proper functioning of the internal insurance market”<sup>192</sup>. However, Art.1:103(2) indicate that most of the provisions of PEICL are of a semi-mandatory character, as they allow derogations, provided that the latter “is not to the detriment of the policyholder, the insured or beneficiary”.

The PEICL is destined to act as an “optional instrument”, since (according to Art 1:102 PEICL) it “shall apply when the parties [...] have agreed that their contract shall be governed by them”. “In view of the mandatory character of the PEICL, the choice is an “either - or” only”<sup>193</sup>, since contracting parties are not empowered to combine provisions of the PEICL with those of national law, in order to achieve the desired effect. Of course it should be maintained that PEICL should be treated only as soft law, since it has not been implemented within the EU and that its provisions have the character of simple suggestions.

At this point it would be important to elaborate on the definitions of general rules provided by PEICL, which could play an important role for the future of VAT treatment of insurance transactions, especially in the case of the introduction of PEICL to the EU legal framework. Accordingly, the “insurance contract” is defined by PEICL as “a contract under which one party, the insurer, promises another party, the policyholder, cover against a specified risk in exchange for a premium” (Art. 1:201 PEICL). As defined by the PEICL, the insurance contract constitutes nothing

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188 See Basedow, *Gesetzgebung* 16 referring to data provided by EUROSTAT as found in PEICL: “The Principles of European Insurance Contract Law”, Project Group “Restatement of European Insurance Contract Law”, 2009, sellier, European law publishers GmbH, Munich, Introduction I4. ISBN 978-3-86653-069-0

189 See to that effect, the Communication from the Commission to the European Parliament and the Council, “A more coherent European Contract Law An action Plan”, COM(2003) 68 final, 12 February 2003, para.47&48

190 PEICL is translated into Czech, Dutch, French, German, Greek, Hungarian, Italian, Polish, Portuguese, Slovak, Spanish and Swedish.

191 Project Group “Restatement of European Insurance Contract Law”, PEICL: “The Principles of European Insurance Contract Law”, 2009, sellier, European law publishers GmbH, Munich, Introduction I 10, ISBN 978-3-86653-069-0

192 *Ibid.*, 4, I 15.

193 Roberta PANIZZA “The Principles of European Insurance Contract Law: An Optional Instrument?”, Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament, ©European Parliament,2010, p.9

more but the “transfer (of the economic consequences) of a risk”<sup>194</sup> from the policyholder to the insurer, for an agreed price. The aforementioned definition is closely related to the interpretation of insurance transactions as expressed in paragraph 34 of the Opinion<sup>195</sup> of Advocate General Fennelly in CPP case (C-349/96). Furthermore, according to both the ECJ’s case law and the provisions of PEICL the service provided by the insurer (or the “cover”<sup>196</sup> as stated in Art. 1:201 PEICL) need not necessarily be the payment of a sum of money, but “may also take the form of the provision of assistance in cash or in kind”<sup>197</sup>. Regarding the definition of “insurance agent”, PEICL seems to disagree with the Insurance Mediation Directive (2002/92/EC), which uses the term “intermediary”<sup>198</sup> for both insurance agents and brokers. According to Art.1:202 para.5 of PEICL: “[i]nsurance agent’ means an insurance intermediary employed by an insurer for marketing, selling or managing insurance contracts”. It, therefore, seems that the definition of the 2002/92/EC Directive is incompatible with the scope of PEICL “because the Directive deals mainly with professional responsibilities of the intermediary rather than with the issue of agent’s authority”<sup>199</sup>. Finally, it must be noted that the PEICL does not provide a definition for “insurance brokers”.

To conclude, it would be fair to admit that in the future, the PEICL could form an essential part of the EU law. According to the latest developments, on 8<sup>th</sup> of June 2011, the European Parliament delivered the (2011/2013(INI)) Resolution supporting that: “the European Contract Law project could be useful for realizing the full potential of the internal market, entailing substantial economic and employment benefits”<sup>200</sup>, while on 17 January 2013, the European Commission decided the setup of a “Commission Expert Group on European Insurance Contract Law”<sup>201</sup> with the target to “carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products”<sup>202</sup>. It would, therefore, be important to monitor closely the course

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194 Project Group "Restatement of European Insurance Contract Law" PEICL: “The Principles of European Insurance Contract Law”, 2009, sellier, European law publishers GmbH, Munich, p.49, ISBN 978-3-86653-069-0

195 According to AG Fennelly: “[t]he essentials of an insurance transaction are, as generally understood, that one party, the insurer, undertakes to indemnify another, the insured, against the risk of loss (including liability for losses for which the insured may become liable to a third party) in consideration of the payment of a sum of money called a premium: it is the giving of the indemnity that constitutes the insurance and, thus, the supply of the service”.

196 See also Project Group "Restatement of European Insurance Contract Law", PEICL: “The Principles of European Insurance Contract Law”, 2009, sellier, European law publishers GmbH, Munich, p.52, N5. ISBN 978-3-86653-069-0

197 Case C-349/96 CPP

198 According to Art 2(7) of the Insurance Mediation Directive (2002/92/EC): “‘tied insurance intermediary’ means any person who carries on the activity of insurance mediation for and on behalf of one or more insurance undertakings in the case of insurance products which are not in competition but does not collect premiums or amounts intended for the customer and who acts under the full responsibility of those insurance undertakings for the products which concern them respectively”.

199 Project Group "Restatement of European Insurance Contract Law", PEICL: “The Principles of European Insurance Contract Law”, 2009, sellier, European law publishers GmbH, Munich, p.55, C7. ISBN 978-3-86653-069-0

200 European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (2011/2013(INI)), para.1

201 Article 1 of Commission Decision of 17 January 2013 on setting up the Commission Expert Group on a European Insurance Contract Law (2013/C 16/03)

202 Article 2(1) of Commission Decision of 17 January 2013 on setting up the Commission Expert Group on a European Insurance Contract Law (2013/C 16/03)



of the PEICL and re-evaluate constantly its possible impact on the future of VAT treatment of insurance transactions.

## **5.2 The Commission Proposal for a Council Directive regarding the VAT treatment of insurance and financial services**

The VAT exemption provided for insurance transactions on Art. 135(1)(a) RVD is a direct offspring of Art.13(B) of the Sixth VAT Directive<sup>203</sup>, thus dating back to 1977. Admittedly, since its introduction (36 years ago) there have taken place numerous changes in the sector of insurance transactions. New insurance products have been introduced so as to cover the new needs that have arisen. Moreover, insurers have established more sophisticated business connections and methods of operating, sometimes with partners which could not under normal circumstances be characterized as insurance institutions. However, the progress in terms of business innovation was not followed by the appropriate changes in the VAT exemption for insurance (and financial) services, thus leading to administrative burdens, legal insecurity and higher charges in terms of “hidden VAT” and litigation costs<sup>204</sup>. It is, therefore, obvious that the aforementioned exemption is outdated and cannot cover the needs of the taxable persons and the Member States, thus being in need of a revision. The aforementioned conclusions were also confirmed by the study requested by the Commission and carried out by PricewaterhouseCoopers with the aim “to increase the understanding of the economic effects of the VAT exemption for financial and insurance services”<sup>205</sup>. According to the study findings “it is clear that the greatest number of EU25 financial firms suffer a significant embedded VAT cost with the importance of this cost varying, depending on the client profile of the firm in question”<sup>206</sup>.

Under those circumstances, the Commission proposed in 2007 a new Directive<sup>207</sup> and Regulation<sup>208</sup> “to mitigate the input VAT burden on the insurance sector and to eliminate the VAT disincentive for outsourcing”<sup>209</sup>. The proposal includes three main measures which focus on the modernization and “clarification of the rules governing the exemption from VAT for insurance and financial services”<sup>210</sup>, so as to enhance

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203 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)

204 “Only 6% of recent ECJ VAT cases (24) involve the definitions of exempt financial services and insurances although the effect can be wide-ranging. Litigation costs, if difficult to quantify, are also high and are probably largely attributable to the poor state of the legislation”. Commission Staff Working Document accompanying the Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services SEC (2007) 1555, p.3

205 TAXUD/2005/ AO-006-Final report – prepared by PricewaterhouseCoopers, 037950EN1

206 TAXUD/2005/ AO-006-Final report – prepared by PricewaterhouseCoopers, 037950EN1 p.26

207 Proposal for a Directive (COM/2007/747) amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services.

208 Proposal for a Regulation (COM/2007/746) laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services.

209 Fabrizio Borselli, “A Sensible Reform of the EU VAT Regime for Financial Services”, International VAT Monitor 5 (2009), note 11, p.375 as found in B. Carvalho; M. Lamensch; S. van Thiel, European Union – “The VAT Exemption for Insurance-Related Services of Brokers and Agents: The Case of the “Call Centre””, EUROPEAN TAXATION, IBFD(20 December 2010) p30.

210 Proposal for a Directive (COM/2007/747) amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, p.3

legal certainty, achieve a “more uniform application of the VAT exemption”<sup>211</sup> and “reduce compliance costs for business”<sup>212</sup>. The proposed measures are expected to reduce the impact of non-recoverable VAT and make insurance business more profitable and competitive. Interestingly, para.3 of the preamble to the proposed Directive indicates that “in order to ensure tax neutrality, the exemptions should be linked to the nature of the services concerned, on the basis of objective economic criteria, and not to the persons supplying them”. The aforementioned view bears striking similarity to the Courts ruling in case C-349/96 (CPP), thus proving that the evolution of legislation is also based on the vital conclusions of litigation. At that point, it would be important to point out that the proposed Directive amends Art.135(1)(a) RVD by defining “insurance and reinsurance” as “the acceptance of a commitment by a person to provide another person, in return for payment of a premium, in the event of materialization of a risk covered, with an indemnity or a benefit as determined by the contract”<sup>213</sup>. Once again, it is obvious that the proposed definition is in line with the settled case law of the ECJ<sup>214</sup>. Moreover, the proposed Directive defines uniformly the intermediation in insurance and financial services as the “distinct act of mediation rendered by a third party who [brings the parties together and] does what is necessary in order for the parties to enter into, maintain, renew or alter a contract in insurance or financial transactions as referred to in points (a) to (g)”<sup>215</sup>. Finally, the proposed Implementing Regulation is enhancing legal security by providing a list of transactions covered by the scope of “intermediation”<sup>216</sup>.

Undeniably, the proposed revisions to the VAT treatment of insurance transactions by the Committee seem promising and in position of providing answers to many of the unresolved issues. Interestingly, “the Polish legislator has already transposed the most recent versions of the proposals into the national VAT Act, with effect from 1 January 2011”<sup>217</sup>. However, despite such unilateral initiatives, there has been a long interval since 2007, without major progress on EU level, which could cause uncertainty regarding the future of the draft Directive. Consequently, as precious time passes, the EU is in danger of ‘having the law making process and regulations undertaken by the Court of Justice of the European Union through litigation initiated by taxpayers, the European Commission and tax authorities’<sup>218</sup>, while the insurance sector within the EU will be taking steps backwards, instead of developing.

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211 Ibid.

212 “Modernizing VAT rules applied on financial and insurance services – Frequently Asked Questions”, 28 November 2007, MEMO/07/519

213 Proposal for a Directive (COM/2007/747) amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, Brussels, 30 September 2011, doc 14964/11 FISC 122, p.2

214 See to that effect Case C-349/96 (Card Protection Plan Ltd v. Commissioners of Customs and Excise), para.17

215 Proposal for a Directive (COM/2007/747) amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, Brussels, 30 September 2011, doc 14964/11 FISC 122, p.6

216 Art 12 of Proposal for a Regulation (COM/2007/746) laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services. Brussels, 30 September 2011, doc 14965/11 FISC 123

217 Rzepa & M. Wyganowski, The Polish VAT Exemption for Insurance is Ahead of EU Law, 24 Intl. VAT Monitor 3 (2013)

218 Comments on the European Commission’s proposal to reform the VAT rules applied to financial and insurance services, FS/MT EBF Ref. N° 0120, 3 May 2012, p.2

## 6 General Conclusions

It is evident from the analysis performed in this Thesis that the VAT exemption for insurance transactions provided by Art.135(1)(a) RVD could be characterized as one of the “grey zones” of the VAT mechanism. It could be assumed that the main intention of the legislator was to include it in the body of the Sixth VAT Directive as an intermediate stage and use it as a basis for further elaboration. However, there has been no development towards that direction since 1977, which has created the need for further clarification of its scope and concepts. In order to achieve that purpose, there has been conducted an ECJ case law analysis in conjunction with the use of horizontal legislation and the critical insight of the Advocate Generals as presented in their Opinions.

Regarding the subject and nature of VAT exempt “insurance and reinsurance transactions”, it is generally accepted that the Art.135(1)(a) does not include a sufficient definition. In an attempt to provide such a definition it could be supported that “the essentials of an insurance transaction are, as generally understood, that one party, the insurer, undertakes to indemnify another, the insured, against the risk of loss in consideration of the payment of a sum of money called a premium” (CPP). Moreover, reinsurance could be defined as the transaction “by which an insurer concludes a contract in which it undertakes to assume, in return for payment of a premium and within the confines of that contract, the debts resulting, for another insurer, from its undertakings in the insurance contracts which it concluded with its own policyholders” (Swiss Re). Both insurance and reinsurance are independent concepts of the EU law, which means that they cannot be interpreted according to national laws of the Member States, in order to avoid divergences and secure the sound function of the VAT mechanism. Additionally, since they constitute exemptions to the general application of the VAT, they must be interpreted strictly. The Court has repeatedly indicated that the in the core of insurance transactions lies the assumption of risk by the insurer which implies a contractual relationship between the policyholder and the insurance provider (CPP, Skandia, Taksatorringen). Consequently, the mere provision of administrative services (Skandia, Taksatorringen) or “back office” activities (Arthur Andersen) without the existence of a contractual relationship with the insured party and the necessary risk assumption cannot constitute insurance transactions. Furthermore, the ECJ has chosen to qualify as decisive the nature of the service and not the status of the supplier (subject), thus giving a broader character to insurance transactions (CPP, Commission v. Greece). In fact, it is not a requirement for a taxable person to be an authorized insurer so as to offer VAT exempt insurance services (CPP). Quite on the contrary, the professional title of insurer per se is not adequate so as to ensure the VAT exemption of the services provided (Skandia). Moreover, the insurance service does not necessarily have to constitute solely “a payment of a sum of money”, since it can also “take the form of the provision of assistance in cash or kind” (CPP, Commission v. Greece). In more technical terms the Court has conclusively considered that the transfer of a portfolio of reinsurance contracts lacks the basic characteristics of insurance and reinsurance transactions, since the transferor, upon the completion of the transfer, did not maintain any legal relationship with the reinsured clients (Swiss Re). Finally, the ECJ invoked the principle of fiscal neutrality so as to rule the resale of the insurance cover (at the exact cost of the insurance) as an exempt insurance service (BGŽ). Regarding the status of the supplies, the Court the ECJ set the standards for the necessary assessment, according to which: “every supply of a service must normally

be regarded as distinct and independent” (CPP, Swiss Re, BGŻ). The Court also established a number of criteria to be followed by the national courts so as to distinguish between a single composite supply and multiple individual supplies (CPP, BGŻ). On the other hand supplies that constitute “a single service from an economic point of view should not be artificially split” so as for the supplier to achieve the VAT exemption by combining multiple exemption bases (Swiss Re).

Regarding the definition of the subject and nature of “related services performed by insurance brokers and insurance agents” within the VAT Directive, the Court has attempted to cover the gap by referring to horizontal legislation (mainly the 77/92/EEC Directive and the 2002/92/EC Directive on insurance mediation, as its successor) and concentrating on the nature of the services performed by them (Arthur Andersen, Beheer BV). Essentially, the core of their activities consists of the facilitation of the conclusion of a contract between two parties, namely the insurer and the person seeking insurance (Taksatorringen). Interestingly, the Court has been reluctant to accept an “automatic cross reference” to the horizontal legislation for the interpretation of the terms “insurance agents” and “insurance brokers”, since it maintained the independent character of the VAT provisions, which must be defined strictly in correspondence with the spirit of the VAT mechanism (Arthur Andersen). Consequently, “related services” could be defined as those provided by a professional who acting as an intermediary, “has a relationship with both the insurer and the insured party” (Taksatorringen). The aforementioned relationship between the intermediaries and the contracting parties does not necessarily have to be direct. In fact, even an indirect connection between a sub-agent and the insurer (through another insurance agent or broker) is adequate in terms of achieving the benefit of VAT exemption. Furthermore, an “insurance broker” is nothing more than an intermediary, who has the freedom to choose between insurance companies, as he is not bound by an exclusivity clause (Taksatorringen, Arthur Andersen). Moreover, an “insurance agent” aims essentially at “the finding of prospects and their introduction to the insurer” (Arthur Andersen), while his power to render the insurer liable is not always recognized as a typical characteristic of his business by the ECJ (Taksatorringen v. Arthur Andersen), in contrast to the provisions of horizontal legislation (the 77/92/EEC Directive). Finally, the ECJ claimed that the principle of neutrality allows the separation of the activities of “insurance agents and brokers” into distinct services, so as to facilitate the unconditional organization of their business (Beheer BV).

According to the opinion of the author of this Thesis, it would be important for the sound function of the VAT mechanism and the achievement of legal security to insist on a fundamental revision of the provisions of Art.135(1)(a). It is beyond any doubt, that the contribution of the ECJ’s case law towards the definition of the scope of the aforementioned VAT exemption is essential. However, such a process is time consuming and necessarily fragmental, since it is initiated by the references of the national courts for preliminary rulings. Consequently an agreement on a new Directive and Regulation setting new standards for the VAT treatment of insurance transactions is needed more than ever. It is, therefore, time to achieve a consensus within the EU, by securing a level playing field within the insurance sector, so as not to jeopardize the future of the insurance business and the rights of policyholders.

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