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FINANCIAL AND INSURANCE SERVICES

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
COM(2007)

Proposal for a

COUNCIL REGULATION

**laying down implementing measures for Directive 2006/112/EC on the common system
of value added tax**

(presented by the Commission)

EXPLANATORY MEMORANDUM

Context

Under Article 397 of Directive 2006/112/EC on the Common system of value added tax, the Council, acting unanimously on a proposal from the Commission, shall adopt measures necessary to implement the Sixth Directive. The Council has reserved its right to decide on these measures, as they might have a significant impact on the budget of one or more Member States. The scope of such implementing measures remains limited since, although they are designed to clarify the provisions laid down in the 6th Directive, they can not derogate from them.

Implementing provisions should ensure the correct and more uniform application of the current VAT system to improve the functioning of the internal market. They are particularly necessary where there is a danger of double taxation of cross-border transactions as the result of divergences between Member States in the application of the provisions of the 6th Directive governing the place of supply.

Comments regarding the individual provisions

Article 1 – Subject matter

Proposal for a

COUNCIL REGULATION

laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the Common system of value added tax¹, and in particular Article 397 thereof,

Having regard to the proposal from the Commission²,

Whereas:

- (1) In order to improve the functioning of the internal market, it is essential to ensure a more uniform application of the current value added tax system. The adoption of provisions implementing Directive 2006/112/EC is a major step forward in that respect. A Regulation, binding and directly applicable in all Member States, will ensure that certain divergences in the application of the provisions of Directive 2006/112/EC no longer occur in the future. This Regulation will only apply when value added tax becomes chargeable after the date of its entry into force.
- (2) In accordance with the principle of proportionality, it is necessary and appropriate for the achievement of the basic objective of ensuring a more uniform application of the current value added tax system to lay down rules implementing Articles 135 1. (a) to (g), 135a and 137a of Directive 2006/112/EC. The implementing provisions were elaborated together with Articles 135 1. (a) to (g), 135a and 137a of the Directive and reflect the intentions of the legislator. However, the lists of cases excluded and included in the exemptions are not exhaustive; they intend to reduce the administrative charges of economic operators and fiscal administrations by listing those cases which come under the VAT exemption for insurance and financial services and mention those which are excluded. This regulation laying down implementing measures for Directive 2006/112/EC does not intend to deviate from constant jurisprudence of the European Court of Justice except where the Directive introducing the new Articles 135 1. (a) to (g), 135a and 137a sets new law. This regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the third paragraph of Article 5 of the Treaty.
- (3) The implementing provisions contain specific rules in response to selective questions of application and are designed to bring consistency of treatment throughout the Community to those specific circumstances only.

¹ OJ L

² OJ C , , p. .

- (4) The definition of insurances in Article 135a 1. (1) of Directive 2006/112/EC is based on the judgement of the Court in case C-8/01³ and requires that the risk which is covered by the insurance contract be substantial. Those cases, where no risk is covered but where only the actuarial counter value applicable when the event covered by the insurance occurs, for example only capital are built up or undertakings providing the payment of a lump sum on maturity, are economically not insurances but often investments or deposits.
- (5) There are also many contracts where risk coverage can be minor, such as in certain Insured Investment Bonds. These bonds may carry some life cover although they are primarily investment vehicles. The life cover can be as low as around one per cent over and above the “bid value” of the investment units within the policy. That means that the value that the sale of investment units in the bond realises on death is added to, so that 101 per cent of that value is actually payable. The percentage of protection cover will vary depending on the bond. Such cases of minor risk coverage should be excluded from the definition of insurance services. It resulted from discussions with insurance operators that a threshold of 5% risk coverage is widely accepted by economic operators as being substantial.
- (6) Another basic principle of insurances is that the insured or a third person is indemnified against the losses or liabilities covered by the policy. Therefore commitments which do not include this element of indemnification should not be covered by the definition of insurances.
- (7) Cases where the insurer does not become the owner of the premium should be excluded from the definition of insurance. The supplier of insurance coverage must become the owner of the premium for being able to accept the risk and to build up and maintain the reserve assets in accordance with regulatory requirements.
- (8) Where the value of taxable components in a service exceeds the value of the elements for risk coverage this is a strong indication for tax avoidance. Such cases should therefore be excluded from the definition of insurance services.
- (9) Capital Redemption Bonds should be excluded from the definition of insurances. Under these policies, there is no risk covered but rather money being deposited. One or more fixed sums are paid to an insurer under a contract pursuant to which one or more specified amounts are paid out at some later time or times, on the basis of an actuarial calculation. Typically the contracts take the form of an annuity certain, where a capital sum is used to buy an annuity for a fixed term not contingent on life, or a sinking fund where regular sums are paid in to secure a capital sum at some later date, for example against the need to find a premium payment to renew a lease. Capital Redemption Bonds should therefore come under the definition of deposits;
- (10) Insured pensions without mortality or longevity risk should be excluded from the definition of insurances. In such cases premiums are received to provide a capital sum to pay a pension. In most cases on maturity a certain percentage of the fund can be taken as a lump sum and the remainder invested in an annuity. In some cases it is possible to defer the annuity and in some special cases alternatives to an annuity can be

³ Judgement of the Court of 20 November 2003 (Case C-8/01), Taksatorringen

used. Insured pensions without mortality or longevity risk are therefore deposits of money and should be exempt under the definition of deposits.

- (11) Annuities without mortality or longevity risk are payments made under a legal obligation and are “pure income profit”. They can be characterised as “annual”, so being capable of recurrence on a periodic basis by reference to an annual time frame. The purchase sum passes absolutely to the provider of the annuity and no debtor/creditor relationship is created in relation to that sum; it is replaced by the annuity. The annuitant’s only right is to demand payments when due. Annuities used for pensions are commonly called a purchased life annuity. The payments for the annuity are not instalments of pre-existing debt. Annuities without mortality or longevity risk are therefore deposits of money and should be exempt under the definition of deposits.
- (12) The definition of insurances should cover life insurance policies; the insured risk is based on the life (lives) of (a) person(s), usually mortality, and diagnosis of a terminal illness, diagnosis of a critical illness, disability due to ill health, permanent disability, accidental death, and requirement for long term care. Such insurances cover also group policies. A group life policy is a life policy that insures more than one life *and* pays benefits on the death of *each* of the lives. Individual proof of insurability is not normally a consideration in the underwriting. Rather, the underwriter considers the size and turnover of the group, and the financial strength of the group. Contract provisions will attempt to exclude the possibility of adverse selection. Group life insurance often has a provision that a member exiting the group has the right to buy individual insurance coverage. Another substantial risk linked with the life of a person is that of longevity; therefore life insurances or pension plans which cover this risk and which are not simply based on the capitalisation of the regular premiums paid by the insured person are insurances.
- (13) Insurance policies could also insure against other life risks such as sickness disability and unemployment and cover against the possibility of being unable to work. The self-employed, in particular, may choose to protect against the risk that illness or disability may make it impossible for them to earn their living. Such policies are commonly known as permanent health insurance or income protection and should be covered by the definition of exempt insurances.
- (14) Health insurances policies should be covered by the definition of insurance services because in general they cover a substantial risk. Such policies will often cover the cost of private medical treatments where other programs do not pay for them or result in quicker health care where better facilities are available. In some circumstances a cash payment is made. Such insurance can be rather general but also cover specific health risks such as workers' compensation insurances, replacing all or part of a worker's wages lost and accompanying medical expense incurred because of a job-related injury.
- (15) Peril insurance policies should be covered by the definition of insurance services because they usually cover some of the most substantial risks for economic operators and consumers. Such policies can target fire, water or even snow risks as well as natural disasters like earthquakes or flooding, accidents like nuclear incidents, accidents of means of transport, transport or travelling accidents or and crime risks

such as vandalism, theft, fraud, forgery or terrorism. They may include breakdown of machinery or means of transport⁴.

- (16) Liability risk insurance policies should be covered by the definition of insurances. They cover legal claims against the insured which usually constitute a substantial risk. Many types of insurance include an aspect of liability coverage. The range of liability risks can reach from a homeowner's insurance policy provide liability coverage which protects the insured in the event of a claim brought by someone who slips and falls on the property to environmental liability risks protecting the insured from bodily injury, property damage and cleanup costs as a result of the dispersal, release or escape of pollutants or professional liability insurances protecting professional practitioners such as architects, lawyers, notaries, doctors, and accountants against potential negligence claims made by their patients/clients. Such professional liability insurance may take on different names depending on the profession. The protection offered by a liability insurance policy can be twofold: a legal defense in the event of a lawsuit commenced against the policyholder and indemnification (payment on behalf of the insured) with respect to a settlement or court verdict. Liability policies typically cover only the negligence of the insured, and will not apply to results of willful or intentional acts by the insured.
- (17) Financial loss risk insurance policies usually cover substantial risks and should therefore be covered by the definition of insurances. They protect persons against various risks of financial losses. For example, insurance might cover the failure of a creditor to pay money it owes to the insured, performance risks of financial products or the risk of a person to fail in performing its obligations under a contract.
- (18) Reinsurance, retrocession and insurance pooling should be covered by the definition of insurance. Reinsurances provide policies to other insurance companies, allowing them to reduce their risks and protect themselves from very large losses. It may also involve retrocession, the transfer of the entire risk to a reinsurance company. Vice versa a reinsurer may also be a direct writer of insurance risks as well. Reinsurance can cover a proportion or all of the risk or it can just cover claims over a certain amount. Such services include the pooling of insurances for huge risks. Within such a pool suppliers of insurance usually underwrite for a certain percentage of the risk or for a specific amount. However, it may also happen that an supplier of insurance opts to cover certain risks alone because he is specialised in these risks. In such pooling scenarios usually one insurance company takes the lead. On the other hand a commitment assumed by an insurance company to carry out, in return for remuneration at market rates, the business activities of another insurance company, which is its 100% subsidiary and which would continue to conclude insurance contracts in its own name, does not constitute an insurance transaction⁵.
- (19) Financial loss and inconvenience risks insurance supplied within a block insurance policy should be covered by the definition of insurance. This scenario covers cases where a taxable person, not being an insurer, procures for his customers who are the

⁴ Judgement of the Court of 7 December 2006 (Case C-13/06), Commission *./.* Greece

⁵ Judgement of the Court of 8 March 2001 (Case 240/99) Skandia

insured, in the context of a block policy of which he is the holder, insurance cover from an insurer who assumes the risk covered (Card Protection Plan scenario⁶).

- (20) Identification of new insurance products or opportunities should be excluded from the definition of services related to insurances. They usually involve looking at market trends and the fiscal regime to identify new selling opportunities; these services are in general analytical and of a preparatory nature; it is virtually impossible to link them specifically to an exempt insurance product. Such services are also very vague in character and their specific impact on an exempt supply of insurance is difficult to see.
- (21) Marketing should be excluded from the definition of services related to insurances. Marketing involves advertising and other measures to promote the sale of insurances; such activities are general services which also apply to other services and goods. They are therefore not specific to insurances.
- (22) Insurance Company Administration services should not be covered by the exemption for insurances. Such services ensure inter alia that regulatory and other legal requirements for carrying out insurance business such as solvency requirements are complied with. Although they are essential, they are not specific to the transactions of supplying exempt insurance services. In fact, many business sectors operate in a legal and regulatory environment of rules they must respect. These rules may be essential and specific to the type of business carried out and even a pre-condition for doing business in insurances but they are not specific to and essential for the supply of an exempt insurance service. The supply itself can be made without these administrative services. Other administrative services involving handling activities⁷ such as the acceptance of applications for insurance, the setting and paying of commission to insurance agents, the organisation and management of information technology, the supply of information and the drafting of reports for insured parties and third parties are also not specific to the supply of exempt insurance services and should therefore be excluded.
- (23) Policy Administration consists of reviewing procedures, putting policyholders on risk, checking that sales procedures including regulatory requirements have been carried out, sending out of documentation to policyholder, record policy details in insurers systems and dealing with policyholder queries; such services should not be covered by the exemption for insurances. They are typically general administrative tasks and therefore not specific to and essential for the supply of exempt insurance services.
- (24) Motor vehicle damage assessments carried out, on behalf of its members, by an association whose members are insurance companies are not insurance transactions.⁸
- (25) back office' activities, consisting in rendering services, for payment, to an insurance company do not constitute the performance of services relating to insurance transactions
- (26) Product development for insurances should be covered by the exemption for insurances. Such activities involve the design of a new products or the tweaking of a current products for a particular market to supply services which comply with the needs of clients. Without such development activities insurance services could not be

⁶ Judgement of the Court of 25 February 1999 (Case C-349/96), Card Protection Plan. /. Commissioners of Customs and Excise

⁷ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

⁸ Judgement of the Court of 20 November 2003 (Case C-8/10), Taksatorringen

supplied; they are therefore essential for and specific to the supply of exempt insurance services; the development of such products is also a distinctive service.

- (27) Underwriting of risk should not be covered by the exemption for insurances. Such services are distinct; they consist of an assessment of the insurance risk and the underwriting of the insurance proposals, putting the insurer “on risk”; the risk passes from the insured to the insurer. Without such services no commitment would be established; they are thus essential for and specific to the supply of exempt insurance services.
- (28) Risk management should be exempt as a related services; they are distinct in character and consist of the review of the insurer’s exposure to risk and verifying options such as reinsurance, product mix or derivatives to reduce them to the required level; Without such services the insurer could not accept the risk; they are thus essential for and specific to the supply of exempt insurance services.
- (29) Investment management should be covered by the exemption for insurances; they are distinct services and consist of the management of the investment portfolio to ensure that the investment return matches the liabilities of the insurer; in fact, it is the return from the investment portfolio and the amount of the earned premium which are essential for the insurer in supplying the policy and accepting the risk transfer.
- (30) Claims handling services are related services to insurances and should be covered by the exemption for insurances; such services consist of reviewing claims received to ensure they are covered by the policy, clearing and settlement, including agreeing the amount of the claim with policyholder and paying the claim;
- (31) Issuing, cession, renewal, prolongations, amendments, continuing and rescissions of contracts should be covered by the exemption for insurances; they are specific to the functioning of an insurance policy; with the issued policy the insured is able to prove risk coverage; a cession changes the creditor or debtor; a renewal is the concluding of a contract for another period; prolongations extend the period of application of the contract; amendments and rescissions of contracts have a direct impact on how rights and obligations are exercised under the policy. They are also distinct in character. It is therefore justified to exempt such services and deviate partly from the jurisprudence of the European Court of Justice in Case C-472/03⁹. A cession includes factoring scenarios where the factor assumes the creditor's position for a granted credit. In this respect it is justified to deviate from the jurisprudence of the European Court of Justice in case C-305/01.¹⁰
- (32) Although involving a finance element, the granting of payment by instalments or of an allowed period for payment for the supply of services and goods should be excluded from the definition of "granting of credits" where the financing element is a part of the remuneration for the services or goods. In such cases the described specific ways of payment are not available separately. The same applies to so-called hire-purchase scenarios. In cases where a buyer cannot afford to pay the asked price for an item of property as a lump sum but can afford to pay a percentage as a deposit, a hire-purchase contract allows the buyer to hire the goods for a monthly rent. When a sum equal to the original full price plus interest has been paid in equal instalments, the buyer may

⁹ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

¹⁰ Judgement of the Court of 26 June 2003 (Case C-305/01), MGK Kraftfahrzeuge Factoring

then exercise an option to buy the goods at a predetermined price (usually a nominal sum) or return the goods to the owner. Such scenarios cannot be considered lending of money. The same reasoning applies to conditional sales; such sales are comparable to hire purchase except the credit is generally provided by the shop. It is an agreement where the price is payable by instalments and title to the goods remain with the seller until the full price is paid. Additional charges for the financing elements do not come under the definition "granting of credit".

- (33) The supply of financing elements in combination with a leasing of goods or services should be excluded from the definition of "granting of credits"; such financing elements exist in a variety of scenarios. In leasing scenarios such as operating lease, finance lease or contract hires the financing elements are built into remuneration, which the lessee has to pay for the use of goods or services; they are thus not lending of money.
- (34) The granting of time to pay before delivery by a supplier of goods and services should be excluded from the definition of "granting of credits" in accordance with the jurisprudence of the European Court of Justice in (Case C-281/71)¹¹ because the remuneration for that financing is included in the taxable amount.
- (35) Services which lead to a tradable creditor's position for debts of a corporation or other association should be excluded from the definition of "granting of credits", because they reflect an exempt supply of securities; these services include for example debt securities such as bonds, bills, certificates of deposit and other commercial papers. In finance, a bond is a debt security, in which the issuer owes the holders a debt and is obliged to repay the principal and interest (the coupon) at a later date, termed maturity. Other stipulations may also be attached to the bond issue, such as the obligation for the issuer to provide certain information to the bond holder, or limitations on the behaviour of the issuer. Bonds are generally issued for a fixed term (the maturity) longer than ten years. A bond is simply a loan, but in the form of a security, although terminology used is rather different. The issuer is equivalent to the borrower, the bond holder to the lender, and the coupon to the interest. Bonds enable the issuer to finance long-term investments with external funds. Debt securities with a maturity shorter than one year are typically bills. Certificates of deposit (CDs) or commercial papers are considered money market instruments, a market for short-term borrowing and lending, typically up to thirteen months. This also applies to tradable promissory notes. Such notes, also referred to as a note payable in accounting, are contracts detailing the terms of a promise by one party (the maker) to pay a sum of money to the other (the payee). The obligation may arise from the repayment of a loan. The terms of a note typically include the principal amount, the interest rate if any, and the maturity. Sometimes there will be provisions concerning the payee's rights in the event of a default, which may include foreclosure of the maker's interest. Demand promissory notes are notes that do not carry a specific maturity date, but are due on demand of the lender. Usually the lender will only give the borrower a few days notice before the payment is due.
- (36) Prepaid credit card services are not lending of money and are therefore not "granting of credit", they are dealt with in the framework of cash services. Prepaid credit card services cover scenarios where the card holder spends money which has been "stored" via a prior deposit by the card-holder or someone else;

¹¹ Judgement of the Court of 27 October 1993 (Case C-281/91), Muys' en De Winter's

- (37) Loans and syndicated loans should be covered by the "granting of credit". Under a loan money is lent and usually paid back in instalments. A syndicated loan (or "syndicated bank facility") is a large loan in which a group of banks work together to provide funds for a borrower. There is usually one lead bank (the "Arranger" or "Agent") that takes a percentage of the loan and syndicates the rest to other banks. A syndicated loan is the opposite of a bilateral loan, which only involves one borrower and one lender (often a bank or financial institution.);
- (38) Mortgage loans are also loans, involving the lending of money but they are secured by real property; they should therefore be covered by the "granting of credit".
- (39) Overdraft facilities are based on an explicit credit agreement whereby the possibility is granted to dispose of funds in current account which exceed the current balance in that account and where the amount of credit has to be repaid on demand; such overdraft facilities therefore involve the lending of money and should be covered by the "granting of credit".
- (40) Overrunning facilities are based on a tacit credit agreement whereby the possibility is granted to dispose of funds in current accounts which exceed the available balance or the ceiling of a global credit; as such they involve the lending of money and should be covered by the "granting of credit".
- (41) Global credits are "granting of credit"; are credit arrangements where the client is entitled to drawdown at his disposal until the total amount of credit under the agreement is utilised;
- (42) Overdraft loans are also called "bounce protection" plans; they are offered by banks to low-income consumers. In exchange for covering account overdrafts up to a set limit, banks charge bounced check fee. Some banks also charge a per day fee until the consumer's account has a positive balance. In addition to writing checks, customers can borrow against their bounce protection limit using their debit cards and by making withdrawals. Such services are lending of money and should thus be covered by the "granting of credit".
- (43) Credit card services consist of a system of payment named after a small plastic card to users of the system. Credit card services are different from debit card services because it does not remove money from the user's account after every transaction. In the case of credit cards the issuer lends money to the user. A credit card may allow the user to revolve his balance at the cost of having interest charged. However, there are also credit card services which require the user to pay his balance in full each month; in such cases the credit card is often called charge card. However, also for such charge cards the balance is credited until the end of the month with interest being charged. Such services are lending of money and should thus be covered by the "granting of credit". However, this does not include the supply of blank cards, which is a supply of goods.
- (44) Pawn broking is lending of money and should thus be covered by the "granting of credit". A typical case of pawn broking is the customer bringing his own goods to the shop, where they are held as collateral against a loan. If the customer repays the loan within the period their goods are returned. The customer will pay interest on the loan. If the customer does not repay the loan within the period, the shop will sell the goods. The loan will often include ancillary charges for valuation, cleaning and repair.

- (45) Debt securities such as bonds, bills, certificates of deposit and commercial papers are classical means for the safeguarding of credits. In finance, a bond is a debt security, in which the issuer owes the holders a debt and is obliged to repay the principal and interest (the coupon) at a later date, termed maturity. Other stipulations may also be attached to the bond issue, such as the obligation for the issuer to provide certain information to the bond holder, or limitations on the behavior of the issuer. Bonds are generally issued for a fixed term (the maturity) longer than ten years. A bond is simply a loan, but in the form of a security, although terminology used is rather different. The issuer is equivalent to the borrower, the bond holder to the lender, and the coupon to the interest. Bonds enable the issuer to finance long-term investments with external funds. Debt securities with a maturity shorter than one year are typically bills. Certificates of deposit (CDs) or commercial papers are considered money market instruments (a market for short-term borrowing and lending, typically up to thirteen months).
- (46) The identification of new products/ opportunities is not specific to and essential for the "granting of credit". Such services involve looking at market trends and the fiscal regime to identify new selling opportunities; these services are not specific enough to the "granting of credit" because they represent basically analytical activities before credit products are actually supplied; they must also not necessarily lead to the "granting of credit" making it impossible to establish a causal link with the exempt service; in addition such services are very diffuse; they could cover almost anything and therefore they are not distinct enough in character.
- (47) Marketing should be excluded from the definition of services related to "granting credit". Marketing involves advertising and other measures to promote the sale of credit products; such activities are general services which also apply to other services and goods. They are therefore not specific to "granting credit".
- (48) Services ensuring compliance with regulatory and other legal requirements should be excluded from the definition of services related to "granting credit". Such services ensure inter alia that regulatory and other legal requirements for carrying out credit business such as book-keeping, transparency and solvency requirements are complied with. Although they are essential, they are not specific to the transactions of "granting credit". In fact, many business sectors operate in a comparable legal and regulatory environment of rules they must respect. These rules may be essential and specific to the type of business carried out and even a pre-condition for doing business in the banking sector but they are not specific to and essential for the "granting of credit". The credit itself can be granted without these administrative services.
- (49) Software design services consist of the provision of computer programs that control the operation of the computer hardware. In this context the software is generally specific to the requirements of the banking business and is not generally available. Software design services are necessary to give the operator an information technology tool enabling him to supply financial services with the help of this software. In this respect they are comparable to mere material or technical supplies, such as the making available of a system of information technology¹² supplied at a prestige and not specific to and essential for the "granting of credit", while the electronic services

¹² Judgement of the Court of 4 May 2006 (Case (C-169/04), Abbey National

supplied with the help of that designed software may well be specific to the granting of credit.

- (50) Debt collection and recovery are services which are supplied to the grantor of a credit, typically in situations where the debtor of the credit does not fully comply with his payment obligations or has become illiquid and where the grantor of the credit remains in the creditor's position; against this background debt collection and recovery are services supplied to credits in default and thus not specific to and essential for the "granting of credit".
- (51) Company Administration services should not be covered by the exemption for "granting credit". Such services ensure inter alia that regulatory and other legal requirements for carrying out a credit business such as solvency requirements are complied with. Although they are essential, they are not specific to the transactions of supplying exempt insurance services. In fact, many business sectors operate in a legal and regulatory environment of rules they must respect. These rules may be essential and specific to the type of business carried out and even a pre-condition for doing business in credit granting but they are not specific to and essential for the "granting credit". The credits themselves can be granted without these administrative services. Other administrative services involving handling activities¹³ such as the acceptance of applications for a credit, the setting and paying of commission agents, the organisation and management of information technology, the supply of information and the drafting of reports for clients and third parties are also not specific to the "granting of credit" and should therefore be excluded.
- (52) Credit administration consists of reviewing procedures, registering the credits, checking that sales procedures including regulatory requirements have been carried out, sending out of documentation to clients, record credit details in supplier's systems and dealing with queries in case of pooled credits; such services should not be covered by the exemption for insurances. They are general administrative tasks and therefore not specific to and essential for the "granting of credit".
- (53) Legal services, accountancy, audit and bookkeeping services are general services for numerous economic operators and therefore not specific to and essential for the "granting of credit".
- (54) The measurement, prediction and control of credit risks, losses due to credit risk, including credit strategy are services which are specific to and essential for the "granting of credit". Most companies involved in granting credit need services dedicated to the measurement, prediction and control of credit risks and losses due to credit risk. This field is often referred to as consumer/retail credit risk management; however the word management is commonly dropped. A common method for predicting credit risk is through the credit scorecard. The scorecard is a statistically based model for attributing a number (score) to a customer (or an account) which indicates the predicted probability that the customer will exhibit a certain behavior. In calculating the score, a range of data sources may be used, including data from an application form, from credit reference agencies or from products the customer already holds with the lender. Credit strategy is concerned with turning predictions of customer behavior (as provided by scorecards) into decisions. To turn an application score into a Yes/No decision "cut-offs" are generally used. A cut-off is a score at and

¹³ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

above which customers have their application accepted and below which applications are declined. Such services have a direct impact on whether a supplier can accept the risk of "granting credit" and should thus be covered as related services.

- (55) Underwriting of credits includes taking decisions on credit applications on behalf of the grantor along pre-agreed lines. Not all decisions can be made easily. This may be for a number of reasons; insufficient data, regulatory requirements, or a borderline decision. In such cases highly trained professionals called underwriters manually review the case and make a decision. This is more common in highly regulated products such as mortgages, especially when large sums are involved. Such services also have a direct impact on whether a supplier can accept the risk of "granting credit" and should thus be covered as related services.
- (56) Credit rating services, including assessing credit worthiness have a direct impact on whether a supplier can accept the risk of "granting credit" and under which conditions he can accept the risk; they should therefore be covered as related services. A credit rating assesses the credit worthiness and financial health of an individual, corporation, or even a country. Credit ratings are calculated from financial history and current assets and liabilities. Typically, a credit rating tells a lender or investor the probability of the subject being able to pay back a loan. A poor credit rating indicates a high risk of defaulting on a loan, and thus might lead to higher interest rates.
- (57) Record keeping, arrangement and monitoring of payments made for a loan has a direct impact on how the creditor must react; where instalments are arriving as agreed, he will probably not react at all. Where instalments are paid as provided for, he might opt for exercising his right of claiming back the credited amount immediately or to commercialise distrainers. Such services should therefore be covered as related services to "granting credit".
- (58) Product development for credits should be covered by the exemption for insurances. Such activities involve the design of a new products or the tweaking of a current products for a particular market to supply services which comply with the needs of clients. Without such development activities different forms of credit granting could not be supplied; they are therefore essential for and specific to the supply of exempt "credit granting"; the development of such products is also a distinctive service.
- (59) Issuing, cession, renewal, prolongations, amendments, continuing and rescissions of contracts should be covered by the exemption for "granting credit"; they are specific to the functioning of a credit contract; with the issued contract the creditor is able to prove credit coverage; a cession changes the creditor or debtor; a renewal is the concluding of a contract for another period; prolongations extend the period of application of the contract; amendments and rescissions of contracts have a direct impact on how rights and obligations are exercised under the credit contract. They are also distinct in character. It is therefore justified to exempt such services and deviate partly from the jurisprudence of the European Court of Justice in Case C-472/03¹⁴. A cession includes factoring scenarios where the factor assumes the creditor's position for a granted credit. In this respect it is justified to deviate from the jurisprudence of the European Court of Justice in case C-305/01.¹⁵

¹⁴ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

¹⁵ Judgement of the Court of 26 June 2003 (Case C-305/01), MGK Kraftfahrzeuge Factoring

- (60) Safeguarding services not directly linked to a credit such as warranties for the repair and replacement of faulty goods should be excluded by the definition of financial safeguarding of credits; such services are linked to goods.
- (61) Services for asset-based safeguarding which are not of a financial character but which are based on real values such as mortgages, performance guarantees or cessions of a trademark or assets of intellectual property as means of safeguarding should be excluded by the definition of financial safeguarding of credits; they have no financial character. In the simplest meaning, asset-based lending is any kind of lending secured by an asset. This means, if the credit is not repaid, the asset is taken. In this sense, a mortgage is an example of an asset-backed loan. More commonly however, the phrase describes lending using assets not normally used in other credits. This type of lending is usually done when the normal routes of raising funds in particular normal unsecured bank lending is not possible. This is usually because the creditor is in dire financial status. Thus, asset based lending can be compared to sub-prime lending. It is usually accompanied by high interest rates. Under a performance guarantee the guarantor has an obligation to provide goods, services or payment in the event of any default. Such guarantees are not financial instruments themselves. The same reasoning applies to cessions of a trademark or assets of intellectual property as means of safeguarding for a credit.
- (62) Rental guarantees providing the outstanding rental payments or paying a particular sum of money, if the tenant defaults on the rental payments should be excluded from the definition of safeguarding of credits, because they are accessory to rental debts which are not credits.
- (63) Export credit guarantees /letters of credit should not be covered by the definition of safeguarding of credits. They represent a form of an official guarantee to reimburse an exporter should a purchaser default on payment for exported goods.
- (63a) Non-pecuniary obligations such as the obligation to renovate a building, should not be covered by the definition of "safeguarding of credits" because they lack the character of a financial transaction¹⁶
- (64) Credit default swaps (CDS) have the effect of transferring the credit exposure of credits between parties. It is an agreement between a protection buyer and a protection seller whereby the buyer pays a periodic fee in return for a contingent payment by the seller upon a credit happening in the reference entity. Most CDS contracts are physically settled, where upon a credit event the protection seller must pay the par amount of the contract against the protection buyer's obligation to deliver a bond or loan of the name against which protection is being sold. A CDS is often used like an insurance policy or hedge for the holder of debt, though because there is no requirement to actually hold any asset or suffer a loss, a CDS is not actually insurance. The typical term of a CDS contract is five years, although being an over-the-counter derivative almost any maturity is possible. Against this background a CDS is a typical financial instrument for safeguarding of credits.
- (65) Financial futures and options should be covered by the definition of safeguarding of credits where they are used to limit the risks of a credit. A futures contract gives the holder the obligation to settle or not to settle in accordance with the contract, which differs from an options contract, which gives the holder the right, but not the

¹⁶ Judgement of the Court of 17 April 2007 (Case C-455/05), Velvet & Steel Immobilien

obligation. In other words, the owner of an options contract may exercise the contract. Both parties of a "futures contract" must fulfill the contract on the settlement date. Futures or options related to goods are not financial and therefore not covered by the definition.

- (66) Interest rate SWAPS should be covered by the definition of safeguarding of credits where they are used to safeguard a credit. In the field of derivatives, an interest rate swap, allows one party to exchange a stream of interest for another party's stream. Interest rate swaps are often used by companies to alter their exposure to interest-rate fluctuations of credits, by swapping fixed-rate obligations for floating rate obligations, or vice versa. By swapping interest rates, a company is able to alter their interest rate exposures and bring them in line with management's appetite for interest rate risk.
- (67) Customs bonds should be covered by the definition of safeguarding of credits. They represent a guarantee for credited customs duties and taxes in default.
- (68) Sales of repossessions after mortgage default are not related to the safeguarding of credits but they represent the utilisation of the means used for safeguarding a credit when a granted credit has become default. Such sales of repossessions are therefore not specific to the safeguarding of credits.
- (69) Total return SWAPS (TRORS) are not related to the safeguarding of credits and should be excluded from the definition of safeguarding of credits. A total return swap is a swap in which party A pays the total return of an asset and party B makes periodic interest payments. The total return is the capital gain or loss, plus any interest or dividend payments. Note that if the total return is negative, then party A receives this amount from party B. The parties have exposure to the return of the underlying stock or index, without having to hold the underlying assets. The profit or loss of party B is the same for him as actually owning the underlying asset. The essential difference between a TRORS and a credit default swap (CDS) is that the latter provides protection not against loss in asset value but against specific credit events. In that sense, a TRORS isn't a credit derivative at all, in the sense that a CDS is. A TRORS is funding-cost arbitrage. TRORS are related to securities.
- (70) Equity SWAPS are not related to the safeguarding of credits and should be excluded from the definition of safeguarding of credits. An equity swap is a special type of total return swap, where the underlying asset is a stock, a basket of stocks, or a stock index. Compared to actually owning the stock, in this case there are no payments up front, but there are also no voting or other rights that stock holders do have. Equity swaps are related to securities.
- (71) The identification of new products/ opportunities is not specific to and essential for the "safeguarding of credits". Such services involve looking at market trends and the fiscal regime to identify new selling opportunities; these services are not specific enough to the "safeguarding of credit because they represent basically analytical activities before products for the safeguarding of credits are actually supplied; they must also not necessarily lead to the "safeguarding of credit" making it impossible to establish a causal link with the exempt service; in addition such services are very diffuse; they could cover almost anything and therefore they are not distinct enough in character.
- (72) Marketing should be excluded from the definition of services related to "safeguarding of credits". Marketing involves advertising and other measures to promote the sale of

credit products; such activities are general services which also apply to other services and goods. They are therefore not specific to "safeguarding credits".

- (73) Administration consists of reviewing procedures, registering the credits and means of safeguarding, checking that sales procedures including regulatory and legal requirements have been carried out, sending out of documentation to clients, record credit and client details in supplier's systems and dealing with queries in case of pooled credits; such services should not be covered by the exemption for "safeguarding of credits". They are general administrative tasks and therefore not specific to and essential for the "safeguarding of credits".
- (74) Software design services consist of the provision of computer programs that control the operation of the computer hardware. In this context the software is generally specific to the requirements of the banking business and is not generally available. Software design services are necessary to give the operator an information technology tool enabling him to supply financial services with the help of this software. In this respect they are comparable to mere material or technical supplies, such as the making available of a system of information technology¹⁷ supplied at a prestage and not specific to and essential for the "safeguarding of credits", while the electronic services supplied with the help of that designed software may well be specific to the safeguarding of credits.
- (75) Services for asset-based safeguarding which are not of a financial character but which are based on real values such as mortgages, performance guarantees or cessions of a trademark or assets of intellectual property as means of safeguarding are excluded from the definition of financial safeguarding of credits because they have no financial character. The valuation of such non-financial collateral must therefore also be excluded from the definition of related services to "safeguarding of credits".
- (76) The valuation of financial collateral used for the safeguarding of a credit is specific to and essential for the "safeguarding of credits"; such services have a direct impact on whether a supplier can accept the means for safeguarding and under which conditions he can accept the risk or whether he must use additional means; they should therefore be covered as related services. Such services are similar to credit rating services because the evaluation of the means for safeguarding of credits has an impact on the credit worthiness and financial health of an individual, corporation, or even a country.
- (77) Product development for "safeguarding of credits" should be covered by the exemption. Such activities involve the design of a new products or the tweaking of a current products for a particular market to supply services which comply with the needs of clients. Without such development activities different forms of safeguarding could not be supplied; they are therefore essential for and specific to exempt "safeguarding of credits"; the development of such products is also a distinctive service.
- (78) Issuing, cession, renewal, prolongations, amendments, continuing and rescissions of contracts should be covered by the exemption for "safeguarding of credits"; they are specific to the safeguarding itself; with the issued contracts the creditor is able to prove that his credits are safeguarded; a cession changes the creditor or debtor; a renewal is the concluding of a contract for another period; prolongations extend the

¹⁷ Judgement of the Court of 4 May 2006 (Case (C-169/04), Abbey National

period of application of the contract; amendments and rescissions of contracts have a direct impact on how rights and obligations are exercised under the safeguarding contract and can themselves also develop that safeguarding effect or increase it. They are also distinct in character. It is therefore justified to exempt such services and deviate partly from the jurisprudence of the European Court of Justice in Case C-472/03¹⁸.

- (79) Check trading services are related to the granting of credit; it reflects a situation where a check trading company sells a voucher to a customer for a specific amount. The customer will repay that credit over a set period. The difference between what the customer pays and the value on the voucher is consideration for VAT exempt credit. The customer will use the voucher to buy from a participating trader who will account for VAT on a sale if it is taxable.
- (80) Deposits are a form of book money and from a legal and financial accounting standpoint the term deposit is actually used by the banking industry in financial statements to describe the liability owed by the bank to its depositor, and not the deposited funds themselves, which are shown an asset of the bank. Therefore those scenarios where such a liability is not pertinent should be excluded from the definition of "deposit services".
- (81) Services for the depositing of other funds than money, such as collectors' items, rights, claims or titles should be excluded from the definition of "deposit services". These are safe-keeping services. Deposit services are limited to money.
- (82) Hire of safes and security boxes is also not a deposit service but renting out of secure space. Such services are thus excluded from "deposit services".
- (83) Sight deposits (deposits on call), saving deposits and time deposits should be covered by the definition of deposits. Sight deposits are funds which can be transferred immediately and without restriction to another account or which can be converted into cash. Savings deposits are funds in accounts maintained i.a. by commercial banks, savings and loan associations, credit unions, and mutual savings banks that pay interest but can not be used directly as money (by, for example, writing cheques). These saving deposits let customers set aside a portion of their liquid assets that could be used to make purchases while earning a monetary return. A time deposit (also known as a term deposit) is a deposit at a banking institution that cannot be withdrawn for a certain "term" or period of time. When the term is over it can be withdrawn or it can be held for another term. Generally speaking, the longer the term the better is the yield on the money. A certificate of deposit is a time-deposit product.
- (84) Saving certificates, saving bonds and pension savings plans should be covered by the definition of deposits. They are deposit of money in an account. Fixed Interest Savings Certificates are lump sum investments that earn guaranteed rates of interest over set periods of time, called 'terms'. Savings bonds are often fixed rate investments that offer a guaranteed fixed interest rate for the term of the investment, which is typically 1, 2 or 5 years. The terms of the bond will state how money may be deposited, i.e. whether deposits can be made as a lump sum and/or on a regular basis. There is usually a requirement to keep the money invested for the full term of the bond in order

¹⁸ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

to benefit from the higher interest rates offered. Withdrawals are not permitted. A pension is a steady income given to a person (usually after retirement). Pensions are typically payments made in the form of a guaranteed annuity to a retired or disabled employee. Some retirement plan (or superannuation) designs accumulate a cash balance (through a variety of mechanisms) that a retiree can draw upon at retirement, rather than promising annuity payments. These are often also called pensions. In either case, a pension created by an employer for the benefit of an employee is commonly referred to as an occupational or employer pension. Labor unions, the government, or other organizations may also fund pensions. Occupational pensions are a form of deferred compensation, usually advantageous to employee and employer for tax reasons.

- (85) Capital Redemption Bonds are usually excluded from the definition of insurances because no risk is covered. As one or more fixed sums are paid under a contract pursuant to which one or more specified amounts are paid out at some later time or times, on the basis of an actuarial calculation, such contracts are deposits on money in an account. Typically the contracts take the form of an annuity certain, where a capital sum is used to buy an annuity for a fixed term not contingent on life, or a sinking fund where regular sums are paid in to secure a capital sum at some later date, for example against the need to find a premium payment to renew a lease. Capital Redemption Bonds should therefore come under the definition of deposits.
- (86) Insured pensions without mortality or longevity risk are excluded from the definition of because they deposit money. In fact, in such cases premiums are received to provide a capital sum to pay a pension. In most cases on maturity a certain percentage of the fund can be taken as a lump sum and the remainder invested in an annuity. In some cases it is possible to defer the annuity and in some special cases alternatives to an annuity can be used. Insured pensions without mortality or longevity risk are therefore deposits of money and should be exempt under the definition of deposits.
- (87) Annuities without mortality or longevity risk are payments made under a legal obligation and are “pure income profit”. They can be characterised as “annual”, so being capable of recurrence on a periodic basis by reference to an annual time frame. The purchase sum passes absolutely to the provider of the annuity and no debtor/creditor relationship is created in relation to that sum; it is replaced by the annuity. The annuitant’s only right is to demand payments when due. Annuities used for pensions are commonly called a purchased life annuity. The payments for the annuity are not instalments of pre-existing debt. Annuities without mortality or longevity risk are therefore deposits of money and should be exempt under the definition of deposits.
- (88) Issuing, cession, renewal, prolongations, amendments and rescissions of deposit contracts should be covered by the exemption for deposit services; they are specific to the functioning of a deposit; with the issued contract the depositor is able to prove his title to the deposit; a cession changes the creditor or debtor; a renewal is the concluding of a contract for another period; prolongations extend the period of application of the contract; amendments and rescissions of contracts have a direct impact on how rights and obligations are exercised under the deposit arrangement. They are also distinct in character. It is therefore justified to exempt such services and

deviate partly from the jurisprudence of the European Court of Justice in Case C-472/03¹⁹.

- (89) The identification of new products/ opportunities is not specific to and essential for "deposit services". Such services involve looking at market trends and the fiscal regime to identify new selling opportunities; these services are not specific enough to "deposit services" because they represent basically analytical activities before deposit services are actually supplied; they must also not necessarily lead to deposit services being supplied, making it impossible to establish a causal link with the exempt service; in addition such services are very diffuse; they could cover almost anything and therefore they are not distinct enough in character.
- (90) Marketing should be excluded from the definition of services related to "deposit services". Marketing involves advertising and other measures to promote the sale of "deposit services"; such activities are general services which also apply to other services and goods. They are therefore not specific to "deposit services".
- (91) Services ensuring compliance with regulatory and other legal requirements should be excluded from the definition of services related to "deposit services". Such services ensure inter alia that regulatory and other legal requirements for carrying out "deposit services" such as book-keeping, transparency and solvency requirements are complied with. Although they are essential, they are not specific to the transactions of "deposit services". In fact, many business sectors operate in a comparable legal and regulatory environment of rules they must respect. These rules may be essential and specific to the type of business carried out and even a pre-condition for doing business in the banking sector but they are not specific to and essential for the "deposit services". Deposit services can be without these administrative services.
- (92) Software design services should be excluded from the definition of services related to "deposit services" for the same reasons already stated in conjunction with other exempt financial services.
- (93) Company administration consists of reviewing procedures, registering the deposits, checking that sales procedures including regulatory and legal requirements have been carried out, sending out of documentation to clients, record deposit and client details in supplier's systems and dealing with queries; such services should not be covered by the exemption for "deposit services ". Other administrative services involving handling activities²⁰ such as the acceptance of applications for a credit, the setting and paying of commission agents, the organisation and management of information technology, the supply of information and the drafting of reports for clients and third parties are also not specific to "deposit services" and should therefore be excluded. They are general administrative tasks and therefore not specific to and essential for the "deposit services ".
- (94) Legal services, accountancy, audit and bookkeeping services are general services for numerous economic operators and therefore not specific to and essential for "deposit services ".
- (95) Sorting and counting of money for the purpose of making a deposit are specific to and essential for "deposit services ". These activities contribute directly to the deposit

¹⁹ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

²⁰ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

being made and the correct amount being registered. They are also services which are distinct in character.

- (96) Reporting on the balances of deposits and interest calculation, statements of account and commitment overviews are specific to and essential for "deposit services ". These are services carried out in executing direct contractual obligations which determine the functioning of the contract; they are also services which are distinct in character.
- (97) Calculation of tax and fees with regard to the cancellation of pension saving plans are specific to and essential for "deposit services ". These services are supplied for ensuring that pension saving plans can be terminated properly and that the deposited money can be paid out as agreed in the contract. These services are also distinct in character.
- (98) Budgeting of accounts, including economic feasibility studies for appraisal of customers' requirements are specific to and essential for "deposit services ". These services are supplied for ensuring that the deposits are properly composed and structured in accordance with the needs of a specific client; in various case these services also lead to the development of new deposit services; the services are also distinct in character and should therefore be covered by the exemption.
- (99) Safekeeping of certificates for deposits (CD); certificates of deposit have specific, fixed terms (often three months, six months or one to five years) and usually a fixed interest rate requiring that the CD be held until maturity. Safekeeping of CDs ensures that the CDs are presented at the date of maturity and either liquidated or used for making another deposit or an investment. In this sense safekeeping contributes to realising the objective of the deposit and is therefore specific to and essential for "deposit services ". It is also distinct in character. In some cases suppliers of "deposit services" pool the supply of specific deposits
- (100) Identity verification and money laundering checks are services preventing a criminal misuse of deposits for purposes other than those agreed upon and help keeping deposits within agreed contractual parameters. In this sense identity verification and money laundering checks contribute to realising the objective of the deposit and are therefore specific to and essential for "deposit services ".
- (101) accepting of money for deposits usually consists of services supplied by help of machines which allow clients to make deposits outside the normal office hours such as night-safes allowing to deposit the daily intake or other machines allowing the deposit of cash money; they are specific to and essential for "deposit services " because without them deposit could not be made as required.
- (102) Pure book-keeping and auditing services should be excluded from the definition of "account operation services"; such services are general in nature and usually not related to the operation of a monetary account.
- (103) Operation of deposit accounts, of current accounts and mixtures of are account operation services. A deposit account is an account at a banking institution that allows money to be held on behalf of the account holder. A current account is a deposit account offering various flexible payment methods to allow customers to distribute money directly to others. Most current accounts have a check book, offer the facility to arrange standing orders, direct debits and payment via a debit card. Current accounts may also allow borrowing via an overdraft facility. Current accounts providers include banks, building societies and credit unions. Since the internet

revolution most retail banking institutions offer access to current accounts via online banking.

- (104) Deposit, transfer and withdrawal of money to or from a bank account, cheque services, standing order services, direct debits, cash machine services, internet and telephone banking, credit cards, debit cards and transfer services like BACS, CHAPS and SWIFT are account operation services.
- (105) Checks are negotiable instruments instructing a financial institution to pay a specific amount of a specific currency from a specific demand account held in the maker/depositor's name with that institution. Both the maker and payee may be natural persons or legal entities. As checks are means to arrange payments via a specific account they are account operation services.
- (106) A standing order is an instruction a bank account holder gives to his bank to pay a set amount at regular intervals to another account. The instruction is sometimes known as a banker's order. They are typically used to pay rent, mortgage or other fixed regular payments. Because the amounts paid are fixed, a standing order is not usually suitable for paying variable bills such as credit card, or gas and electricity bills.
- (107) Direct debit is a payment method that allows an organisation to instruct their bank to collect varying amounts directly from customers' accounts. There are generally two ways to set up a direct debit: One method requires the customer to instruct his or her bank to honour debit notes from the organisation, the other one just requires the customer to give an authorisation to the organisation making the collections. The availability of these methods varies between countries and banks.
- (108) Cash machines services are electronic services for an account allowing customers to make cash withdrawals and check their account balances without the need for a human teller. Many also allow people to deposit cash or cheques, transfer money between accounts, top up their mobile phones' pre-paid accounts or even buy postage stamps.
- (109) Internet or Online banking describes the use of a bank's secure website to view for a specific account balances and statements, perform transactions and payments, and various other facilities, especially for banking outside bank hours and banking from anywhere where internet access is available. Telephone banking is the term applied to specific provision of banking services over the telephone in relation to a specific account. In many cases such calls are to a call centre or automated service, although some institutions continue to answer such calls in their branches. Often call centre opening times are considerably longer than branches, and some firms provide these services on a 24 hour basis.
- (110) Credit card is a system of payment named after the small plastic card issued to users of the system. A credit card is different from a debit card in that it does not remove money from the user's account after every transaction. In the case of credit cards, the issuer lends money to the consumer (or the user). It is also different from a charge card (though this name is sometimes used by the public to describe credit cards), which requires the balance to be paid in full each month. In contrast, a credit card allows the consumer to 'revolve' their balance, at the cost of having interest charged. Cards are related to a specific account. In many countries the debit card is multipurpose, acting as the automated teller machine card for withdrawing cash and as a check guarantee card. Merchants can also offer "cashback" /"cashout" facilities to customers, where a

customer can withdraw cash along with their purchase. The use of debit cards has become wide-spread in many countries and has overtaken the check and in some instances cash transactions by volume. Like credit cards, debit cards are used widely for telephone and Internet purchases.

- (111) Inter-bank electronic clearance services organise the transfer of funds between accounts and are therefore account operation services.
- (112) Debits and credits of other e-money media organise the transfer of funds from an account into other money media such as telephone cards, credits for mobile phones and other media which allow payment for goods and services; they are thus account operation services.
- (113) Sorting and counting of money for the purpose of withdrawing money from an account, are account operation services. Usually such activities cover the supply of sorted coins and bank notes to economic operators in the form of withdrawal from an account and should thus be covered by the exemption.
- (114) The arrangement of overdraft facilities for an account, where not covered by the exemption for granting of credits, are account operation services. In some cases such overdraft facilities are granted for remuneration without the client using these facilities because the client does not need them in a concrete case but might them in the future and therefore arranges them for use when needed.
- (115) General printing of cheques books is not specific to and essential for account operation services; when cheques are printed the individual account to which they relate, is not yet added to the cheques;
- (116) The supply of blank cards which are not yet individualised as referring to a specific customer and his account are not specific to and essential for account operation services;
- (117) Internet hosting fees are general services which are offered for a variety of businesses and purposes; they are not specifically related to account operation services and thus not covered as services related to account operation services;
- (118) Hire of safes and security boxes is renting out of secure space. Such services are thus excluded from being related services to "account operation services ";
- (119) The identification of new products/ opportunities is not specific to and essential for "account operation services ". Such services involve looking at market trends and the fiscal regime to identify new selling opportunities; these services are not specific enough to " account operation services " because they represent basically analytical activities before account operation services are actually supplied; they must also not necessarily lead to account operation services being supplied, making it impossible to establish a causal link with the exempt service; in addition such services are very diffuse; they could cover almost anything and therefore they are not distinct enough in character;
- (120) Marketing should be excluded from the definition of services related to "account operation services ". Marketing involves advertising and other measures to promote the sale of "account operation services "; such activities are general services which also apply to other services and goods. They are therefore not specific to "account operation services ".

- (121) For the same reasons explained in the context of other financial services, services ensuring compliance with regulatory and other legal requirements, software design, company administration, legal services, accountancy, audit and bookkeeping services are not specific for "account operation services ";
- (122) Imprinter/ terminal rental services and other machinery rental for the processing of card payments are not specific for "account operation services " ; they are general services improving the conditions under which "account operation services" can be supplied; such processing equipment is used in a variety of business sectors with varying software; they are therefore not specific to and essential for "account operation services " .
- (123) Debt settlement is not specific to account operation services. Debt settlement, also known as debt arbitrage or debt negotiation is an aggressive approach to debt reduction, supplied to debtors with high debts and a high risk of bankruptcy. The service consists in a debt settlement agency negotiating with creditors to settle the debt for a lower amount than owed, usually a lump-sum payment. Such services are supplied in conjunction with various other debts and are therefore not specific to and essential for bank account services.
- (124) Transactions between operators for the transfer of funds between accounts and clearing of transactions are specific to and essential for "account operation services " . Such services include merchant transaction services, credit card terminal services and interchange services; by accepting a customer's plastic cards, merchants pay electronic transaction fees imposed by credit-debit card associations. Credit card terminal services organise the onward supply of the credit card transaction and are a necessary step to complete the payment process; Interchange services is a term used in the payment card industry to describe the service of accepting their credit and debit cards for purchases; the card-[issuing bank] in a payment transaction deducts the interchange fee from the amount it pays the [acquiring bank] that handles a credit or debit card transaction for a merchant. The acquiring bank then pays the merchant the amount of the transaction minus both the interchange fee and an additional, smaller fee for the acquiring bank. Interchange fees have a complex pricing structure, which is based on the card brand, the type of credit or debit card, the type and size of the accepting merchant, and the type of transaction (e.g. online, in-store, phone order). Further complicating the rates schedules, interchange fees are typically a flat fee plus a percentage of the total purchase price (including taxes). Often the fee averages approximately 2% of transaction value. Such services are linked to the bank account of the merchant and enable the transfer of funds and the clearing of the transactions. They are thus specific to and essential for account operation services.
- (125) Membership, joining or subscription services for payment cards or systems for an account are specific to and essential for account operation services because they give access to a system account operation services;
- (126) Transaction authorisation, including anti-fraud checks and transaction processing are services for the control and the processing of transfers of funds between bank accounts and thus specific to and essential for account operation services;
- (127) the issue of customer and merchant statements for accounts is necessary to ensure essential information on the functioning of the accounts and appropriate communication between the supplier of account operation services and the client; these services are therefore specific to and essential for account operation services.

- (128) Verifications of payments ensure the proper functioning of transfers of funds via accounts and are therefore specific to and essential for account operation services.
- (129) the issuing of cheques books for a specific account specific to and essential for account operation services; they allow the client to organise payments via this account and are also distinct in character;
- (130) services relating to collectors' items, such as gold, silver or other metal coins or bank notes normally not used as legal tender or coins of numismatic interests cannot be currency exchange or cash services because they do not concern legal tender; the same applies for virtual currencies which are not legal tender;
- (131) The supply and renting of machines for accepting, counting, handling, cleaning, bundling, sorting or exchanging money; these are either supplies of goods or services which help improving the conditions under which "currency exchange services" and "cash services" can be supplied; they represent the supply of mere physical, technical or administrative services, which do not alter the legal or financial situation²¹; such processing machines are used in a variety of business sectors with varying software; they are therefore not specific to and essential for "currency exchange services" and "cash services";
- (132) Change of bank notes or coins into different currencies or the change of bank notes and coins within the same currency are self-explanatory prototypes of "currency exchange services" and "cash services" and therefore covered by the exemption;
- (133) Cash dispensing is the manual or automatic distribution of bank notes and coins or the storage of e-money in appropriate cards or other e-money storage devices using for example debit and credit card services, traveller cheques or cards; nowadays such dispensing of cash is increasingly done with machines. With a cash dispenser, the customer identifies himself with a magnetic stripe or chip device, which allows him to withdraw money from the dispenser or upload money value into another electronic device or the same card. Such services ensure the availability of cash where it is needed and contribute to the functioning of money. Cash dispensing can also involve the change of currency; in such cases the client introduces foreign currency which the machine recognises and receives local currency with a fee being deducted and with the local currency being dispensed to him by the machine. In an increasing number of cases such dispensing activities also allow clients to store money value in e-money storage devices (i.a. cards and mobile phones); such storage can be linked to an account and would be covered by the exemption for account operation services; in other cases cash is inserted into the machine, which will then upload the e-money storage device with this amount; it is also possible that foreign currency bank notes and coins are inserted into the machine for uploading a local currency amount into the e-money storage device. In such cases the dispensing fulfils some of the basic functions of "currency exchange" and "cash services" and the functioning of money by altering the financial situation. There should not be difference in treatment between cash and book-money where the nature of the service is the same. Cash dispensing should therefore be covered by the exemption for "currency exchange services" and "cash services".

²¹ *JUDGMENT OF THE COURT (Fifth Chamber) of 13 December 2001 (Case C-235/00), CSC*

- (134) Safekeeping and storage of money is not specific to and essential for "currency exchange services" and "cash services" and therefore covered by the exemption as a related service; these services represent the supply of mere physical, technical or administrative services, which do not alter the legal or financial situation²²; they are supplied in respect of an infinite number of goods and therefore not specific to the exempt services.
- (135) Courier and security transport services are not specific to and essential for "currency exchange services" and "cash services"; such services do not consist in payments from one economic operator to another but rather ensure that, for example, the bank concerned disposes of sufficient cash for its over-the-counter-business or that cash in excess is transferred to a safe deposit. They represent the supply of mere physical, technical or administrative services, which do not alter the legal or financial situation²³; they are also supplied in respect of an infinite number of goods and therefore not specific to the exempt services.
- (136) Publishing of information on exchange rates is a general service, which does not alter the legal or financial situation. It is also not specific to currency exchange services but can be used for an infinite number of business purposes.
- (137) Installing of cash machines only helps improving the conditions under which "currency exchange services" and "cash services" are supplied; it represent the supply of mere technical service, which do not alter the financial situation;
- (138) For the same reasons explained in the context of other financial services, debt settlement and recovery are not specific for "currency exchange services" and "cash services";
- (139) Issuing of customer and merchant statements for the distribution of bank notes and coins is specific to and essential for "currency exchange services" and "cash services". These are services carried out for ensuring the correctness of transactions and they are also services which are distinct in character.
- (140) Operating services for cash machines supplied between financial institutions are comparable to exempt interchange services supplied between credit card operators; they are supplied to ensure the transfer and clearing between these financial institutions of funds dispensed by cash machines. This includes settlement of accounts following the distribution of banknotes and coins (e.g.: credit card exchange services following the distribution of cash money via a cash machine or manually and where not already covered by bank account operation services);
- (141) Spots, forward transactions, futures, currency swaps, foreign exchange options, forex swaps are specific to and essential for "currency exchange services" and "cash services". A spot transaction is a two-day delivery transaction. This trade represents a "direct exchange" between two currencies, has the shortest time frame, involves cash rather than a contract; and interest is not included in the agreed-upon transaction. Another way to deal with the foreign exchange risk is to engage in a forward transaction. In this transaction, money does not actually change hands until some agreed upon future date. A buyer and seller agree on an exchange rate for any date in the future, and the transaction occurs on that date, regardless of what the market rates

²² *dito*

²³ *dito*

are then. The duration of the trade can be a few days, months or years. Foreign currency futures are forward transactions with standard contract sizes and maturity dates — for example, 500,000 EURO for next November at an agreed rate. Futures are standardized and are usually traded on an exchange created for this purpose. The average contract length is roughly 3 months. Futures contracts are usually inclusive of any interest amounts. Another common type of forward transaction is the currency swap. In a swap, two parties exchange currencies for a certain length of time and agree to reverse the transaction at a later date. These are not contracts and are not traded through an exchange. A foreign exchange option is a derivative where the owner has the right but not the obligation to exchange money denominated in one currency into another currency at a pre-agreed exchange rate on a specified date. A Forex swap is an over the counter short term interest rate derivative. It consists of a spot foreign exchange transaction entered into at exactly the same time and for the same quantity as a forward foreign exchange transaction. The forward portion is the reverse of the spot transaction, where the spot purchase is offset by a forward selling. In this reason, surplus funds in one currency are for a while swapped into another currency for better use of liquidity. Protects against adverse movements in the forex rate, but favorable moves are renounced. The fixed rate in this transaction is the forward rate that is locked in by the forward contract. The floating rate will be the overnight rate that is realized on a daily basis by the spot transaction. Typically, the floating side of these trades is indexed to the Overnight Index Swap (OIS) rate. This rate is an average of the rates that are paid based on a survey. It is different from a currency swap which is a much rarer, long term transaction, governed by a slightly different set of rules.

- (142) Collecting, sorting, counting and anti-fraud checks of bank notes and coins used as legal tender (e.g.: recognition of genuine banknotes and coins, fitness for use in circulation and proper functioning of the tracing system) are specific to and essential for "currency exchange services" and "cash services". These services ensure that the exempt services work properly and in accordance with contractual obligations; they are also distinct in character. Such services are also exempt is supplied in relation to book-money; therefore such services should also be exempt where they are related to cash.
- (143) Data collection services for the recycling of banknotes and coins as provided for by the European Central Bank and national Central Banks which are specific to and essential for "currency exchange services" and "cash services". Central Banks have introduced a framework for the recycling of banknotes under which credit institutions and other professional cash handlers, as addressees by the Framework, shall regularly provide National Central Banks with general information on recycling and cash centres, statistics on the volume of cash operations, information on machines used for recycling purposes and ATMs; and information on remote bank branches with a very low level of cash operations, where fitness checks are carried out manually.
- (144) In its constant jurisprudence the ECJ²⁴ has emphasised that trade in securities involves acts which alter the legal and financial situation between parties and are comparable to those involved in the case of a transfer or a payment. The supply of a mere physical, technical or administrative service, which does not alter the legal or financial situation, is therefore not covered by the exemption for financial services. Against this background the management and safekeeping of shares - transactions which,

²⁴ Judgements of the Court of 13 December 2001 (Case C-235/00), CSC and of 4 May 2006 (Case C-169/04), Abbey National

significantly, do not involve alteration of the legal or financial positions of the parties - are excluded from being exempt supplies of securities.

- (145) Instruments of payment such as tradable deferred payment schemes, letters of credit and similar instruments are not reflecting an equity ownership position in a corporation or other association or a creditor's position for debts and should therefore be excluded from the definition of securities.
- (146) Services generating unit ownership in goods or commodities other than real estate are not reflecting an equity ownership position in a corporation or other association or a creditor's position for debts and are thus excluded from the definition of securities.
- (147) Equity securities such as shares should be covered by the definition of securities. An equity security is a share in the capital stock of a company (typically common stock, although preferred equity is also a form of capital stock). The holder of equity is a shareholder, owning a share, or fractional part of the issuer. Equity securities are not entitled to any payment. In bankruptcy, they share only in the residual interest of the issuer after all obligations have been paid out to creditors. However, equity generally entitles the holder to a pro rata portion of control of the company, meaning that a holder of a majority of the equity is usually entitled to control the issuer. Equity also enjoys the right to profits and capital gain and equity holders are entitled to the "upside" of the business and to control the business. A share is one of a finite number of equal portions in the capital of a company, entitling the owner to a proportion of distributed, non-reinvested profits known as dividends and to a portion of the value of the company in case of liquidation.
- (148) Debt securities typically require regular payments (interest) to the holder, equity securities are not entitled to any payment. Holders of debt securities receive only interest and repayment of principal regardless of how well the issuer performs financially. Furthermore, debt securities do not have voting rights outside of bankruptcy. Such debt securities should be covered by the definition of securities. They exist in various forms.
- (149) Debentures are debt securities which come under the definition of exempt securities; In finance, a debenture is a long-term debt instrument used by governments and large companies to obtain funds. It is similar to a bond except the securitization conditions are different. A debenture is usually unsecured in the sense that there are no liens or pledges on specific assets. It is however, secured by all properties not otherwise pledged. In the case of bankruptcy debenture holders are considered general creditors. The advantage of debentures to the issuer is they leave specific assets unencumbered, and thereby leave them open for subsequent financing. Debentures are generally freely transferable by the debenture holder.
- (150) Bonds and corporate bonds come under the definition of exempt securities; In finance, a bond is a debt security, in which the authorised issuer owes the holders a debt and is obliged to repay the principal and interest (the coupon) at a later date, termed maturity. Other stipulations may also be attached to the bond issue, such as the obligation for the issuer to provide certain information to the bond holder, or limitations on the behaviour of the issuer. Bonds are generally issued for a fixed term (the maturity) longer than ten years. Corporate bonds represent the debt of commercial or industrial entities. Government bonds are medium or long term debt securities issued by

sovereign governments or their agencies. Typically they carry a lower rate of interest than corporate bonds, and serve as a source of finance for governments. Sub-sovereign government bonds represent the debt of state, provincial, territorial, municipal or other governmental units other than sovereign governments. Supranational bonds represent the debt of international organizations such as the World Bank, the International Monetary Fund, regional multilateral development banks and others. Insured Investment bonds are also included if not covered by a preceding exemption. These are investment bonds carrying some life cover although they are primarily investment vehicles. The life cover can be as low as around one per cent over and above the “bid value” of the investment units within the policy. That means that the value that the sale of investment units in the bond realises on death is added to, so that 101 per cent of that value is actually payable. The percentage of protection cover will vary depending on the bond.

- (151) Promissory notes and other tradable commercial papers fall under the definition of exempt securities; a promissory note, also referred to as a note payable in accounting, is a contract detailing the terms of a promise by one party (the maker) to pay a sum of money to the other (the payee). The obligation may arise from the repayment of another form of debt than a loan. For example, in the sale of a business, the purchase price might be a combination of an immediate cash payment and one or more promissory notes for the balance. The terms of a note typically include the principal amount, the interest rate if any, and the maturity date. Sometimes there will be provisions concerning the payee's rights in the event of a default, which may include foreclosure of the maker's interest. Demand promissory notes are notes that do not carry a specific maturity date, but are due on demand of the lender. Usually the lender will only give the borrower a few days notice before the payment is due. Commercial papers are money market securities issued by large banks and corporations. They are generally not used to finance long-term investments but rather for purchases of inventory or to manage working capital. It is commonly bought by money funds (the issuing amounts are often too high for individual investors), and are generally regarded as a very safe investment. As a relatively low risk option, commercial paper returns are not large. Securities include other tradable commercial papers for debts are bills of exchange (drafts), checks, and certificates of deposit where not covered by a preceding definitions of exempt services.
- (152) Euro debt securities come under the definition of exempt securities; Euro debt securities are securities issued internationally outside their domestic market in a denomination different from that of the issuer's domicile. They include Eurobonds and Euronotes. Eurobonds are characteristically underwritten, and not secured, and interest is paid gross. A Euronote may take the form of Euro-commercial paper (ECP) or Euro-certificates of deposit.
- (153) services generating unit ownership in mutual funds come under the definition of exempt securities; mutual funds are forms of collective investment which pool money from many investors and then invest their money in securities realising capital gain or loss and collecting dividend or interest income; these investment proceeds are then passed on to the individual investors.
- (154) services generating unit ownership in pension funds come under the definition of exempt securities; a pension fund is a pool of assets forming an independent legal entity which are bought with the contributions to a pension plan for the exclusive purpose of financing pension plan benefits. This includes private and public open

pension funds with no restriction on membership and closed pension funds limited to certain categories of members, such as single and multi-employer pension funds, related members and individual pension funds.

- (155) services generating unit ownership in hedge funds come under the definition of exempt securities; a hedge fund is an investment fund charging performance fees and typically only opens to a limited range of investors, in some countries only open to accredited investors. Though these funds do not necessarily hedge their investments against adverse market moves the term is used to distinguish them from regulated retail investment funds.
- (156) Services generating unit ownership in real estate investment trust (REIT) come under the definition of exempt securities. A real estate investment trust is a corporation investing in real estate that reduces or eliminates corporate income taxes. In return REITs are usually required to distribute a certain percentage, usually 90% of their income, which then may be taxable in the hands of the investors. The REIT structure was designed to provide a similar structure for investment in real estate as mutual funds provide for investments in shares.
- (157) Services generating unit ownership in any other investment funds come under the definition of exempt securities; an investment fund is a collective investment scheme for investing money with other people to participate in a wider range of investments than may be feasible for an individual investor and to share the costs of doing so. Such collective investments aim either targeting specific geographic regions such as emerging Europe or specified themes such as technology.
- (158) Hybrid securities combine characteristics of equity and debt securities; they should therefore be covered by the definition of exempt securities. Hybrids include preference shares; preference shares form an intermediate class of security between equities and debt. If the issuer is liquidated, they carry the right to receive interest and/or a return of capital in priority to ordinary shareholders. However, from a legal perspective, they are capital stock and therefore may entitle holders to some degree of control depending on whether they contain voting rights.
- (159) Hybrids also include convertibles; convertibles are bonds or preferred stock which can be converted, at the election of the holder of the convertibles, into the common stock of the issuing company. The convertibility, however, may be forced if the convertible is a callable bond, and the issuer calls the bond. The bondholder has, for example, about 1 month to convert it, or the company will call the bond by giving the holder the call price, which may be less than the value of the converted stock. This is referred to as a forced conversion.
- (160) Hybrids include equity warrants; equity warrants are options issued by the company which allow the holder of the warrant to purchase a specific number of shares at a specified price within a specified time. They are often issued together with bonds or existing equities, and are, sometimes, detachable from them and separately tradable. When the holder of the warrant exercises it, he pays the money directly to the company, and the company issues new shares to holder. Warrants, like other convertible securities, increases the number of shares outstanding, and are usually accounted for in financial reports as fully diluted earnings per share, which assumes that all warrants and convertibles will be exercised.
- (161) Issuing, cession, renewal, prolongations, amendments and rescissions of security contracts should be covered by the exemption for supplies of securities; they are

specific to the functioning of securities as tradable instruments; with the issued contract the investor is able to prove his title or right; a cession changes the creditor or debtor; a renewal is the concluding of a contract for another period; prolongations extend the period of application of the contract; amendments and rescissions of contracts have a direct impact on how rights and obligations are exercised under the security arrangement. They are also distinct in character. It is therefore justified to exempt such services and deviate partly from the jurisprudence of the European Court of Justice in Case C-472/03²⁵.

- (162) The identification of new products/ opportunities is not specific to and essential for the "supply of securities". Such services involve looking at market trends and the fiscal regime to identify new selling opportunities; these services are not specific enough to "supply of securities" because they represent basically analytical activities before securities are actually supplied; they must also not necessarily lead to securities being supplied, making it impossible to establish a causal link with the exempt service; in addition such services are very diffuse; they could cover almost anything and therefore they are not distinct enough in character.
- (163) Marketing should be excluded from the definition of services related to the "supply of securities". Marketing involves advertising and other measures to promote the sale of "securities"; such activities are general services which also apply to other services and goods. They are therefore not specific to the "supply of securities".
- (164) Services ensuring compliance with regulatory and other legal requirements should be excluded from the definition of services related to the "supply of securities". Such services ensure inter alia that regulatory and other legal requirements for carrying out "supplies of securities" such as book-keeping, transparency and solvency requirements are complied with. Although they are essential, they are not specific to the transactions of "supplies of securities". In fact, many business sectors operate in a comparable legal and regulatory environment of rules they must respect. These rules may be essential and specific to the type of business carried out and even a pre-condition for doing business in the banking sector but they are not specific to and essential for the "supplies of securities". Securities can be supplied without these administrative services.
- (165) Software design services should be excluded from the definition of services related to "supplies of securities" for the same reasons already stated in conjunction with other exempt financial services.
- (166) Debt collection and recovery are services which are supplied to the supplier of securities, typically in situations where the client to whom securities have been supplied does not fully comply with his payment obligations or has become illiquid and where the supplier of the securities remains in the creditor's position; against this background debt collection and recovery are services supplied in case of contractual obligations in default and thus not specific to and essential for the "supply of securities".
- (167) Legal services, accountancy, audit and bookkeeping services are general services for numerous economic operators and therefore not specific to and essential for the "supply of securities".

²⁵ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

- (168) Company administration consists of reviewing procedures, registering the securities, checking that sales procedures including regulatory and legal requirements have been carried out, sending out of documentation to clients, record security and client details in supplier's systems and dealing with queries; such services should not be covered by the exemption for the "supply of securities". Other administrative services involving handling activities²⁶ such as the acceptance of applications for the "supply of securities", the setting and paying of commission agents, the organisation and management of information technology, the supply of information and the drafting of reports for clients and third parties are also not specific to the "supply of securities" and should therefore be excluded. They are general administrative tasks and therefore not specific to and essential for the "supply of securities".
- (169) The supply of options is specific to and essential for the "supply of securities"; in finance options are types of derivative contracts, including call options and put options, where the future payoffs to the buyer and seller of the contract are determined by the price of another security, such as a common stock. More specifically, a call option is an agreement in which the buyer (holder) has the right (but not the obligation) to exercise by buying an asset at a set price (strike price) on (for a European style option) or not later than (for an American style option) a future date (the exercise date or expiration); and the seller (writer) has the obligation to honor the terms of the contract. A put option is an agreement in which the buyer has the right (but not the obligation) to exercise by selling an asset at the strike price on or before a future date; and the seller has the obligation to honor the terms of the contract.
- (170) The supply of futures for securities is specific to and essential for the "supply of securities"; in finance, a futures contract is a standardized contract, traded on a futures exchange, to buy or sell a certain underlying security at a certain date in the future, at a specified price. The future date is called the delivery date or final settlement date. The pre-set price is called the futures price. The price of the underlying security on the delivery date is called the settlement price. The settlement price, normally, converges towards the futures price on the delivery date. A futures contract gives the holder the obligation to buy or sell, which differs from an options contract and which gives the holder the right, but not the obligation. In other words, the owner of an options contract may exercise the contract. Both parties of a "futures contract" must fulfill the contract on the settlement date.
- (171) The supply of forward contracts for securities is specific to and essential for the "supply of securities"; A forward contract is an agreement between two parties to buy or sell a security at a pre-agreed future point in time. Therefore, the trade date and delivery date are separated. One party agrees to buy, the other to sell, for a forward price agreed in advance. In a forward transaction, no actual cash changes hands. If the transaction is collateralized, exchange of margin will take place according to a pre-agreed rule or schedule. Otherwise no security of any kind actually changes hands, until the maturity of the contract. The forward price of such a contract is commonly contrasted with the spot price, which is the price at which the security changes hands. The difference between the spot and the forward price is the forward premium or forward discount. A standardized forward contract that is traded on an exchange is called a futures contract.

²⁶ Judgement of the Court of 3 March 2005 (Case C-472/03) Arthur Andersen

- (172) The supply of Equity swaps and other total return swaps (TRORS) is specific to and essential for the "supply of securities"; an equity swap is a special type of total return swap, where the underlying asset is a stock, a basket of stocks, or a stock index. Compared to actually owning the stock, in this case there is no obligation to pay anything up front, but there are also no voting or other rights that stock holders do have. A total return swap is a swap in which party A pays the total return of an asset, and party B makes periodic interest payments. The total return is the capital gain or loss, plus any interest or dividend payments. If the total return is negative, then party A receives this amount from party B. The parties have exposure to the return of the underlying stock or index, without having to hold the underlying assets. The profit or loss of party B is the same for him as actually owning the underlying asset. Total return swap (also known as total rate of return swap, or TRORS) is a contract in which one party receives interest payments on a reference asset plus any capital gains and losses over the payment period, while the other receives a specified fixed or floating cash flow unrelated to the credit worthiness of the reference asset, especially where the payments are based on the same notional amount. The reference asset may be any asset, index, or basket of assets. The TRORS, then, allows one party to derive the economic benefit of owning an asset without putting that asset on its balance sheet, and allows the other (which does retain that asset on its balance sheet) to buy protection against a potential decline in its value. The essential difference between a TRORS and a credit default swap is that the latter provides protection not against loss in asset value but against specific credit events. In a sense, a TRORS isn't a credit derivative at all but rather derivative of securities. A TRORS is funding-cost arbitrage.
- (173) Performance measurement and rating, prediction and control of securities are specific to and essential for the "supply of securities"; such services are essential for managing the risk involved in the supply of securities; they determine the quality of the product and are essential in the decision making process of buying securities. Without these services most of the securities offered, would not be on the market.
- (174) Arrangement and monitoring of transactions under the security agreement, including possible voting rights are specific to and essential for the "supply of securities"; such services enable the client to exercise his rights in the company or association in which he holds an equity share; such services include portfolio management.
- (175) Issuing of certificates are specific to and essential for the "supply of securities"; such services enable the client to prove his rights under the security;
- (176) product development involves the design of a new products or the tweaking of a current product for a particular market to enhance sales; these services are specific to and essential for the functioning of securities. Without such development activities different forms of securities could not be supplied; they are therefore essential for and specific to the supply of exempt "securities"; the development of such products is also a distinctive service.
- (177) Funds investing in goods or commodities other than real estate or in derivatives in goods or commodities are not covered by the definition of investment funds. Securities investing in goods or commodities other than real estate are excluded from the definition of exempt supplies of securities because an exemption could lead to circumvention of taxable supplies of goods. The intention of the exemption for the management of investment funds is to put smaller investors who cannot bear the expenses of direct investments, on an equal footing with bigger investors who can.

Investment funds collect the money from smaller investors and allow them to share the costs of investments. Therefore the management of such funds is exempt from VAT. However, this also means that the exemption does not apply where the direct investment into securities is also not exempt.

- (178) Funds investing in insurance products and deposits are accessible to smaller investors without huge investment costs being involved. Therefore such funds not covered by the definition of investment funds;
- (179) Open-ended funds, also referred to as unit trusts, Open-ended investment companies or SICAFs (Société d'investissement à capital variable) and pooled funds (fonds communs de placement), which are basically open partnerships, as well as other common funds and registered UCITS vehicles ("Undertakings for Collective Investment in Transferable Securities") are covered by the definition of investment funds because they represent a collective investment which can issue and redeem shares at any time making them a tradable instrument; an investor can purchase shares in such funds directly from the mutual fund company or through a brokerage house; they are mutual funds equitably divided into shares or units which vary in direct proportion to the variation of the value of the funds net asset value. Each time money is invested, new shares or units are created to match the prevailing share price and each time shares are redeemed, the assets sold match the prevailing share price. In this way there is no supply or demand created for shares and they remain a direct reflection of the underlying asset.
- (180) Exchange Traded Funds (ETFs) are covered by the definition of investment funds because they are open ended mutual funds which can be traded at any time and they are typical funds investing into equities because typically RTFs replicate a stock market index such as Euro Stocks or a market sector such as clean energy technologies. ETFs include index-linked and actively managed funds regardless of whether they pursue dynamic or rather static indexing investment strategies;
- (181) Closed-ended funds are covered by the definition of investment funds because they follow the same investment principles and usually the shares of these funds are traded on an exchange or directly through the fund manager to create a secondary market subject to market forces and in accordance with demand they are traded at a premium or at a discount to their net asset value.²⁷
- (182) Hedge funds are covered by the definition of investment funds because the shares are tradable even though typically only open to a limited range of investors and in some countries only to accredited investors. These funds usually invest in equity and are therefore investment funds.
- (183) Pension funds investing in equity and debt assets are covered by the definition of investment funds; such funds basically have the same characteristics as other open-ended mutual funds with the difference that the structure is designed to serve for pension purposes.
- (184) The definition of exempt management services for investment funds must be seen against the background of the purpose of the exemption and the corresponding intentions of the legislator. The intention of the exemption for the management of investment funds is to put smaller investors who cannot bear the expenses of direct

²⁷ Judgement of the Court of 28 June 2007 (Case C-363/05), JP Morgan

investments, on an equal footing with bigger investors who can. Therefore the definition of management must include services which are functions specific to undertakings for collective investment and exclude services for the control and supervision of their activities.²⁸ The Directive determines itself the specific services in the value chain of fund management, which it considers being specific in a modern fund management environment. In that perspective, external auditing of the fund are services for the outside control and supervision of the fund and are thus excluded from the definition of management of investment funds.

- (185) Marketing should be excluded from the definition of management of investment funds. Marketing involves advertising and other measures to promote the sale of investment funds; such activities are general services which also apply to other services and goods. They are therefore not specific to investment funds. This also applies to other promotional activity such as advertising to gather assets, services supplied by distributors for reaching end customer such as sales activities, services for the provision of documentation, like the provision of product documentation;
- (186) Management of company overheads which are not explicitly listed by the Directive itself, such as overhead allocation for premises, senior management, cost of capital requirements at the management company level are functions which are supplied in an infinite number of companies and cases; therefore such services are not functions specific to investment funds. The same applies to systems development like planning and implementation of new IT (information technology) and major enhancements to existing systems, systems maintenance such as operational and technical maintenance of existing IT;
- (187) Distribution compliance services also where they are supplied in accordance with the regulatory requirements regarding the conduct of business or sale of investment funds are services which ensure the proper monitoring of funds and are thus part of services for the control and supervision of their activities and excluded from the definition of management;
- (188) Advice is usually pure information which is not specific to investment funds; in fact many funds bundle the provision of advice into the cost of distribution; others will be provided on an execution only basis; they are thus not management of investment funds;
- (189) Product development is part of operational asset management; it involves the design of a new products, the composing of new product baskets or the tweaking of a current product for a particular market to enhance sales; these services are specific to investment funds; without these services, the funds could not achieve their investment purposes because only constant developing insures that the fund achieves the return envisaged by the investment and that new or varying demands of customers are met.
- (190) Proxy voting services are part of the administration of shares; they ensure that unit owners in such funds can exercise their voting rights and their rights of co-determination properly.
- (191) Other services involving the responsibility of the supplier for essential decisions in piloting the fund and in achieving pursued investment objectives and in policy formulation or other services involving his responsibility as chief executive officer are

²⁸ Judgement of the Court of 4 May 2006 (Case C-169/04), Abbey National

specific to investment funds because they are part of the central management functions of such funds.

- (191a) Services involving the occupation of the position of a party to a contract relating to a financial product or insurance should be excluded from the definition of "intermediation in insurance and financial services" because they do fulfil in effect the specific and essential functions of the service of intermediation. Intermediation requires something other than the provision of contractual services typically undertaken by the parties to such contracts. Intermediation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation.²⁹
- (192) Telephone or call-centre services including services with automated procedures for the calculating of insurance coverage costs or casts for financial services should be excluded from the definition of "intermediation in insurance and financial services" because they do not form a distinct whole, fulfilling in effect the specific and essential functions of the service of intermediation. The nature of intermediation being supplied requires a situation, where there is a need for the special know-how of a mediator and a need for making choices requiring that know-how. Telephone or call-centre services are automated contact points for scenarios where a supplier of insurance or financial services advertises standardised contracts, for example a critical illness cover. The advert contains a telephone number for potential customers to use. The insurer pays an outsourcer to handle calls from potential policyholders responding to the advertisement. The outsourcer has to explain the scope of the policy and, after inputting details provided by the callers, use an automated computer program to calculate the cost of insurance cover. The outsourcer has to pass the name of the person who wishes to be insured to the insurer who after carrying out further checks places the insured on risk. The outsourcer is not supplying agent services because in such scenarios there is no need for the special know-how of a mediator and no need for making choices which require that know-how; on supplying telephone or call-centre services the outsourcer acts rather like an administrative front-desk of the supplier.
- (193) Services for marketing by using brands should also be excluded from the definition of "intermediation in insurance and financial services" because they do not form a distinct whole, fulfilling in effect the specific and essential functions of the service of intermediation.; such services are supplied by persons who do not interfere in the process of establishing a link between the suppliers of exempt services and their clients; basically they supply platform services where, for example, a bank advertises travel insurance underwritten by an unrelated insurer but using the bank's name. When the customers telephone for a quote, although they are told that they have contacted the bank, the call operators are actually employed by the insurer whose employees carry out all the administration including putting the policyholder on risk. The bank receives both a fixed fee plus a payment for each successful sale. Such services basically have the character of platform marketing by using a trademark or brand different from that of the actual supplier. There is no need for the special know-how of a mediator and no need for making choices which require that know-how.
- (194) Web-hosting, other web-services or hosting services should also be excluded from the definition of "intermediation in insurance and financial services" because they do not form a distinct whole, fulfilling in effect the specific and essential functions of the

²⁹ Judgement of the Court of 13 December 2001 (Case C-235/00), CSC, paragraph 39

service of intermediation.; such services are also platform marketing services which do not require special know-how of a mediator and no need for making choices which require that know-how. Under web-hosting an airline web site offering cheap flights might contain a button via which a customer can purchase travel insurance; clicking on the web site will lead the customer to an insurer's web site. The website receives commission for each click through, whether insurance is taken up or not. The service provided by the website is not intermediation. The same applies to other web services where, for example, a car retailer's web site offers goods. As an added extra the customer can purchase liability insurance by clicking on the web site, which then leads the customer to an insurer's web site. The website is paid an agreed fee to host the insurer's click through but receives no additional payment whether insurance is taken up or not. The service provided by the website is not intermediation. This also applies to other hosting services where, for example, a supermarket provides leaflets for motor insurance with both a website address and a telephone number. If the customer telephones the person receiving the call, who is employed by the insurer, can identify that the number telephoned is the one on the leaflet provided by the super market. The supermarket receives a fee for each sale. The service provided by the website is not intermediation.

- (195) Advertising services do not fulfil in effect the specific and essential functions of the service of intermediation.; such services are again marketing services which do not require special know-how of a mediator and no need for making choices which require that know-how; such services would cover scenarios where a shop provides leaflets for credit services with both a website address and a telephone number. If the customer telephones the person receiving the call, who is employed by the bank, can identify that the number telephoned is the one on the leaflet provided by the shp. The shop receives a fee for each concluded contract. In other cases the customer uses the web site; the details are collected by the shop and passed on to the bank. A fee is again received for every sale. Such services are not intermediation.
- (196) Services limited to providing information about a financial or insurance product and, as the case may be, receiving and processing applications for subscription, without issuing them³⁰ do not fulfil in effect the specific and essential functions of the service of intermediation.; such services are administrative handout activities which do not require special know-how of a mediator and a need for making choices which require that know-how;
- (197) Client introducing services fulfil in effect the specific and essential functions of the service of intermediation; such services are usually activities requiring special know-how of a mediator and a need for making choices which require that know-how and covers scenarios where, for example, a mediator advises that a client needs an insurance indemnity policy. The mediator passes the name of the client to an insurance broker who specialises in such policies. Cover is arranged by the broker on behalf of the client. The mediator receives a commission for introducing the client. Such services are intermediation. Such services and other intermediation services can also

³⁰ Judgement of the Court of 13 December 2001 (Case C-235/00), CSC

be supplied in layers of sub-contracting, where intermediation is sub-contracted from one mediator to a second one.³¹

- (198) Advice which includes the possibility of the supplier to place the policy holder on risk or oblige a supplier, fulfil in effect the specific and essential functions of the service of intermediation; such services are usually activities requiring special know-how of a mediator and a need for making choices which require that know-how and cover scenarios where, for example, a bank advertises a new credit card. The advert contains a telephone number for potential customers to use. The bank pays an outsourcer to handle calls from potential clients responding to the advertisement. The outsourcer has to explain the conditions for using the credit card and, after inputting details provided by the callers, calculates parameters and costs for using the credit card system. If the person wants to enter into the credit card agreement, the outsourcer can accept and sign the credit card agreement for the bank. The outsourcer is supplying intermediation services.
- (199) Services involving negotiation on the conditions of the product, fulfil in effect the specific and essential functions of the service of intermediation; such services are usually activities requiring special know-how of a mediator and a need for making choices which require that know-how; they cover scenarios where, for example a weekly travel magazine negotiates with an insurer special rates of insurance cover for its subscribers against sickness travel cancellation. The magazine sets out the full details of what is covered or excluded and the price of the insurance. The subscribers can then either complete a coupon in the magazine and send it with a cheque to the insurer or telephone the insurer quoting a reference published in the magazine with their credit card details. The magazine receives commission for each policy taken up plus a separate payment for agreeing to help market the product. In such a scenario the commission reflects the supply of intermediation.
- (200) Services facilitating client access to a contract for being supplied with insurance or financial services fulfil in effect the specific and essential functions of the service of intermediation; such services are usually activities requiring special know-how of a mediator and a need for making choices which require that know-how; they cover scenarios where, for example, an insurance broker has an agreement with an insurance company to sell some or all of its insurances and for that purpose has leaflets setting out details of an insurance product displayed in his office. These leaflets have details that identify the broker stamped on them. Potential customers come into the office, in some cases they will discuss their requirements with the broker, in other cases they will just pick up the leaflet. Where the potential customer sends off the leaflet and takes up the insurance, the broker will receive a commission. This is a supply of intermediation services.
- (201) Stock brokering fulfils in effect the specific and essential functions of the service of intermediation; such services are usually activities requiring special know-how of a mediator and a need for making choices which require that know-how; they usually cover scenarios where the broker sells or buys stock on behalf of a customer. The stock broker matches up stock buyers and sellers. A transaction on a stock exchange must be made between two members of the exchange, typically a broker. In addition to actually trading stocks for their clients, stock brokers may also offer advice to their clients on which stocks, mutual funds, etc. to buy. A Stock broker also sells or buys

³¹ Judgement of the Court of 21 June 2007 5Case C-453/05), Ludwig

stock on behalf of a customer. The same principles apply, of course, where other persons than stockbrokers are supplying the same services.

- (202) Mortgage brokering fulfils in effect the specific and essential functions of the service of intermediation; such services are usually activities requiring special know-how of a mediator and a need for making choices which require that know-how; they usually cover scenarios where the broker sources mortgage loans on behalf of individuals or businesses.
- (203) Other transactions liable to create, alter or extinguish parties' rights and obligations in respect of exempt insurance and financial services³² fulfil in effect the specific and essential functions of the service of intermediation because they have a direct impact on rights and obligations of parties and establish a causal link, because without that intermediation these changes in the financial situation would not have taken place. The same principles apply where intermediation leads to the client abandoning his withdrawal from a contract and him continuing his contract. In fact, in modern intermediation, the activities for accompanying clients in continuing their contracts have even become more important than intermediation for the conclusion of contracts.

HAS ADOPTED THIS REGULATION:

Chapter I

Subject-matter

Article 1

This Regulation lays down measures for the implementation of Articles 135 1. (a) to (g), 135a and 137a of Directive 2006/112/EC.

Chapter II

Definitions of exempt insurance and financial services

(Articles 135 1., (a) to (g) and 135a of Directive 2006/112/EC)

Article 2

1. The following services are excluded from the definition of insurance services in Article 135a 1. (1):

- (a) Commitments where
- no risk is covered;

³² Judgement of the Court of 13 December 2001 (Case C-235/00), CSC , paragraph 41

- risk coverage does not achieve a threshold of 5% of the total value of the commitment;
 - no indemnification is provided for;
 - the insurer does not become owner of the premium or
 - where the taxable services elements in the insurance undertaking exceed the value of the exempt elements covering the risk. The value of other exempt services is disregarded.
- (b) Capital Redemption Bonds;
 - (c) Insured pensions without mortality or longevity risk;
 - (d) Annuities without mortality or longevity risk;

2. Unless excluded by paragraph 1, the following services are included in the definition of insurance services in Article 135a 1. (1):

- (a) Life policies including group life policies and policies covering longevity risks;
- (b) Sickness disability and unemployment insurance;
- (c) Health insurance policies;
- (d) Peril insurance policies;
- (e) Liability insurance policies;
- (f) Financial loss risk insurance policies;
- (g) Reinsurance, retrocession and pooling of insurance policies;
- (h) Financial loss and inconvenience risks insurance supplied within a block insurance policy;

3. The following services are not distinct services which are specific to and essential for the exempt transaction and thus excluded from the definition of insurance services in Article 135a 1. (1):

- (a) Identification of new insurance products/opportunities;
- (b) Marketing;
- (c) Insurance Company Administration;
- (d) Policy administration;
- (e) Motor vehicle damage assessment by an association whose members are insurance companies;

4. Unless excluded by paragraph 3 the following services are distinct services which are specific to and essential for the exempt transaction and thus included in the definition of insurance services in Article 135a 1. (1):

- (a) Product development for insurances;
- (b) Underwriting of risk;

- (c) Risk management;
- (d) Investment management;
- (e) Putting policyholders on risk;
- (f) Claims handling;
- (g) Issuing, cession, renewal, prolongations, amendments and rescissions of contracts;

Article 3

1. The following services are excluded from the definition of "granting of credit" and "financial safeguarding of credits" in Article 135a 1. (2)

- (1) Granting of credit
 - (a) the granting of payment by instalments, of an allowed period for payment for the supply of services and goods, as well as hire-purchase or scenarios where the financing element is a part of the remuneration for the services or goods;
 - (b) the supply of financing elements in combination with a leasing or rental of goods or services;
 - (c) Time to pay before delivery granted by the supplier in connection with his supplies of goods and services;
 - (d) Services which lead to a tradable creditor's position for debts of a corporation or other association;
 - (e) Debit card services;
- (2) Financial safeguarding of credits
 - (a) Safeguarding services not directly linked to a credit such as warranties for the repair and replacement of faulty goods;
 - (b) Services for asset-based safeguarding which are not of a financial character but which are based on real values such as mortgages, performance guarantees or cessions of a trademark or assets of intellectual property as means of safeguarding.
 - (c) Rental guarantees providing the outstanding rental payments or paying a particular sum of money, if the tenant defaults on the rental payments;
 - (d) Export Credit Guarantee / Letter of credit (UK);
 - (e) Non-pecuniary obligations;

2. Unless excluded by paragraph 1, the following services are included in the definition of "granting of credit" and "financial safeguarding of credits" in Article 135a 1. (2):

- (1) Granting of credit
 - (a) Loans and syndicated loans;
 - (b) Mortgage loans;
 - (c) Overdraft facilities;
 - (d) Overrunning facilities;

- (e) Global credits;
- (f) Overdraft loans;
- (g) Credit card services;
- (h) Pawn broking;
- (i) Debt securities such as bonds, bills, certificates of deposit and commercial papers;

(2) Financial safeguarding of credits

- (a) Credit default swaps (CDS)
- (b) Financial futures and options;
- (c) Interest rate SWAPS;
- (d) Customs bonds (UK);

3. The following services are not distinct services which are specific to and essential for the exempt transaction and thus excluded from the definition of "granting of credit" and "financial safeguarding of credits" in Article 135a 1. (2):

(1) Granting of credit

- (a) Identification of new products/ opportunities
- (b) Marketing;
- (c) Services ensuring compliance with regulatory and other legal requirements for "credit granting";
- (d) Software design;
- (e) Debt collection or recovery;
- (f) Company administration;
- (g) Credit administration;
- (h) Legal services, accountancy, audit and bookkeeping services;

(2) Financial safeguarding of credits

- (a) Sales of repossessions after mortgage default;
- (b) Total return swaps (TRORS);
- (c) Equity swaps;
- (d) Identification of new products/ opportunities;
- (e) Marketing;
- (f) Administration;
- (g) Software design;
- (h) Valuation of non-financial collateral such as mortgages, motor cars, trademarks etc.

4. Unless excluded by paragraph 3 the following services are distinct services which are specific to and essential for the exempt transaction and thus included in the definition of "granting of credit" and "financial safeguarding of credits" in Article 135a 1. (2):

- (1) Granting of credit
 - (a) The measurement, prediction and control of credit risks, losses due to credit risk, including credit strategy;
 - (b) Underwriting of credits;
 - (c) Credit rating services, including assessing credit worthiness ;
 - (d) Record keeping, arrangement and monitoring of payments made for a loan;
 - (e) Product development for credits;
 - (f) Issuing, cession, renewal, prolongations, amendments and rescissions of contracts;
 - (g) Check trading;
- (2) Financial safeguarding of credits
 - (a) Valuation of financial collateral;
 - (b) Record keeping, arrangement and monitoring of means for "safeguarding of credits";
 - (c) Product development for safeguarding of credits;
 - (d) Issuing, cession, renewal, prolongations, amendments and rescissions of contracts;

Article 4

1. The following services are excluded from the definition of "deposit services" and "account operation services" in Article 135a 1. (3):

- (1) Deposit services
 - (a) Services where the supplier of the services becomes the owner of the funds;
 - (b) Services for the depositing of other funds than money, such as collectors' items, rights, claims or titles;
 - (c) Hire of safes and security boxes;
- (2) Account operation services
 - (a) Pure book-keeping services;
 - (b) Auditing services;

2. Unless excluded by paragraph 1, the following services are included in the definition of "deposit services" and "account operation services" in Article 135a 1. (3):

- (1) Deposit services
 - (a) Sight deposits (deposits on call), saving deposits and time deposits;
 - (b) Deposits in form of saving certificates, saving bonds and pension savings plans;
 - (c) Capital redemption bonds;
 - (d) Insured pensions;
 - (e) Annuities;

- (f) Issuing, cession, renewal, prolongations, amendments and rescissions of deposit contracts;
- (2) Account operation services
 - (a) Operation of deposit accounts, of current accounts and mixtures of both;
 - (b) Deposit, transfer and withdrawal of money to or from a bank account, including cheque services, standing order services, direct debits, cash machine services, internet and telephone banking, credit cards, debit cards, inter-bank clearance services like BACS, CHAPS and SWIFT and operating services for cash machines supplied between financial institutions;
 - (c) Debits and credits of other e-money media,
 - (d) Sorting and counting of money for the purpose of withdrawing money from an account;
 - (e) Arrangement of overdraft facilities where not covered by the exemption for loans;

3. The following services are not distinct services which are specific to and essential for the exempt transaction and thus excluded from the definition of "deposit services" and "account operation services" in Article 135a 1. (3):

- (1) Deposit services
 - (a) Identification of new products/ opportunities
 - (b) Marketing;
 - (c) Services ensuring compliance with regulatory and other legal requirements for "deposit services";
 - (d) Software design;
 - (e) Company administration;
 - (f) Deposit administration;
 - (g) Legal services, accountancy, audit and bookkeeping services;
- (2) Account operation services
 - (a) General printing of cheque books;
 - (b) Supplies of blank cards;
 - (c) Internet hosting fees;
 - (d) Hire of safes and security boxes;
 - (e) Identification of new products/ opportunities
 - (f) Marketing;
 - (g) Services ensuring compliance with regulatory and other legal requirements for "account operation services ";
 - (h) Software design;
 - (i) Company administration;
 - (j) Legal services, accountancy, audit and bookkeeping services;

(k) Imprinter/ terminal rental services and other machinery rental for the processing of card payments;

(l) Debt settlement;

4. Unless excluded by paragraph 3 the following services are distinct services which are specific to and essential for the exempt transaction and thus included in the definition of "deposit services" and "account operation services" in Article 135a 1. (3):

(1) Deposit services

(a) Sorting and counting of money for the purpose of making a deposit;

(b) Reporting on the balances of deposits and interest calculation, statements of account and commitment overviews;

(c) Calculation of tax and fees with regard to the cancellation of pension saving plans;

(d) Budgeting of accounts, including economic feasibility studies for appraisal of customers' requirements;

(e) Safekeeping of certificates for deposits;

(f) Identity verification and money laundering checks;

(g) Automated accepting of money for deposits;

(2) Account operation services

(a) Transaction services between operators for the transfer of funds between accounts and clearing of transactions;

(b) Membership, joining or subscription services for payment cards or systems for an account;

(c) Transaction authorisation, including anti-fraud checks and transaction processing;

(d) Issue of customer and merchant statements;

(e) Issue of customer and merchant statements;

(f) Verification of payments;

(g) Issuing of cheques books for a specific account

Article 5

1. The following services are excluded from the definition of "currency exchange services" and "cash services" in Article 135a 1. (4):

(a) services relating to collectors' items, such as gold, silver or other metal coins or bank notes normally not used as legal tender or coins of numismatic interests;

(b) Services concerning virtual currencies;

(c) Supply and rental of machines for accepting, counting, handling, cleaning, bundling, sorting or exchanging money;

2. Unless excluded by paragraph 1, the following services are included in the definition of "currency exchange services" and "cash services" in Article 135a 1. (4):

- (a) Change of bank notes or coins into different currencies;
- (b) Change of bank notes and coins within the same currency;
- (c) Cash dispensing;

3. The following services are not distinct services which are specific to and essential for the exempt transaction and thus excluded from the definition of "currency exchange services" and "cash services" in Article 135a 1. (4):

- (a) Safekeeping and storage of money;
- (b) Courier and security transport services;
- (c) Publishing of information on exchange rates;
- (d) Installing of cash machines;
- (e) Debt settlement and recovery

4. Unless excluded by paragraph 3 the following services are distinct services which are specific to and essential for the exempt transaction and thus included in the definition of "currency exchange services" and "cash services" in Article 135a 1. (4):

- (a) Issuing of customer and merchant statements for the distribution of bank notes and coins;
- (b) Operating services for cash machines supplied between financial institutions;
- (c) Spots, forward transactions, futures, currency swaps, foreign exchange options, forex swaps;
- (d) Collecting, sorting, counting and anti-fraud checks of bank notes and coins used as legal tender (e.g.: recognition of genuine banknotes and coins, fitness for use in circulation and proper functioning of the tracing system);
- (e) Data collection services for the recycling of banknotes and coins as provided for by the European Central Bank and national Central Banks;

Article 6

1. The following services are excluded from the definition of "supply of securities" in Article 135a 1. (5):

- (a) Management and safekeeping in securities;
- (b) Instruments of payment;
- (c) Services generating unit ownership in goods or commodities other than real estate.

2. Unless excluded by paragraph 1, the following services are included in the definition of "supply of securities" in Article 135a 1. (5):

- (1) Equity securities such as shares
- (2) Debt securities

- (a) Debentures;
- (b) Bonds and corporate bonds;
- (c) Promissory notes and other tradable commercial papers;
- (d) Euro debt securities;
- (e) Services generating unit ownership in mutual funds;
- (f) Services generating unit ownership in pension funds;
- (g) Services generating unit ownership in hedge funds;
- (h) Services generating unit ownership in real estate investment funds;
- (i) Services generating unit ownership in any other investment funds;
- (3) Hybrids:
 - (a) Preference shares;
 - (b) Convertibles;
 - (c) Equity warrants;
- (4) Issuing, cession, renewal, prolongations, amendments and rescissions of securities contracts;

3. The following services are not distinct services which are specific to and essential for the exempt transaction and thus excluded from the definition of "supply of securities" in Article 135a 1. (5):

- (a) Identification of new products/ opportunities;
- (b) Product development;
- (c) Marketing;
- (d) Services ensuring compliance with regulatory and other legal requirements for the supply of securities;
- (e) Software design;
- (f) Debt recovery;
- (g) Legal services; accountancy, audit and bookkeeping services;
- (h) Company administration and other administrative services;

4. Unless excluded by paragraph 3 the following services are distinct services which are specific to and essential for the exempt transaction and thus included in the definition of "supply of securities" in Article 135a 1. (5):

- (a) Options;
- (b) Futures;
- (c) Forward contracts;
- (d) Equity swaps and other total return swaps (TRORS);
- (e) Performance measurement and rating, prediction and control of securities;

- (f) Arrangement and monitoring of transactions under the security agreement, including possible voting rights;
- (g) Issuing of certificates proving the rights of the client;
- (h) Product development

Article 7

1. The following services are excluded from the definitions of "investment funds" in Article 135a 1. (6) and of "management services" in Article 135a 1. (7):

(1) Investment funds

- (a) Funds investing in goods or commodities other than real estate or in derivatives in goods or commodities;
- (b) Funds investing in insurance products and deposits;

(2) Management

- (a) External audit of the fund;
- (b) Marketing;
- (c) Management company overheads such as Overhead allocation for premises, senior management, cost of capital requirements at the management company level;
- (d) Systems development like planning and implementation of new IT (information technology) and major enhancements to existing systems, systems maintenance such as operational and technical maintenance of existing IT;
- (e) Distribution compliance services also where they are supplied in accordance with the Regulatory requirements regarding the conduct of business or sale of investment funds;
- (f) Advice;

2. Unless excluded by paragraph 1, the following services are included in the definitions of "investment funds" in Article 135a 1. (6) and of "management services" in Article 135a 1. (7):

(1) Investment funds

- (a) Open-ended funds;
- (b) Exchange Traded Funds;
- (c) Closed-end funds;
- (d) Hedge funds;
- (e) Pension funds investing in equity and debt assets;

(2) Management

- (a) Product development;
- (b) Proxy voting services;
- (c) other services where they involve the responsibility of the supplier:
 - (i) for the decisions and supervision necessary to implement the pursued investment objectives and achieve stability and growth or
 - (ii) for the formulation of policy requiring analysis of all factors having an effect on short and long term profits or
 - (iii) as chief executive officer (e.g. for non observing regulatory provisions).

Article 8

1. The following services are excluded from the definition of "intermediation in insurance and financial services" in Article 135a 1. (7):

- (a) Services involving the occupation of the position of a party to a contract relating to a financial product or insurance;
- (b) Telephone or call-centre services;
- (c) Marketing by using brands;
- (d) web-hosting, other web-services or hosting services
- (e) Advertising services;
- (f) other services limited to providing information about a financial or insurance product and, as the case may be, receiving and processing applications for subscription, without issuing them.

2. Unless excluded by paragraph 1, the following services are included in the definitions of "intermediation in insurance and financial services" in Article 135a 1. (7):

- (a) Client introducing services;
- (b) Advice which includes the possibility to oblige the supplier;
- (c) Services involving negotiation on the conditions of the product;
- (d) Services facilitating client access to a contract for being supplied with insurance or financial services;
- (e) Stock brokering;
- (f) Mortgage brokering;
- (g) Other transactions liable to create, continue, alter or extinguish parties' rights and obligations in respect of exempt insurance and financial services;

Chapter II

Cost-sharing groups

(ARTICLE 137A)

Article

1.

Chapter III

Final provisions

Article 27

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President