

## THE *CARD PROTECTION PLAN* CASE

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In its *SDC* judgment<sup>2</sup> the European Court of Justice laid down the following principles:

1. the exemption of financial services from Value Added Tax ("VAT") applies even if the services are not provided by banks; and above all,
2. a subcontractor who carries out a VAT-exempt financial service provided, as a matter of law, by a bank to its client makes a VAT-exempt supply to the bank.

Undoubtedly these two propositions from the *SDC* case appear at first sight to be of interest only to the banking industry. In fact, this is far from being the case. For example, in reliance upon the *SDC* case, the European Commission recently started non-compliance proceedings against France in relation to blood-testing services provided by sub-contractors to French hospitals. Such services, when provided by a hospital, are exempt from VAT. If the hospital chooses to have the blood test performed by an outside laboratory, French law requires that the outside laboratory charges VAT to the hospital. Under the *SDC* case, the subcontracted service should also be exempt from VAT. The *Card Protection Plan* case refines the relevant jurisprudence.

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<sup>2</sup> Case C-2/95, *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] ECR I-3017.

### **A complex transaction involving an insurance service and other services**

Card Protection Plan ("CPP") "offers holders of credit cards, on payment of a certain sum, a plan intended to protect them against financial loss and inconvenience resulting from the loss or theft of their cards or of certain other items such as car keys, passports and insurance documents".<sup>3</sup>

The Court of Justice said that:

"In so far as this card protection plan ["the plan"] provides for indemnification of the cardholder against financial loss in the event of loss or theft, CPP obtains block cover from an insurance company. The block policy was arranged by an insurance broker instructed by CPP. At the material time the insurer was Continental Assurance Co. of London ("Continental"). It is CPP's customers who are mentioned in the policy as the assured. When a cardholder becomes a customer of CPP, his name is added to the schedule of the assured covered by that policy. CPP pays premiums to the insurance company in advance at the beginning of the policy year; any necessary adjustments are made at the end of the year, according to the number of customers who have joined or left the plan".<sup>4</sup>

In addition to the award of various financial indemnities, the plan includes other benefits, namely:

- maintenance by CPP of a computerized record of customers credit cards;
- provision of a 24 hour telephone line for notification of card theft, in order to permit necessary measures to be taken to transmit the information to the card issuers;
- assistance in obtaining replacement credit cards

CPP charges its clients a single fee for all the benefits offered.

In the beginning, the British VAT authorities considered that the services provided by CPP were exempt from VAT in their totality.

From 1990 onwards, they considered that CPP had to charge VAT to its clients.

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<sup>3</sup> See paragraph 7 of the judgment.

<sup>4</sup> See paragraph 8 of the judgment.

Following the dispute that ensued, the House of Lords referred to the Court of Justice, for a preliminary ruling, questions which may be summarised as follows:

1. Does the exemption for “insurance transactions” defined in the Sixth VAT Directive, only apply when insurance services are provided by an insurer to an end consumer?
2. For the purposes of VAT, should a service or services similar to those offered by CPP, be considered a single but composite supply, or a multiplicity of supplies, some being subject to VAT, and some being exempt?

**A Member State may not Limit the Applicability of the Exemption on Insurance Transactions**

The first question was certainly the easiest, taking into account the Court’s jurisprudence on credit card companies in the *SDC* case. In the Court’s words:

“... it must be noted that CPP is the holder of a block insurance policy under which its customers are the insured. It procures for those customers, for payment, in its own name and on its own account, ... insurance cover by having recourse to an insurer. Consequently, for the purposes of VAT, there is a supply of services between Continental and CPP on the one hand, and between CPP and its customers on the other, and the fact that Continental under the terms of its contract with CPP provides insurance cover directly to CPP’s customers is not material in this respect.

... Such a supply of services by CPP constitutes an insurance transaction [exempt by virtue of] article 13(B)(a) [of the Sixth VAT Directive]. It is true that the exemptions provided for [these services] are to be construed strictly... . However, the expression “insurance transactions” is broad enough in principle to include the provision of insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured.

... That interpretation is supported by the purpose of the Sixth Directive, which exempts insurance transactions but gives member states ... the possibility of maintaining or introducing a tax on insurance contracts. Consequently, if “insurance transactions” refers solely to transaction preformed by insurers themselves, the final consumer might have to pay not only that tax but also VAT, in the case of block policies. Such a result

would be contrary to the purpose of the exemption provided for by article 13(B)(a)."<sup>5</sup>

This first question being answered, there remained to be determined "...with reference to a plan such as that offered by CPP to its customers, what the appropriate criteria are for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately".<sup>6</sup> Under the Court's ruling, "... having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases. However, as the court has ruled in other cases where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place".<sup>7</sup>

In other words, "... a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service".<sup>8</sup>

Under the Court's ruling:

"[t]here is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied..."

In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances [reveal] that the customers intended to purchase two distinct services, namely an insurance

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<sup>5</sup> See paragraphs 21 to 23 of the judgment.

<sup>6</sup> See paragraph 26 of the judgment.

<sup>7</sup> See paragraphs 27 and 28 of the judgment.

<sup>8</sup> See paragraph 29 of the judgment.

supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this”.<sup>9</sup>

Very logically, the Court held that it is for the UK courts to decide “in the light of the above criteria, whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies, namely an exempt insurance supply and a taxable card registration service, or whether one of those two supplies is the principal supply to which the other is ancillary, so that it receives the same tax treatment as the principal supply”.<sup>10</sup>

### **A Jurisprudence of Multiple Consequences**

We can only encourage service providers (and their lawyers) reading this article, to consider what implications the Court’s jurisprudence may have on the services they provide to their clients. Many insurance services are indeed provided as ancillaries to a main service, of which it may be said, using the Court’s formula, that they do not constitute for customers an aim in themselves, but are a means of enjoying the principal service supplied.

Examples of situations in which the Court’s approach in *CPP* may be material are:

- tourism services, with the provision of insurance cover provided as an ancillary service
- the sale of goods together with insurance
- long term car rental with insurance provided by the lessor.

So far as Belgium is concerned, up to now the payments related to the cost of insurance, made by the lessee to the lessor, could only be considered exempt from VAT if two conditions were met:

- (i) the insurance contract had to be signed by the insurance company and the lessee (although the lessor could act by proxy for the lessee), and

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<sup>9</sup> See paragraphs 30 and 31 of the judgment.

<sup>10</sup> See paragraph 32 of the judgment.

- (ii) the insurance premiums had to be charged by the lessor to the lessee as a precise distinct amount. As Mr Christian Amand was recently pointing out, the VAT administration “is going to have to show more flexibility” in this matter.<sup>11</sup>

We would add that the administrations will have to show flexibility in other areas as well. No doubt the administrations of other Member States will face their own challenges as a result of the Court’s judgment in *CPP*.

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<sup>11</sup> Ced.samson, *Actualités fiscales*, 10th March 1999, p.10/5.