OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 8 February 2017 (1)

Case C-678/15

Mohammad Zadeh Khorassani

v

Kathrin Pflanz

(Request for a preliminary ruling from the
Bundesgerichtshof (Federal Court of Justice, Germany)

(Consumer protection — Markets in financial instruments — Definition of 'investment services and activities' — 'Reception and transmission of orders in relation to one or more financial instruments' — Whether brokering in the conclusion of a portfolio management agreement is included)

1. The Bundesgerichtshof (Federal Court of Justice, Germany) requests a ruling from the Court of Justice on one of the methods of providing financial services governed by Directive 2004/39/EC. (2) In particular, the Bundesgerichtshof asks whether the conduct of a natural person who has brokered the conclusion of a portfolio management agreement (entered into by a third person and investment companies established in Liechtenstein) can fall within the categories of services to which that directive applies.

2. The case is important, on the one hand, from the general perspective of the protection of investors. Because of the asymmetry of information between users of financial services and the undertakings which provide them, the growing complexity of the products offered and the lack of financial knowledge on the part of large sections of the population, together with other factors, individuals may be led to make incorrect decisions (seriously prejudicial to their interests) in matters relating to savings, investments and debt. To put a stop to this state of affairs, which has had some bearing on certain of the recent crises, legislatures have, notwithstanding the liberalisation of the markets and their high level of global competition, adopted rules protecting the position of consumers, seeking to strike a balance (3) between their interests and those of market operators. The MiFID I specifically reflects this model of intervention.

3. On the other hand, from a perspective more focused on the particular legal rules laid down in that directive, the question arises as to the legislative framework of certain cases of brokering, like that at the heart of the case in the main proceedings. Are they subject to the MiFID I, which would result in greater protection of investors or do they, on the contrary, fall outside the scope of that directive? In particular, the dispute is confined to an analysis of whether 'financial services' must be taken to mean only those services provided by investment companies that receive and execute orders from investors relating to *specific* [*particular*] financial instruments. Much of the dispute has turned on that adjective.

I – **Legal Framework**

A – *EU law*

1. Directive 2004/39

4. According to recital 2:

'… it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision.'

5. Recital 20 reads:

'For the purposes of this Directive, the business of the reception and transmission of orders should also include bringing together two or more investors thereby bringing about a transaction between those investors.'

6. In accordance with Article 1(1):

'This Directive shall apply to investment firms and regulated markets.'

7. Article 3(1) provides:

'1. Member States may choose not to apply this Directive to any persons for which they are the home Member State that:

– are not allowed to hold clients' funds or securities and which for that reason are not allowed at any time to place themselves in debit with their clients, and

– are not allowed to provide any investment service except the reception and transmission of orders in transferable securities and units in collective investment undertakings and the provision of investment advice in relation to such financial instruments, and

– in the course of providing that service, are allowed to transmit orders only to:

(i) investment firms authorised in accordance with this Directive;

…’

8. Article 4(1) contains the following definitions:

‘(1) “Investment firm” means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis;

…

(2) “Investment services and activities” means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I;

…

(4) “Investment advice” means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;

(5) “Execution of orders on behalf of clients” means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients;

…

(9) “Portfolio management” means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments;

…’

9. Section A of Annex I lists the following investment services and activities:

‘(1) Reception and transmission of orders in relation to one or more financial instruments.

(2) Execution of orders on behalf of clients.

(3) Dealing on own account.

(4) Portfolio management.

(5) Investment advice.

2. Directive 2006/73/EC (4)

10. According to recital 81:

‘Generic advice about a type of financial instrument is not investment advice for the purposes of Directive 2004/39/EC, because this Directive specifies that, for the purposes of Directive 2004/39/EC, investment advice is restricted to advice on particular financial instruments. However, if an investment firm provides generic advice to a client about a type of financial instrument which it presents as suitable for, or based on a consideration of the circumstances of, that client, and that advice is not in fact suitable for the client, or is not based on a consideration of his circumstances, depending on the circumstances of the particular case, the firm is likely to be acting in contravention of Article 19(1) or (2) of Directive 2004/39/EC. In particular, a firm which gives a client such advice would be likely to contravene the requirement of Article 19(1) to act honestly, fairly and professionally in accordance with the best interests of its clients. Similarly or alternatively, such advice would be likely to contravene the requirement of Article 19(2) that information addressed by a firm to a client should be fair, clear and not misleading.’

11. Article 52 provides:

‘For the purposes of the definition of “investment advice” in Article 4(1)(4) of Directive 2004/39/EC, a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.

That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps:

(a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;

(b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.’

B – *German law*

12. The national provisions applicable to the dispute are contained in the Kreditwesengesetz (Law on the financial sector; ‘KWG’). (5)

13. Paragraph 1 provides:

‘(1a) … Financial services are:

(1) the brokering of business involving the purchase and sale of financial instruments (investment brokering),

(1a) the provision of personal recommendations to clients or their representatives, in respect of transactions relating to specific financial instruments, provided that the recommendation is based on a consideration of the personal circumstances of the investor or is presented as suitable for him and is not issued exclusively through distribution channels or to the public (investment advice);

…'

14. Paragraph 32(1) states:

'1. Any person intending to provide financial services in the national territory commercially or on a scale requiring a commercially organised business must obtain written authorisation from the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Office for the Supervision of Financial Services) …'

15. Paragraph 823(2) of the Bürgerliches Gesetzbuch (German Civil Code; 'BGB') reads as follows:

'The duty [to make good the resulting damage] falls on any person who contravenes a provision of law intended to protect another person.'

II – **The dispute in the main proceedings and the question referred for a preliminary ruling**

16. In November 2007, Mr Khorassani entered into contact with Ms Pflanz who, it appears, recommended the 'Grand-Slam' capital investment to him. Ms Pflanz was not authorised by the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Office for the Supervision of Financial Services; 'BaFin') to provide financial services under Paragraph 32(1) of the KWG.

17. On 19 November 2007, Ms Pflanz advised Mr Khorassani to sign a service agreement with G.S.S. AG, and a portfolio management agreement with D. AG as well, both of these companies being established in Liechtenstein.

18. Mr Khorassani signed those agreements, committing himself to an initial payment in the amount of EUR 20 000 and successive monthly payments of EUR 1 000, and a 5% premium in addition. In December 2007, the applicant had already paid EUR 27 000 in total, from which EUR 19 731.60 was deducted as an administration charge to be paid in advance and EUR 1 285.71 was deducted as a premium.

19. Mr Khorassani cancelled the agreements and claimed repayment of the sums paid and damages from the two Liechtenstein undertakings and from Ms Pflanz. The Landgericht Berlin (Regional Court, Berlin) ruled the action brought against the two undertakings inadmissible on the grounds that it lacked international jurisdiction, and held that the action brought against Ms Pflanz was unfounded.

20. After obtaining repayment in the amount of EUR 6 803.03, Mr Khorassani considered his claim satisfied at that amount, but he brought an appeal before the Kammergericht (Higher

Regional Court), in which he continued to pursue his claim (payment of EUR 20 196.97 plus interest and a declaration of termination of the contract) in relation to Ms Pflanz.

21. The Kammergericht (Higher Regional Court) dismissed the appeal. It took the view that Mr Khorassani was not entitled to damages under Paragraph 823(2) of the BGB, in conjunction with Paragraph 32(1) of the KWG, because Ms Pflanz had not provided him with any service subject to authorisation under Paragraph 1(1a) of the KWG.

22. The appellate court accepted that there was not only investment advice but also investment brokering (within the meaning of the national provisions cited), because Ms Pflanz had Mr Khorassani sign (6) the corresponding documents following the consultation. However, neither activity related to a (specific) transaction involving the purchase and sale of financial instruments. The appellate court took the view that it was significant that a portfolio management agreement was negotiated with Mr Khorassani, which for its part was to be used as the basis for the purchase, sale and management of specific financial instruments, but was not itself a financial instrument.

23. Mr Khorassani appealed to the Bundesgerichtshof (Federal Court of Justice) against that judgment. In its order for reference, that court states that the appellate court was right to find that Ms Pflanz had not provided Mr Khorassani with investment advice within the meaning of Paragraph 1(1a) of the KWG. It added that, on that basis, there was no infringement of Paragraph 32(1) of the KWG.

24. The Bundesgerichtshof (Federal Court of Justice) takes the view that investment advice is not provided if portfolio management is recommended (7) without reference also being made to specific financial instruments. Ms Pflanz did not perform an activity involving investment advice, because the agreements recommended by her concerned financial portfolio management and it was not established that, in addition, the defendant provided recommendations relating to specific capital investments.

25. However, the referring court harbours uncertainties as a result of Ms Pflanz's conduct in encouraging Mr Khorassani to conclude a portfolio management agreement. For the Bundesgerichtshof (Federal Court of Justice), the outcome of the dispute depends on whether the brokering of portfolio management agreements is covered by the first sentence of Article 4(1)(2) in conjunction with point 1 of Section A of Annex I to the MiFID I, the content of which is reflected in the German provisions.

26. According to German law, (8) investment brokering is the brokering of business involving the purchase and sale of financial instruments, which requires an activity ultimately intended to ensure that the customer concludes a transaction.

27. The Bundesgerichtshof (Federal Court of Justice) sets out the appellate court's findings to the effect that Ms Pflanz brokered the portfolio management agreement concluded between the applicant and D. AG. It must, therefore, be established whether that agreement itself constitutes 'business involving the purchase and sale of financial instruments', in accordance with point 1 of the second sentence of Paragraph 1(1a) of the KWG.

28. The referring court states that it has not yet decided that question and that, in Germany, the BaFin takes the view that a portfolio management agreement constitutes business involving the purchase and sale of financial instruments, because it involves the performance of those transactions on behalf of the investor. (9) By contrast, the dominant view in the legal literature concerning point 1 of the second sentence of Paragraph 1(1a) of the KWG and the identically-worded point 4 of the first sentence of Paragraph 2(3) of the Wertpapierhandelsgesetz (Law on Securities Trading; 'the WpHG') is that investment brokering cannot be limited merely to intermediate stages, but must extend to a transaction concerning specific financial instruments, so that the brokering of portfolio management agreements is not covered by that concept.

29. In view of the uncertainty surrounding whether the first sentence of Article 4(1)(2) in conjunction with point 1 of section A of Annex I to the MiFID I is to be interpreted strictly or more broadly, the Bundesgerichtshof (Federal Court of Justice) considered it necessary to refer the following question to the Court of Justice for a preliminary ruling:

'Is the reception and transmission of an order which relates to a portfolio management (Article 4(1)(9) of the MiFID) an investment service within the meaning of the first sentence of Article 4(1)(2) in conjunction with point 1 of Section A of Annex I to the MiFID?'

30. Neither of the two parties to the main proceedings lodged written observations during the preliminary-ruling proceedings, nor did they attend the hearing held on 16 November 2016, at which oral argument was presented by the United Kingdom and German Governments and the Commission.

III – **Analysis of the question referred for a preliminary ruling**

31. The Bundesgerichtshof (Federal Court of Justice) has expressed its question precisely, after holding that Ms Pflanz's (10) conduct in suggesting to Mr Khorassani the conclusion of the portfolio management contract with the Liechtenstein investment companies could not be classified as 'investment advice' within the meaning of point 5 of section A of Annex I to the MiFID. In the view of the national court, because these were not personalised recommendations concerning specific financial instruments, they could not be classified as investment advice.

32. The Court must therefore limit its reply to the referring court, confining itself to interpreting the term 'investment advice', in accordance with MiFID I, and is not called upon to give its view on the concept of investment advice.

33. To my mind, fixing the discussion in those terms is of some significance. If, as a result of later events, the choice of the portfolio management companies suggested (11) by Ms Pflanz proved inappropriate, her conduct in providing that recommendation is, in my view, more significant than the subsequent, almost derived, signing of the 'recommended' agreement concluded by Mr Khorassani. It would be paradoxical to exclude the requirement of administrative authorisation (and, in the referring court's view, the resulting liability) for the more serious action, that is, for the advice to entrust a portion of the assets to two specific undertakings so that those undertakings could manage those assets, while, at the same time, requiring authorisation (and creating the subsequent liability, if that is lacking) for the almost instrumental act of having sent that agreement to the portfolio management companies.

34. It must, in short, be determined whether conduct such as Ms Pflanz's constitutes an investment service governed by the rules laid down in the MiFID I, in particular, a service involving the 'reception and transmission of orders in relation to one or more financial instruments'.

35. The arguments put forward in the order for reference and in the written and oral observations demonstrate that there are two possible interpretations of that concept. The German, United Kingdom and Portuguese Governments support the broader interpretation, whereas the Commission and the Polish Government support the stricter or more restrictive. I shall reveal now that I tend towards the latter, that is, a negative reply to the question referred by the Bundesgerichtshof (Federal Court of Justice).

36. According to settled case-law, in interpreting provisions of EU law, account must be taken not only of their wording but also of their context and of the objectives pursued by the rules of which they form part. (12) I shall, therefore, apply those (literal, systematic and teleological) criteria for interpretation to the provision at issue.

37. I shall begin with the literal interpretation. According to the first sentence of Article 4(1)(2) of the MiFID I, investment services and activities means 'any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I'. Those services include the '[r]eception and transmission of orders in relation to one or more financial instruments'. (13)

38. The German version (14) of that provision appears to be worded more restrictively than others, like the Spanish, French, English, Italian and Portuguese versions. (15) Therefore, the German Government points out that the expression 'in relation to one or more financial instruments' (or its equivalent in most of the language versions) might not require a *direct* link between the portfolio management agreement and the specific financial instruments. From that perspective, *indirect* financial brokering would suffice for the activity to be caught by the provision: that would be the case of actions aimed at the conclusion of a portfolio management agreement, which would accordingly be classified as a financial service covered by the MiFID I, the provision of which would require the relevant administrative authorisation.

39. Although that argument gives food for thought, I am not entirely persuaded by it. Like the Commission, I believe, rather, that the key element for interpreting point 1 of section A of Annex I to the MiFID I is the word 'orders', which is repeated without variation in all the language versions ('ordenes', 'ordres', 'Auftrag', 'ordini', 'ordens'). The provision refers to financial services involving the 'reception and transmission of orders' and these must, in my view, relate to transactions involving particular or specific financial instruments.

40. To my mind, it is difficult to receive and transmit an 'order' if it does not concern the performance of specific financial transactions, for, in the everyday terminology used in financial markets, that term implies the notion of something concrete. Although the directive does not use in that part of the annex the wording chosen by the German legislature in Paragraph 1 of the KWG ('business involving the purchase and sale'), I believe that the concept of 'orders' is indissociable from the specific financial instruments in relation to which a purchase, transfer or other similar transaction is 'ordered'. Encouragement to direct an investment towards certain

types of financial assets, is, in general, a recommendation or advice but not an ‘order’ capable of being ‘rece[ived] and transmi[tted]’.

41. That interpretation is bolstered by the fact that the ‘[e]xecution of orders on behalf of clients’, a type of financial service included in point 2 of section A of Annex I to the MiFID I, is defined in Article 4(1)(5) of that directive as ‘acting to conclude agreements to buy or sell *one or more* financial instruments on behalf of clients’. (16)

42. There is a close link between the ‘reception and transmission of orders’ and the ‘execution of orders on behalf of clients’. If the undertaking providing both those services has the appropriate infrastructure and facilities, the reception and transmission of an order relating to a (*one or more*) specific product must necessarily be linked to its execution. In such circumstances, there would have been no need to differentiate between the two types of financial service, but the MiFID I included that distinction because there are financial services firms which, while not having the capacity to execute the orders they receive, must transmit these orders to other firms that do have the suitable capacity to do so. In those cases, ‘reception and transmission’ are distinct from ‘execution’, but the orders remain unchanged.

43. The reception and transmission of orders and the execution of orders must both refer to specific financial instruments: it is not possible, in this type of market, to execute generic orders, nor can such orders be received and transmitted if their subsequent execution is not feasible. Under the MiFID I, orders cannot be likened to generic orders, nor can they include activities aimed at the conclusion of a portfolio management agreement, which does not entail an executable order in relation to a specific financial instrument.

44. Contrary to what the United Kingdom maintains, I do not believe that that interpretation is shaken by recital 20 in the preamble to the MiFID I. (17) In my view, the activity of bringing together two or more investors, as a hypothetical example of the reception and transmission of orders, must, if it is to fall within the concept of the financial services concerned, relate to a specific transaction between those investors, concerning ‘one or more’ financial instruments.

45. That same conclusion is reached, in my view, in the light of the systematic link between the provision and other provisions which may or may not be close to it.

46. In support of a broad interpretation of point 1 of section A of Annex I to the MiFID I, the United Kingdom and German Governments rely upon the difference in the rules governing investment advice, on the one hand, and the reception and transmission of orders in relation to financial instruments, on the other:

– In accordance with recital 81 and Article 52 of Directive 2006/73, generic advice about a type of financial instrument is not investment advice for the purposes of the MiFID I, because that concept is restricted to advice provided in relation to particular financial instruments.

– However, the MiFID I and Directive 2006/73 do not provide for a similar restriction in relation to the reception and transmission of orders.

47. Therefore, according to the German and United Kingdom Governments, an order does not necessarily have to concern a specific financial instrument. This would exclude a strict interpretation of point 1 of section A of Annex I to the MiFID I, for if the legislature had wished to provide for such a limitation it would have done so.

48. Nor does that argument *a contrario* persuade me either. The references in recital 81 and Article 52 of Directive 2006/73 to particular financial instruments, when investment advice is concerned, are explained by the purpose of excluding such advice from encompassing generic advice about a type of financial instrument. (18) The aim of not making generic advice subject (at that stage of the legislation) (19) to the requirements of the MiFID I explains why the reference to 'particular financial instruments' was expressly included in order to define the positive and negative limits of that concept.

49. That same stipulation was not, however, essential for financial services involving the reception and transmission of orders because those services were (and are) in themselves linked to performance 'orders' which, by definition, contain a mandate concerning specific financial instruments. Repetition of that stipulation in Directive 2006/73, in relation to those services, would have been superfluous.

50. Moreover, as the Commission rightly states, a stipulation included in an implementing directive (in this case, Directive 2006/73) on investment advice may not be used as the basis for an interpretation *a contrario* of the basic directive (the MiFID I), as regards financial services involving the reception and transmission of orders.

51. In fact, it could be said that all the investment services and activities provided for in section A of Annex I to Directive 2004/39 concern transactions relating to specific financial instruments. Investment advice was the only service or activity liable to create uncertainties and, in order to dispel these, the implementing directive (Directive 2006/73) expressly stipulated that such advice would fall within the scope of the directive only when it related to 'particular financial instruments'.

52. In short, when a person acts as a broker between a client and an investment company, proposing to the former that he entrust the latter with the management of his assets, that person neither acts nor operates, in principle, in relation to a specific financial instrument. It is the companies that manage the client's portfolio that will subsequently, with his consent or under his mandate, determine in what financial instruments the investment will take concrete form.

53. The application of the teleological or purposive criterion for interpretation also leads me to reply in the negative to the question submitted by the referring court.

54. As the Court has stated, (20) as is clear in particular from recitals 2, 5 and 44 in the preamble to the MiFID I, the latter's objectives are, inter alia, protection of investors, preservation of the efficient and orderly functioning of financial markets, and the transparency of transactions.

55. The German, United Kingdom and Portuguese Governments have relied upon the protection of investors, extensively referred to in Directive 2004/39, to warrant a broad

interpretation of point 1 of section A of Annex I to the MiFID I. Brokering of a portfolio management agreement is, from that perspective, equivalent to the 'reception and transmission of orders in relation to one or more financial instruments'.

56. Those Governments argue that the interpretation they propose is that most consistent with the aim of attaining a high level of protection of investors, as it would enable those cases of indirect financial brokering to be made subject to the MiFID I. Operators like Ms Pflanz would, therefore, be required in Germany to hold an administrative authorisation from the BaFin, and be subject to supervision by that body.

57. Admittedly, the protection of investors is a crucial objective of the MiFID I, (21) which is reflected in the requirements imposed on investment firms with regard to their relationships with users of their services: under Article 19(1) and (2), such firms must act honestly, fairly and professionally in accordance with the best interests of their clients, to whom they must provide information that is fair, clear and not misleading.

58. However, application of the rules for protection of investors may not lead to disproportionate results, like the extension of the controls provided for in the MiFID I to any operator and to all types of financial service. (22) A good intention, which that underlying the argument of the Governments seeking to maximise the scope of that directive to protect investors from conduct like that at issue in the main proceedings undoubtedly is, is not to be translated into an interpretation of the applicable law that distorts the meaning of that law.

59. The MiFID I includes certain limits within which the aim of protecting investors must be applied, and those limits must not be exceeded. On the one hand, under Article 4(1)(1), the definition of investment firm encompasses only those legal persons which, as part of their occupation, regularly provide financial services to third parties, although Member States are permitted to include natural persons in that definition subject to certain conditions.

60. On the other hand, Article 3(1) of the MiFID I provides that Member States may regulate through national provisions and exclude from their scope the activity of any person who is not authorised to hold clients' funds or securities and who may only receive and transmit orders in transferable securities and units in collective investment undertakings, if that person is allowed to transmit such orders to investment firms for execution.

61. I refer to those two provisions in order to draw attention to the fact that the protection of users of financial services, as the 'weaker' party in the relationship, does not make it lawful to dispense with the requirements inherent in the correct interpretation of legal provisions, especially if the latter leave open other methods of safeguarding the rights and interests of investors, as is the case here.

62. In that connection, in order to achieve the financial balance sought by Mr Khorassani in claiming the repayment of his investment, it is not essential to 'distort' the concept of 'reception and transmission of orders in relation to one or more financial instruments' in such a way that it encompasses earlier actions (in this case, the brokering of a portfolio management agreement) in themselves falling outside the terms in which the actual management of the assets is subsequently to be expressed.

63. The protection of investors is sufficiently guaranteed by the MiFID I, since a portfolio management firm that proposes to an investor the execution of orders (as is the case) relating to specific financial instruments assumes the responsibilities inherent in its legal position.

64. Mr Khorassani (who must, moreover, have known that he was investing in financial institutions established outside Germany) may bring legal proceedings against the Liechtenstein companies in accordance with the clauses of his portfolio management agreement governing the courts having jurisdiction. If the Liechtenstein courts have jurisdiction, his legal protection as a client is guaranteed, given that the MiFID I applies within the European Economic Area, of which Liechtenstein forms part, so that it does not have the status of a third country for the purposes of the directive. (23)

65. It being possible for the client to sue the portfolio management firm, I do not see that it is necessary for the rules laid down in the MiFID I to be extended to one who merely brokered the portfolio management agreement. The aim of guaranteeing protection of investors' interests, when these are already properly protected by other provisions of that directive, does not, I stress, call for a very strained, legally speaking, interpretation of the provisions at issue.

66. Lastly, I must make one further point, in keeping with the observations of the Polish Government. It cannot be determined from the information in the order for reference whether or not Ms Pflanz was a tied agent of the two investment firms in Liechtenstein, a matter which it is for the national courts to establish. (24)

67. If Ms Pfalz was a tied agent, account will have to be taken Article 23 of the MiFID I, which lays down a number of obligations and checks for financial undertakings that appoint tied agents 'for the purposes of promoting the services of the investment firm, soliciting business or receiving orders from clients or potential clients and transmitting them, placing financial instruments and providing advice in respect of such financial instruments and services offered by that investment firm.'

68. In those circumstances, given that the brokering of a portfolio management agreement is just one of the activities that a tied agent may carry out for the firm which appoints him or her, that agent must also observe the rules of conduct in the provision of services laid down in Article 19 of the MiFID I. In particular, under Article 19(1), a tied agent must 'act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8'. It is, I stress, for the referring court (or, as the case may be, the lower courts) to determine whether those provisions are applicable in the main proceedings and to draw the relevant legal conclusions.

IV – **Conclusion**

69. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice):

The brokering of a portfolio management agreement, in circumstances like those at issue in the main proceedings, does not constitute an investment service within the meaning of the first sentence of Article 4(1)(2) of, in conjunction with point 1 of section A of Annex I to, Directive

2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

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1 Original language: Spanish.

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2 Directive of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1). It is usually known as the ‘MiFID I’.

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3 Underlying this problem are differing notions of the legal concept of users of financial services. For some, over-protection is almost tantamount to treating users of financial services in the same way as persons who lack the capacity to give consent. For others, however, since the transactions concerned are complex ones which entail the assumption of risks (an inherent feature of financial decisions), the prior information obligations do not go far enough and the decision has been taken to supplement them with strict conditions and guarantees *ex ante*.

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4 Commission Directive of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ 2006 L 241, p. 26).

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5 Law of 9 September 1998 (BGB1. 1998 I, p. 2776), as amended by the Law of 16 July 2007 (BGB1. 2007 I, p. 1330).

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6 The referring court is not particularly explicit in its description of this part of the facts.

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7 It relies for that purpose on point 3 of the second sentence of Paragraph 1(1a) of the KWG and Article 4(1)(9) of Directive 2004/39.

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8 Point 1 of the second sentence of Paragraph 1(1a) of the KWG.

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9 The referring court also points out that two administrative courts supported that point of view in judgments delivered at first instance regarding the granting of interim legal protection, which relied on the wording of the legislation ('Geschäfte über', 'business involving'), from which, in their view, it cannot be inferred that only the brokering of the legal transactions by means of which the legal acquisition of the financial instrument is directly effected is meant.

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10 The order for reference does not explain whether Ms Pflanz was acting in a professional or merely a personal capacity, nor whether she did so on an occasional or a regular basis. As the German Government acknowledged at the hearing, Directive 2004/39, as transposed into national law, applies to natural persons in Germany only where they provide services in a professional capacity.

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11 As the German Government observed at the hearing, Ms Pflanz acted as an 'ambassador' in proposing to Mr Khorassani the portfolio management agreement which he signed and which she subsequently sent to the management company. The German Government therefore argued that the difficulty in this case was derived more from the recommendation to conclude the agreement (conduct which it categorised as culpable) than from the transmission of the signed agreement.

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12 Judgments of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 35), and of 8 November 2016; *Ognyanov* (C-554/14, EU:C:2016:835, paragraph 31).

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13 Point 1 of section A of Annex I.

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14 'Annahme und Übermittlung von Aufträgen, die ein oder mehrere Finanzinstrument(e) zum Gegenstand haben'.

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15 According to the Spanish version, 'recepción y transmisión de órdenes de clientes en relación con uno o más instrumentos financieros'; according to the French version, 'réception et transmission d'ordres portant sur un ou plusieurs instruments financiers'; according to the

English version, ‘reception and transmission of orders in relation to one or more financial instruments’; according to the Italian version, ‘ricezione e trasmissione di ordini riguardanti uno o più strumenti finanziari’; and according to the Portuguese version, ‘recepção e transmissão de ordens relativas a um ou mais instrumentos financeiros’.

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16 No italics in the original.

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17 I would recall that that recital states: ‘for the purposes of this Directive, the business of the reception and transmission of orders also includes bringing together two or more investors thereby bringing about a transaction between those investors’.

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18 See the judgment of 30 May 2013, *Genil 48 and Comercial Hostelera de Grandes Vinos* (C-604/11, EU:C:2013:344, paragraphs 51 and 52).

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19 It should be recalled that investment advice was classified as a type of financial service for the first time in the MiFID I, since Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27) did not include it. It would be illogical for Directive 93/22 to have included brokering of portfolio management agreements as a financial service involving the reception and transmission of orders and for it not to have applied to investment advice services.

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20 Judgment of 22 March 2012, *Nilaş and Others* (C-248/11, EU:C:2012:166, paragraph 48).

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21 It should be observed that the MiFID I does not harmonise completely the provision of financial services and merely effects partial harmonisation, as may be inferred from recital 2 in its preamble, which states that ‘it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision’.

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22 In that connection, the judgment of 3 December 2015, *Banif Plus Bank* (C-312/14, EU:C:2015:794), held that an investment service or activity within the meaning of Article 4(1)(2) of Directive 2004/39 does not encompass certain foreign exchange transactions, effected by a

credit institution under clauses of a foreign currency denominated loan agreement, consisting in fixing the amount of the loan on the basis of the purchase price of the currency applicable when the funds are advanced and in determining the amounts of the monthly instalments on the basis of the sale price of that currency applicable when each monthly instalment is calculated.

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23 The MiFID II (Articles 39 to 42) and the MiFIR (Articles 46 to 49), which will replace the MiFID I with effect from 3 January 2018, provide for a registration system for third-country firms wishing to provide financial services in the EU without the need to establish a branch, provided that the Commission regards the supervisory regime in their State of origin as being equivalent to that of the EU. Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ 2014 L 173, p. 84) and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349).

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24 When asked about this at the hearing, the German Government stated that it had no additional information about the facts.