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Opinion of the Advocate General in Case C-650/16

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On The exemption for services supplied by an independent group of persons is not limited to the (para) medical sector

Article 132 (1) (f) of the VAT Directive exempts from VAT *"the supply of services by independent groups of persons, who are carrying on an activity that is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition."*

The objective of this exemption is to prevent the application of VAT to supplies of shared services by an "independent group of persons" to its members, which would normally be unable, or only partially able, to deduct the VAT charged to them. In this way it enables the pooling of resources through a centralizing entity to be performed in a VAT neutral manner. This would, for example, include administrative and IT services carried out by a shared services center to banks or insurance companies or not-for-profit organizations.

Due to the broad language used by the directive in defining this exemption, member states have interpreted and implemented it in very different manners in their own national VAT laws. In many member states, including Luxembourg, economic operators in a variety of sectors including not-for-profit organizations as well as banks, insurance companies, and other providers of financial services take advantage of this regime to share resources in a VAT-neutral manner.

Taking a different view, however, Germany has chosen to interpret this exemption far more restrictively in its domestic legislation. In its implementation of Article 132, Germany has specifically restricted its scope to supplies of services carried out by groups whose members are doctors, exercise paramedical professions, or carry on activities in the hospital and medical care sectors. Accordingly, groups of members operating in the financial and insurance sectors are, a priori, prohibited from benefiting from this exemption.

Germany considers that this restriction of the scope of the exemption is justified on the basis that Article 132 appears in Chapter 2 of the VAT Directive, titled "Exemptions for certain activities in the public interest," which should therefore exclude the application of the exemption for all non-public interest activities. The further restriction in the scope of the exemption, from all public interest activities to only activities in the medical and paramedical sectors, was then further justified

by Germany's view that the use of this exemption by any other public interest sectors would automatically result in the distortion of competition.

The European Commission considered the German implementation of this exemption to be too restrictive and consequently launched infringement proceedings against Germany in this respect. As Germany was unwilling to amend its legislation to expand the scope of the exemption, the matter has now been addressed to the Court of Justice of the European Union.

Mr. Melchior Wathelet concluded on 5 April 2017, as the Advocate General in this case, that Germany's view of the exemption as being limited to members undertaking activities in the public interest was not justified and is therefore in breach of its obligations to properly implement the VAT Directive. This conclusion was arrived at on the basis of the following principal arguments:

1. *"(…), first of all, that the wording of Article 132(1)(f) of the VAT Directive does not contain any restriction to a determined or determinable professional sector, a fortiori solely to the activities mentioned in the preceding points of that provision, which relate inter alia to health, the only restriction being that only services rendered by an IGP to its members are exempt."*
2. *"Nothing in the Court's case-law indicates any other restriction on the exemption laid down in Article 132(1)(f) of the VAT Directive… [and, in particular, in] the judgment of 20 November 2003, Taksatorringen (C 8/01), the Court recognised that insurance transactions (….) came under the exemption for cost sharing. The Court has thus already extended the exemption to activities which do not have a medical or social objective."*
3. *"Furthermore, the position of that exemption in the VAT Directive can be explained by historical reasons, as the Commission has acknowledged that the title of Article 132 of the VAT Directive was the result of careless drafting."*

In addition to finding there to be no basis to limit the scope of the exemption, a priori, to services rendered to members operating in the medical and paramedical sectors, the Advocate General further disagreed with Germany's view that it had the right to make an assessment of the risk of distortions of competition arising from the use of the exemption on a sector-by-sector basis. In the view of the Advocate General, the obligation within Article 132(1)(f) of the VAT Directive to ensure that its use does not give rise to distortions of competition must be assessed on the basis of each individual case. Any potential determination that distortions would be more likely to arise in one sector than another, therefore, could not replace the individual assessment of each specific use of the exemption by a group on its own merits.

Consequently, the Advocate General unambiguously rejects Germany's arguments in support of any right to restrict the scope of the exemption provided for under Article 132 (1) (f) to the health sector alone.

It is particularly worth noting that the position advanced by Mr. Wathelet in his opinion in this case is in direct contradiction with the position advanced by Advocate General, Mrs. Kokott, in her recent opinions in the Cases C-605/15 Aviva and C-326/15 DNB Banka. In both of these opinions Mrs. Kokott specifically stated

that *"[g]roups of financial services undertakings do not therefore fall within the scope of Article 132(1)(f) of the VAT Directive."* The inclusion of such a statement in both opinions of Mrs. Kokott was particularly surprising given that the argument was not raised by the parties in the cases at hand, although both matters concerned different elements of the use of the exemption by groups whose members operated in the financial sector.

It is quite exceptional to have such directly opposing views of Advocate Generals in respect of the interpretation of a provision of the VAT Directive and casts additional uncertainty regarding the final position that the Court itself will take. This uncertainty, however, should be resolved relatively quickly, as the Court is due to set out its own view of the scope of the exemption on 4 May 2017 in Case C-275/15 EC v Luxembourg, in the infringement action taken by the Commission against Luxembourg's own national law implementing this exemption for independent groups of persons.

The Luxembourg regime surrounding the exemption of supplies made by independent groups of persons permits independent group of persons to make supplies of services to members acting in any sector which can, in principle, be exempt from VAT where the regime's conditions are met. While it is a number of the other, non-sector specific, features of Luxembourg's independent group of persons regime that are challenged by the Commission in this case, if the Court agrees with the (unsolicited) opinion presented by Mrs. Kokott to the effect that the exemption should not be available to members undertaking activities outside those in the public interest, it would be able to rule in favor of the Commission on this basis, without the need to address all specifically challenged elements of Luxembourg's regime. On the contrary, should the Court limit its judgement to the consideration of the features of Luxembourg's independent group of persons regime actually challenged by the Commission in the proceedings, this would indicate an implicit acceptance of the views of Mr. Wathelet, finding no basis for the restriction of the scope of the exemption to benefit members undertaking activities in the public interest.

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