

CJEU Advocate General's strict opinion on "independent group of persons" under VAT directive (2/10/17)

We continue to inform our subscribers about ongoing proceedings over the concept of an independent group of persons (IGP). On 1 March 2017 Juliane Kokott, Advocate General (AG) at the Court of Justice of the European Union (CJEU), presented her findings on DNB Banka AS case C-326/15, recommending that the CJEU should answer all the questions in the negative. If the CJEU follows this recommendation, the future existence of IGP in the banking and insurance sector will be at risk. This article explores the AG findings in reply to questions asked by the Administrative District Court of Latvia.

On 1 July 2015, the Administrative District Court of Latvia asked the CJEU the following questions about the application of article 132(1)(f) of the VAT directive (the DNB Banka AS case):

1. Is it possible for an IGP under article 132(1)(f) to exist when its members are established in separate member states in which that provision of the directive has been transposed with different requirements that are not compatible?
2. Can a member state restrict a taxable person's entitlement to the 132(1)(f) exemption when that taxable person has satisfied all the requirements for claiming the exemption in his member state, but that provision of the directive has been transposed into the national law of the member states of other IGP members with restrictions that limit the scope for another member state's taxable person to claim a corresponding exemption in his member state?
3. Is the 132(1)(f) exemption available for services in the VAT-registered customer's member state when the VAT-registered supplier has charged VAT on those services in another member state under general arrangements, that is, considering that VAT on those services was payable in the customer's member state under article 196 of the VAT directive?
4. Must the IGP be taken to mean a separate entity whose existence should be proved through a specific agreement creating the IGP? If the IGP need not be taken to mean a separate entity, should the IGP be regarded as a group of related companies that mutually supply back-office services as part of their day-to-day business, and can the existence of the IGP be proved through contracts for services or transfer pricing documentation?
5. Can a member state restrict a taxable person's entitlement to the 132(1)(f) exemption when that taxable person has applied a markup to the transactions as required under the legislation on direct taxation of the member state in which the taxable person is established?
6. Is the 132(1)(f) exemption available for services received from third countries? In other words, can an IGP member supplying services to its other members be a taxable person registered for VAT in a third country?

The AG urges the CJEU to give negative answers to all these questions:

1. A group of related companies mutually supplying services cannot be an IGP under article 132(1)(f). The AG also states that the exemption is restricted to services the IGP supplies to its members (as opposed to any services the members supply to the IGP or between themselves).
2. Article 132(1)(f) is applicable only to transactions that are exempt under article 132, not article 135. Article 135 provides for an exemption on other activities, not activities in the public interest. Financial services are exempt under article 135. Accordingly, article 132(1)(f) is not applicable to groups in the business of supplying financial services.

3. With respect to the cross-border application of the 132(1)(f) exemption, the AG states that the exemption is restricted to members governed by the same legal system of the particular member state. Accordingly, the AG finds that the 132(1)(f) exemption is not available for cross-border transactions.
4. The 132(1)(f) exemption is restricted to an IGP that asks each member to reimburse exactly his portion of their joint expenses without exceeding it. Accordingly, the exemption requirements are not satisfied if a markup is added to the cost of services.