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Commission v Germany (C-616/15) – AGO – cost sharing exemption

This case concerns Germany's domestic application of the cost sharing exemption. German rules limit the exemption to supplies of services by cost sharing groups whose members are either doctors or health professionals and hospitals or establishments similar to hospitals.

The Advocate General (AG) refers to independent groups of persons (IGP) when referring to what others may call a cost sharing group. The AG's response is long (26 pages) but essentially breaks down the arguments put forward by Germany into two categories (the figures in brackets refer to the relevant paragraph numbers in the AGO):

The scope of Article 132(1)(f) of the VAT Directive

This issue concerns whether the cost sharing exemption is limited to just supplies of services made by an IGP to members with exempt activities in the public interest under Article 132, or whether it can apply to services made to members who have activities exempted elsewhere under the Directive, such as banking and insurance under Article 135. To note, AG Kokott recently opined in *Aviva* (C-605/15) and *DNB Banka* (C-326/15) that the exemption is restricted just to supplies to members with public interest activities.

Germany's view – It is clear from the position, wording, drafting history and objective of this exemption that it is limited to supplies by IGPs to members in the health sector or at least to members with certain activities in the public interest (70).

The Commission's view – The exemption does not just apply to supplies to members with public interest activities. However, even if that restriction is right, Germany has gone too far in limiting it to only one of the public interest activities (health) and not applying it to all of them.

The AG – The AG looked at the exemption from a schematic (72), teleological (84) and textual approach (90). In particular the Court looked at the draft proposal for the Sixth Directive (91), which provided that 'services supplied by the independent professional groups of a medical or like nature to their members for the purposes of their exempted activities' were to be exempted. However, the final version of the Sixth Directive had removed this restriction. The AG also noted the existing case law which does not support such a restriction. This included *Taksatorringen* (C-8/01) in which the Court recognised that members with insurance transactions could benefit from the exemption for cost sharing subject to the non-distortion of competition condition being complied with (99). Reference was made to the *DNB Banka* hearing and that all the other parties disagreed with Germany. It appears that this Opinion was written before the Opinion in *DNB Banka* was released. The AG also viewed the proposed legislation on cost sharing in the insurance and financial services rewrite as a clarification and not as an unsuccessful attempt to widen the cost sharing exemption to supplies to members in the finance and insurance sectors (108). In conclusion the AG noted the imperfections in the wording of the VAT Directive but was of the view that the exemption under Article 132(1)(f) may not be restricted to just supplies by IGPs to members with activities in the public interest (para 111). Therefore, in limiting it even further Germany has not complied with its obligations, in the AG's view.

Distortion of competition

The Article 132(1)(f) exemption is subject to the provision that such an exemption is not likely to cause distortion of competition.

Germany's view – Germany supports its restriction of the exemption to members in the health sector on the basis that it prevents such distortion of competition. It considers that it is not necessary to, and it would be impossible to, consider such risk on an individual basis.

The Commission's view – The existence of distortion of competition must be done on an individual basis.

The AG – Having referred to the *Bridport and West Dorset Golf Club* (C-495/12) judgment and the power conferred to Member States in implementing an exemption, the AG agreed with the Commission that Article 132(1)(f) requires examination on an individual basis. The AG found further support for this view again in *Taksatorringen* (C-8/01) in which the Court ruled 'the exemption must be refused if there is a genuine risk that the exemption may by itself, immediately or in the future, give rise to distortions of competition,' (emphasis added). The AG added that although a Member State may legitimately define in greater detail the condition relating to the absence of distortion of competition it must ensure this does not restrict or extend the scope of the exemption under Article 132(1)(f).

To access the Opinion click here**.**

Importance? Whilst this case concerns Germany's cost sharing exemption, the AG's detailed analysis of the exemption will be of particular importance to sectors whose exemption does not fall under the public interest exemption, such as insurance and financial services. This is one of four ongoing cases concerning the cost sharing exemption. The other three (*Commission v Luxembourg* (C-274/15), *Aviva* (C-605/15), and *DNB Banka* (C-326/15) have seen Opinions delivered by AG Kokott. Her suggested responses have given a very narrow scope to the exemption, including the view in the latter two that the exemption only applies to supplies to members whose activities are covered by the public interest exemptions. The Court may independently overturn the Opinion of AG Kokott, but while we wait for the decisions in the other cost sharing cases the exempt non-public interest sectors will be encouraged that a different AG is of the same view as regards the scope of this exemption as everyone else (except Germany and AG Kokott) seems to be.

Marc Brent
Indirect Tax
T: +44 (0)20 7311 5462
E: marc.brent@kpmg.co.uk

John Rippon
Indirect Tax
T: +44(0)151 4735197
E: john.rippon@kpmg.co.uk

kpmg.com/uk

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