Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 1 March 2017 [1]

Case C-326/15

'DNB Banka' AS
(Request for a preliminary ruling

from the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia))

(Taxation — VAT — Article 132(1)(f) of Directive 2006/112/EC — Exemption for the supply of services by independent groups for their members — Direct effect of a directive — Definition of an 'independent group of persons')

I – Introduction

1. In this request for a preliminary ruling originating from Latvia, the Court is concerned with Article 132(1)(f) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2] ('the VAT Directive'). This provision is one of the exemptions under European Union VAT law which has not yet been fully clarified. The Court has dealt with it and its numerous definitional conditions only three times in the last few decades. [3] However, there are at present four cases pending before the Court [4] relating to different aspects of this exemption.

2. The present case would appear to be of fundamental importance above all for its personal scope. In the similar case *Aviva*, [5] on the other hand, the primary issue to be decided is how far the material scope (extension to insurance companies) and the territorial scope (extension to 'cross-border groups') of Article 132(1)(f) of the VAT Directive extends and how an absence of distortion of competition is to be determined.

3. The background to the exemption is the decision by the EU legislature not to grant an input tax deduction in principle to undertakings which make exempt supplies, such as doctors or schools. Thus, while the outputs of such undertakings are not taxed, at the same time VAT is charged on their inputs. This results in the supply to the final consumer being only partially exempt, as the non-deductible VAT is generally taken into account in pricing and is thus borne by the recipient not directly, but indirectly.

1 Original language: German.

2 OJ 2006 L 347, p. 1.

3 Judgments of 15 June 1989, *Stichting Uitvoering Financiële Acties* (348/87, EU:C:1989:246); of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621); and of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing* (C-407/07, EU:C:2008:713).

4 Along with the present case, these are Cases C-274/15 (*Commission* v *Luxembourg*), C-605/15 (*Aviva*) and C-616/15 (*Commission* v *Germany*).

5 Court case number: C-605/15.

4. Because there is no input tax deduction for such undertakings, the purchase of (taxable) elements of the supply which could also be provided by the undertakings themselves may have a negative influence on pricing to the amount of the non-deductible VAT. For example, where a private detective is employed by an insurance company, expenditure is incurred to the amount of the personnel costs, but where recourse is had to the services of an external detective, expenditure is incurred to the amount of those personnel costs and the applicable VAT. There is generally therefore an economic interest in an undertaking making such supplies itself and not purchasing them from another undertaking giving rise to tax liability. Consequently, in the applicable VAT system, through the creation of an exemption without input tax deduction, an undertaking making exempt supplies is treated like a final consumer. A final consumer likewise does not owe any VAT, but also cannot claim any input tax deduction, even if he supplies services for consideration or sells goods.

5. However, for undertakings making exempt supplies too, there may be situations in which it makes economic sense, or is even necessary for competition reasons, to provide individual elements of a supply not alone, but together with other undertakings also making exempt supplies. It may thus make sense if, for example, several social security institutions share the costs of a data processing centre. For cases of this kind, Article 132(1)(f) of the VAT Directive also exempts supplies by the group to its members under certain conditions. The exclusion of input tax deduction does not therefore affect pricing, which leaves the scope of the exemption for the final consumer unchanged. The scope does not then depend on whether the supply as a whole was made by an exempt undertaking or by that undertaking together with other exempt undertakings.

II – Legal framework

A – EU law

6. In the European Union, VAT is charged pursuant to the VAT Directive. Under Article 2(1)(c) of the VAT Directive, 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' is subject to VAT.

7. Under Article 132(1)(f) of the VAT Directive, however, Member States must exempt the following transactions from VAT:

'the supply of services by independent groups of persons, who are carrying on an activity which 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'. [6]

B – National law

8. For the period to which the main proceedings relate, Latvian law did not include any provision transposing Article 132(1)(f) of the VAT Directive.

6 Article 132(1)(f) of the VAT Directive corresponds to the provision contained in Article 13(A)(1)(f) of the now replaced Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'). Regard must also be had to the Court's case-law on that provision in the present case.

III – The main proceedings

9. The main proceedings concern the VAT owed by the Latvian credit institution DNB Banka AS for 2009 and 2010.

10. DNB Banka is part of the DNB group. In those years DNB Banka provided apparently exempt financial services and was supplied various services by other companies in the group, for which, in the assessment of the referring court, DNB Banka evidently owes tax as the customer. It is disputed in this connection whether the services are exempt under Article 132(1)(f) of the VAT Directive. The following are specifically at issue:

– financial services provided by the parent company DNB Nord AS, established in Denmark;

– IT services provided by the Danish sister company DNB Nord IT AS;

– transmission, under cost allocation arrangements, of software licences purchased from a third party by the grandparent company DNB Bank ASA, established in Norway.

11. By way of consideration, DNB Banka was invoiced in each case by the Danish companies in the group, DNB Nord and DNB Nord IT, for the costs for the supply of services together with an uplift of 5%. In this regard, DNB Nord IT at least was able to claim input tax for the supply of services in Denmark. The Danish authorities took the view that that supply of services is not exempt.

IV – Procedure before the Court

12. On 1 July 2015, the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), which is now hearing the dispute, referred the following questions to the Court pursuant to Article 267 TFEU:

‘(1) Is it possible for there to be an independent group of persons for the purposes of Article 132(1)(f) of the Directive, when the members of that group are established in separate Member States of the European Union, in which that provision of the Directive has been transposed with different requirements which are not compatible?

(2) Can a Member State restrict the right of a taxable person to apply the exemption provided for in Article 132(1)(f) of the Directive, when that taxable person has satisfied all the requirements for the application of the exemption in its Member State, but that provision of the Directive has been transposed into the national law of the Member States of other members of the group with restrictions which limit the possibility for taxable persons of other Member States of applying in their own Member State the corresponding exemption from value added tax?

(3) Is it permissible to apply the exemption in Article 132(1)(f) of the Directive to services in the Member State of the recipient of those services, who is a taxable person for value added tax, when the provider of the services, also a taxable person for value added tax, has applied in another Member State value added tax to those services in accordance with general arrangements, that is, considering that value added tax on those services was payable in the Member State of the recipient of those services, in accordance with Article 196 of the Directive?

(4) Must the term “independent group of persons”, for the purposes of Article 132(1)(f) of the Directive, be taken to mean a separate legal person whose existence has to be proved through a specific agreement creating that independent group of persons?

If the reply to that question is that an independent group of persons need not necessarily be taken to mean a separate entity, is an independent group of persons to be regarded as a group of related undertakings in which, in the course of their usual economic activities, those undertakings provide each other with support services for carrying out their commercial activities, and may the existence of that group be proved through the contracts for services concluded or through documentation on transfer prices?

(5) Can a Member State restrict the right of a taxable person to apply the value added tax exemption in Article 132(1)(f) of the Directive, when that taxable person has applied an uplift to the transactions, as required under the legislation on direct taxation of the Member State where the taxable person is established?

(6) Does the exemption in Article 132(1)(f) of the Directive apply to services received from third countries? In other words, where a member of an independent group of persons, as referred to in Article 132(1)(f) of the Directive, provides, within that group, services to other members of the group, can that person be a taxable person from a third country?'

13. Written observations on these questions were submitted by DNB Banka, the Hellenic Republic, the Republic of Latvia, the Grand Duchy of Luxembourg, Hungary, the Republic of Poland, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland and the European Commission. DNB Banka, the Republic of Latvia, the Federal Republic of Germany, the Grand Duchy of Luxembourg, the Republic of Poland, the United Kingdom and the Commission took part in the hearing on 30 June 2016.

V – Legal assessment

14. As the referring court has stated, it was not until 1 January 2014 that a provision was adopted in Latvian law to transpose Article 132(1)(f) of the VAT Directive. The referring court nevertheless takes the view that Article 132(1)(f) of the VAT Directive had direct effect, to the benefit of DNB Banka, before that time. It therefore considers it necessary to have an interpretation of that provision in order to give judgment in the case in the main proceedings.

A – The direct effect of the exemption

15. It is first necessary to review the premise posited by the referring court regarding the direct effect of Article 132(1)(f) of the VAT Directive.

16. According to settled case-law, a provision of a directive which a Member State has failed to implement in domestic law may be relied on directly by individuals where the provision is, so far as its subject matter is concerned, unconditional and sufficiently precise. [7]

17. It is settled case-law that a provision of EU law is unconditional, so far as its subject matter is concerned, where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States. [8]

7 See inter alia judgments of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraph 25); of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256, paragraph 29); of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 51); and of 7 July 2016, *Ambisig* (C-46/15, EU:C:2016:530, paragraph 16); see judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 12).

8 See inter alia judgments of 23 February 1994, *Comitato di coordinamento per la difesa della cava and Others* (C-236/92, EU:C:1994:60, paragraph 9); of 26 October 2006, *Pohl-Boskamp* (C-317/05, EU:C:2006:684, paragraph 41); of 1 July 2010, *Gassmayr* (C-194/08, EU:C:2010:386, paragraph 45); of 15 May 2014, *Almos Agrárkülkereskedelmi* (C-337/13, EU:C:2014:328, paragraph 32); and of 7 July 2016, *Ambisig* (C-46/15, EU:C:2016:530, paragraph 17).

18. Article 132(1)(f) of the VAT Directive is unconditional, so far as its subject matter is concerned, in that it does not provide Member States with an option whether to make provision for this exemption in national law, but requires them to do so. [9]

19. However, in a recent judgment, the Court held for the first time that a provision of the VAT Directive was not unconditional, so far as its subject matter is concerned, on the ground that, even though no express provision was made to that effect by its wording, it needed to be further specified by national legislation. [10]

20. The Federal Republic of Germany has argued, in essence, that in order to implement this condition in national law it is necessary for the national legislature to examine and select the permitted sectors. It is not possible for the competent national authorities to decide in each individual case whether there is distortion of competition precluding the exemption. Against this background, it is not possible for Article 132(1)(f) of the VAT Directive to have direct effect.

21. Nevertheless, the abovementioned ruling of the Court concerned a provision (Article 11 of the VAT Directive) which offers Member States an option which, if exercised, requires a number of imprecise legal concepts to be fleshed out. An exemption such as Article 132(1)(f) of the VAT Directive is not comparable with this, however.

22. The (negative) definitional element 'distortion of competition' is 'merely' an imprecise legal concept, in relation to which, in the view of the Court, it must be examined whether the group can be assured of keeping its members' custom even without the exemption. [11] That examination must be made in each individual case and cannot be pre-determined abstractly for certain sectors. The provision does not therefore allow the national legislature abstract flexibility, with the result that Article 132(1)(f) of the VAT Directive is also unconditional in this regard.

23. In order to have direct effect, the provision would also have to be sufficiently precise. According to case-law, this is the case 'where the obligation which it imposes is set out in unequivocal terms'. [12] The wording of the directive must thus be sufficiently clear. [13]

24. As was stated above, the (negative) definitional element 'distortion of competition' is 'merely' an imprecise legal concept, the requirements for which must be assessed. The wording of the directive is also sufficiently clear in this regard.

25. Furthermore, the Court has already confirmed direct effect in connection with Article 13(1) of the VAT Directive, which likewise makes taxation of bodies governed by public law dependent on, inter alia, the occurrence of distortion of competition. [14] Even though this requirement involves an assessment of economic circumstances, this does not preclude its direct effect. [15]

9 See to that effect, with regard to another exemption, judgment of 28 November 2013, *MDDP* (C-319/12, EU:C:2013:778, paragraph 49).

10 Judgment of 16 July 2015, *Larentia Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 50).

11 See judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621, paragraph 59).

12 Judgments of 23 February 1994, *Comitato di coordinamento per la difesa della cava and Others* (C-236/92, EU:C:1994:60, paragraph 10); of 17 September 1996, *Cooperativa Agricola Zootecnica S. Antonio and Others* (C-246/94 to C-249/94, EU:C:1996:329, paragraph 19); of 29 May 1997, *Klattner* (C-389/95, EU:C:1997:258, paragraph 33); and of 1 July 2010, *Gassmayr* (C-194/08, EU:C:2010:386, paragraph 45).

13 See inter alia judgments of 25 January 1983, *Smit Transport* (126/82, EU:C:1983:14, paragraph 11); of 4 December 1997, *Kampelmann and Others* (C-253/96 to C-258/96, EU:C:1997:585, paragraph 38); of 9 September 2004, *Meiland Azewijn* (C-292/02, EU:C:2004:499, paragraph 61); of 19 December 2012, *Orfey* (C-549/11, EU:C:2012:832, paragraph 53); and of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic* (C-508/14, EU:C:2015:657, paragraph 53).

14 See the second subparagraph of the provision, which corresponds to the second subparagraph of Article 4(5) of the Sixth Directive.

15 See judgments of 17 October 1989, *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraphs 32 and 33) and of 8 June 2006, *Feuerbestattungsverein Halle* (C-430/04, EU:C:2006:374, paragraph 31) with regard to the second subparagraph of Article 4(5) of the Sixth Directive.

26. In addition, the United Kingdom in particular wishes to reject direct effect for Article 132(1)(f) of the VAT Directive because Member States would still have to adopt rules on the legal form of a group and the conditions for membership.

27. However, I cannot concur with this view either. It is true that a provision of a directive which allows Member States a broad margin of discretion is not directly applicable. However, the definition of the exemption under Article 132(1)(f) of the VAT Directive does not grant the Member States any discretion as to the legal form of the group and the conditions for membership.

28. The rule thus neither contains an explicit power for the Member States to lay down definitions nor does such a power follow from an implicit reference to the respective national civil law. It is settled case-law that, inter alia in the context of the exemptions which are now laid down in Article 132 of the VAT Directive, it is necessary to avoid divergences in the application of the VAT system from one Member State to another.[16] Just as it is settled case-law that, with regard to Article 14(1) of the VAT Directive, the concept of ownership may not relate to the forms existing in national law,[17] recourse cannot be had to national law for the definition of a group and the conditions for membership.

29. Article 132(1)(f) of the VAT Directive thus satisfies the requirement that the law is clearly defined and is also sufficiently precise to have direct effect.[18]

30. As Article 132(1)(f) of the VAT Directive is thus unconditional, so far as its subject matter is concerned, and sufficiently precise, it has direct effect.

B – The questions referred in detail

1. The fourth question: definition of an independent group

31. Of the six questions referred in total, the fourth question will be answered first as it is of fundamental importance for the scope of the exemption under Article 132(1)(f) of the VAT Directive in the present case.

32. By its fourth question, the referring court is essentially seeking to ascertain whether an independent group of persons for the purposes of Article 132(1)(f) of the VAT Directive must be a separate entity or whether it may — as in the dispute in the main proceedings — consist of a group of related undertakings whose companies provide each other with services.

33. It must be stated, first of all, that a group for the purposes of Article 132(1)(f) of the VAT Directive must be a taxable person acting as such within the meaning of Article 9 of the VAT Directive.

16 See inter alia judgments of 25 February 1999, *CPP* (C-349/96, EU:C:1999:93, paragraph 15); of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 15); of 21 February 2013, *Žamberk* (C-18/12, EU:C:2013:95, paragraph 17); and of 2 July 2015, *De Fruytier* (C-334/14, EU:C:2015:437, paragraph 17).

17 See inter alia judgments of 8 February 1990, *Shipping and Forwarding Enterprise Safe* (C-320/88, EU:C:1990:61, paragraph 7); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 62); and of 3 September 2015, *Fast Bunkering Klaipėda* (C-526/13, EU:C:2015:536, paragraph 51).

18 See judgment of 20 November 2003, *Taksatorringen* (C-8/01, EU:C:2003:621, paragraphs 58 to 65).

34. The Court has held, in essence, with regard to Article 132(1)(f) of the VAT Directive that, in the light of the strict interpretation of exemptions under VAT law which is always necessary,[19] an interpretation of that provision going beyond its clear wording is incompatible with the objective of that provision.[20] It is evident from the wording that the group referred to in the element 'independent' supplies the services acting as such and must therefore be distinguished from its members for VAT purposes.

35. As the exemption is thus applicable to the supply of services solely by the group itself, but not by its members, the group must be a taxable person within the meaning of Article 9 of the VAT Directive. Otherwise there would not be a taxable supply of services by the group for the purposes of Article 2(1)(c) of the VAT Directive which could be exempted. Only the supply of services by 'a taxable person acting as such' is taxable.

36. It would be different only if Article 132(1)(f) of the VAT Directive were intended to safeguard the scope of the exemption or non-taxation of the activities of members of the group, where mere cooperation by such taxable persons (or even non-taxable persons) is not intended to result in any further VAT being due. This would then explain why the group must make supplies for the purpose of rendering their members the services directly necessary for the non-taxable activities of the members and may merely claim exact reimbursement of their share of the expenses for that supply of services.

37. However, the wording of Article 132(1)(f) of the VAT Directive, which is to be interpreted strictly, simply refers to the supply of services by a group which are to be exempted and which — as I stated in the Opinion in *Commission* v *Luxembourg*[21] — are taxable only if they are also provided by a taxable person within the meaning of Article 9 of the VAT Directive.

38. Nevertheless, an independent group does not have to be a legal person. The Court has repeatedly indicated that separate legal personality is not a requirement for accepting the existence of a taxable person within the meaning of Article 9 of the VAT Directive.[22] The only relevant factor is whether a person or group of persons or assets 'independently' carries out any economic activity within the meaning of Article 9(1) of the VAT Directive.

39. The Court has thus far dealt with a number of situations, in its case-law regarding the criterion of independence under Article 9(1) of the VAT Directive, where the point at issue was always whether a person or a group of assets was in a relationship of employer and employee with another taxable person and thus, by direct or analogous application of Article 10 of the VAT Directive, did not conduct an activity independently. The subject matter was the independence of a person vis-à-vis his customers,[23] of shareholders vis-à-vis their company[24] and of entities of an organisation vis-à-vis the organisation itself.[25]

19 With regard to this principle, which has subsequently been reiterated in settled case-law, see the judgments of 26 June 1990, *Velker International Oil Company* (C-185/89, EU:C:1990:262, paragraph 19); of 16 September 2004, *Cimber Air* (C-382/02, EU:C:2004:534, paragraph 25); and of 2 July 2015, *De Fruytier* (C-334/14, EU:C:2015:437, paragraph 18).

20 Judgment of 15 June 1989, *Stichting Uitvoering Financiële Acties* (348/87, EU:C:1989:246, paragraphs 13 and 14), with regard to Article 13(A)(1)(f) of the Sixth Directive.

21 See my Opinion in *Commission* v *Luxembourg* (C-274/15, EU:C:2016:750, point 49 et seq.).

22 See judgments of 27 January 2000, *Heerma* (C-23/98, EU:C:2000:46, paragraph 8), and of 29 September 2015, *Gmina Wrocław* (C-276/14, EU:C:2015:635, paragraph 28); see also, to that effect, judgment of 16 July 2015, *Larentia Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 37), which, it would appear, can be applied in this regard to Article 9 of the VAT Directive.

23 Judgments of 26 March 1987, *Commission* v *Netherlands* (235/85, EU:C:1987:161); of 25 July 1991, *Ayuntamiento de Sevilla* (C-202/90, EU:C:1991:332); and of 12 November 2009, *Commission* v *Spain* (C-154/08, EU:C:2009:695).

24 Judgments of 27 January 2000, *Heerma* (C-23/98, EU:C:2000:46), and of 18 October 2007, *van der Steen* (C-355/06, EU:C:2007:615).

25 Judgments of 23 March 2006, *FCE Bank* (C-210/04, EU:C:2006:196), and of 17 September 2014, *Skandia America (USA)* (C-7/13, EU:C:2014:2225), both concerning a branch of a company, and of 29 September 2015, *Gmina Wrocław* (C-276/14, EU:C:2015:635), concerning a municipal entity.

40. This latter case-law regarding organisational entities can be applied to the present case, as a group for the purposes of Article 132(1)(f) of the VAT Directive is intended to offer its members a common structure for cooperation [26] which is therefore organisationally autonomous. With regard to organisational entities, the Court has rejected independence in particular where they cannot own their own property. [27] However, a group — that is to say, a group of several independent companies, based solely on shareholdings existing among them — cannot own its own property as such. Accordingly, in principle a group acting as such neither constitutes a taxable person within the meaning of Article 9(1) nor can it therefore be an independent group for the purposes of Article 132(1)(f) of the VAT Directive.

41. This interpretation is confirmed by the existence of the special rule laid down in Article 11 of the VAT Directive. Under that provision, Member States may 'regard as a single taxable person any persons … who, while legally independent, are closely bound to one another by financial, economic and organisational links'. On the basis of that provision alone, related undertakings are to be construed as a taxable person and supplies within the group are therefore to be exempted from VAT.

42. It is true that under certain circumstances a separate company with several shareholders within a group can be regarded as an independent group. However, the exemption would then apply only to a company's supplies to its shareholders, because Article 132(1)(f) of the VAT Directive exempts only the supply of services by the group to its members, but not vice versa. Nevertheless, such supplies are not at issue in the main proceedings and there is therefore no need for further examination in this regard.

43. Accordingly, the exemption under Article 132(1)(f) of the VAT Directive is not applicable a priori to a case like the dispute in the main proceedings because there is no supply by an independent group to its members under the conditions laid down.

44. In answer to the fourth question, it must therefore be stated that an independent group of persons for the purposes of Article 132(1)(f) does not have to be a legal person, but a taxable person within the meaning of Article 9(1) of the VAT Directive. A group consisting of related companies does not as such satisfy this requirement.

2. The first, second, third and sixth questions: application to a 'cross-border' group

45. By the first, second, third and sixth questions, the referring court is seeking to ascertain whether and under what conditions the exemption under Article 132(1)(f) of the VAT Directive may also be applicable to a cross-border group.

46. As the Federal Republic of Germany has submitted, this presupposes, as a preliminary issue, that the exemption under Article 132(1)(f) of the VAT Directive is actually applicable to undertakings which supply exempt financial services for the purposes of Article 135 of the VAT Directive. As I have explained in my Opinion in *Aviva*, [28] that is not the case. Having regard to its place in the scheme of the directive and its drafting history, Article 132(1)(f) of the VAT Directive covers only groups of taxable persons which carry out exempt transactions in accordance with Article 132 of the VAT Directive. This does not include financial services.

26 Judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing* (C-407/07, EU:C:2008:713, paragraph 37).

27 See, to that effect, Opinion of Advocate General Jääskinen in *Gmina Wrocław* (C-276/14, EU:C:2015:431, point 46) and judgment of 29 September 2015, *Gmina Wrocław* (C-276/14, EU:C:2015:635, paragraph 38); see also judgments of 23 March 2006, *FCE Bank* (C-210/04, EU:C:2006:196, paragraph 37), and of 17 September 2014, *Skandia America (USA)* (C-7/13, EU:C:2014:2225, paragraph 26), which refer to the company having capital of its own.

28 See my Opinion of today's date in Case C-605/15, point 19 et seq.

47. In any event, it is also not possible to infer from the VAT Directive a cross-border application of the exemption under Article 132(1)(f) of the VAT Directive. As I have explained in my Opinion in *Aviva*,[29] this is clear from the Sixth Directive. Furthermore, it is also evident from the difficulties experienced by a number of Member States in assessing the definitional elements of Article 132(1)(f) of the VAT Directive. A Member State's tax revenue would depend on (changing) situations and non-verifiable assessments in other Member States (or even third countries). This would create significant practical problems which would run counter to the principle laid down in EU law that Member States have the power to raise tax revenue in their territory[30] and could thus also justify a possible infringement of fundamental freedoms by the VAT Directive.

3. The fifth question: cost uplift of 5%

48. By the fifth question, the referring court is essentially seeking to ascertain whether the exemption under Article 132(1)(f) of the VAT Directive also applies where the taxable person has calculated the price of his services, as required under the legislation on direct taxation of the Member State where the taxable person is established, based on the expenses incurred plus an uplift, which in this case amounts to 5%.

49. Under Article 132(1)(f) of the VAT Directive, the supply of services by a group is exempted only on the condition that the group 'merely claim[s] from [its] members exact reimbursement of their share of the joint expenses'.

50. If it is established in the present case that more than the expenses within the meaning of that provision were owed, as the referring court has stated, this definitional condition for the exemption is not therefore met.

51. It might be different only if the concept of expenses in Article 132(1)(f) of the VAT Directive also includes the expenses element of the owner's income, which is possibly reflected in an uplift in the actual expenditure for providing the service. However, there are serious doubts in this regard. First, that interpretation is contrary to the wording of the provision in nearly all the languages. In normal usage, 'reimbursement',[31] or even repayment[32] or refund,[33] covers outlay and not income. Consideration of owner's income is also not compatible with the purpose of the exemption under Article 132(1)(f) of the VAT Directive, which I have explained in my Opinion in *Aviva*.[34] This consists in extending another exemption to a preliminary stage, because the taxable persons cooperate with one another for competition reasons. The idea of owner's income as an element of the group's expenses is not compatible with the elimination of a competitive disadvantage.

52. The answer to the fifth question is therefore that the exemption under Article 132(1)(f) of the VAT Directive is not applicable where a consideration is paid for the supply of services which goes beyond the expenses incurred. That is also the case where, as required under the legislation on direct taxation, a simple flat-rate cost uplift is paid.

29 See my Opinion of today's date in Case C-605/15, point 36 et seq.

30 With regard to the principle of territoriality in general, see judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 46); of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraph 82 et seq.); and of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 45 et seq.); with regard to the principle of territoriality in VAT law, see also judgment of 12 September 2013, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraph 42).

31 English: 'exact reimbursement', [German: 'genaue Erstattung',] French: 'remboursement exact', Swedish: 'ersättning', Spanish: 'reembolso exacto'; Latvian: 'precīzi atmaksāt', Polish: 'zwrotu przypadającej'.

32 Dutch: 'terugbetaling'.

33 Italian: 'rimborso', Bulgarian: 'възстановяване (…) разходи', see the apparently broader Danish version: 'godtgørelse', which refers to 'compensation'.

34 See my Opinion of today's date in Case C-605/15, points 20 and 21.

VI – Conclusion

53. Accordingly, I propose that the Court answer the request for a preliminary ruling from the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) as a whole as follows:

(1) An independent group of persons for the purposes of Article 132(1)(f) does not have to be a legal person, but a taxable person within the meaning of Article 9(1) of the VAT Directive. A group of related companies does not as such satisfy this requirement.

(2) Article 132(1)(f) covers, for the present purposes, only groups of taxable persons which carry out exempt transactions in accordance with Article 132(1) of the VAT Directive. Groups of financial services undertakings do not therefore fall within the scope of Article 132(1)(f) of the VAT Directive.

(3) The independent group of persons may supply exempt services only to members that are subject to the same legal order, namely its own.

(4) The exemption under Article 132(1)(f) of the VAT Directive is not applicable where a consideration is paid for the supply of services which goes beyond the expenses incurred. That is also the case where, as required under the legislation on direct taxation, a simple flat-rate cost uplift is paid.