



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Indirect Taxation and Tax administration  
**Value added tax**

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**VALUE ADDED TAX COMMITTEE  
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)  
WORKING PAPER NO 912**

**QUESTION  
CONCERNING THE APPLICATION OF EU VAT PROVISIONS**

**ORIGIN:** France

**REFERENCE:** Article 135(1)(b)

**SUBJECT:** Possible qualification of advisory services by credit intermediaries as negotiation of credit

## **1. INTRODUCTION**

The French authorities wish to discuss with the VAT Committee the scope of the exemption for certain financial services provided for in Article 135(1)(b) of the VAT Directive<sup>1</sup>. They notably seek to establish whether the supply of a financial advisory service by a credit intermediary to a potential borrower could be seen as falling within the category of "negotiation of credit" and therefore be exempt.

The question submitted by France is attached in annex.

## **2. SUBJECT MATTER**

France tables the case where a taxable person supplies a financial advisory service in respect of credits – relating to immovable property – to a potential borrower. Such financial advice would consist in making personal recommendations to a client (the potential borrower) with a view for that client to sign a contract of credit with a third party credit provider (e.g. a financial institution), such advice being part of the preparatory work leading to the negotiation of the credit and independent from the conclusion of a possible credit agreement with a third party.

The taxable person supplying the advisory service described above would qualify as a credit intermediary, as indicated by France. The concept of credit intermediary in respect of credit agreements for consumers relating to residential immovable property is defined at EU level in Article 4(5) of Directive 2014/17/EU<sup>2</sup> as "*a natural or legal person who is not acting as a creditor or notary and not merely introducing, either directly or indirectly, a consumer to a creditor or credit intermediary, and who, in the course of his trade, business or profession, for remuneration, which may take a pecuniary form or any other agreed form of financial consideration: (a) presents or offers credit agreements to consumers; (b) assists consumers by undertaking preparatory work or other pre-contractual administration in respect of credit agreements other than as referred to in point (a); or (c) concludes credit agreements with consumers on behalf of the creditor*".

Although the French authorities do not restrict their question to credit intermediaries as defined in Directive 2014/17/EU, the fact that their inquiry is about credit intermediaries supplying financial advice in respect of credits relating to immovable property allows us to safely assume that most of such intermediaries would fall within the scope of that Directive. Hence, reference may be made to some of its provisions, notably as regards the nature of the activities carried out by credit intermediaries.

According to the French authorities, there may be two scenarios from the point of view of the remuneration of the credit intermediary: (i) where the credit agreement is successfully concluded between the borrower and the credit provider, the credit intermediary is

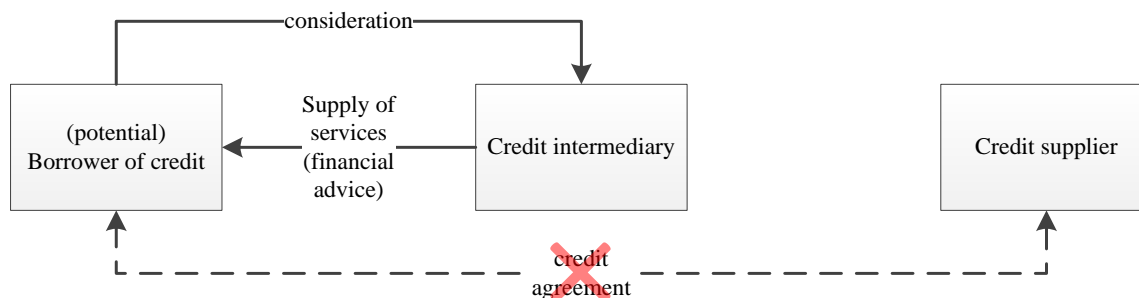
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<sup>1</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

<sup>2</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010. Text with EEA relevance (OJ L 60, 28.2.2014, p. 34–85).

remunerated by the credit provider; (ii) however, in the case that no credit agreement is concluded, the credit intermediary is remunerated by the potential borrower.

The scenario which is the object of analysis in the present document is the second one, that is, the supply of services consisting in financial advice by a credit intermediary to a potential borrower which does not lead to the conclusion of a credit agreement with a third party credit provider. In that case, the consideration in exchange for the supply of services is paid by the recipient of the financial advice (that is, the potential borrower). See below a diagram of the case at hand.



The fact that no credit agreement is concluded raises the question whether the supply of financial advisory services by a credit intermediary to a potential borrower in circumstances such as those described could be seen as falling within the category of "negotiation of credit" and therefore be exempt pursuant to Article 135(1)(b) of the VAT Directive.

### **3. THE COMMISSION SERVICES' OPINION**

Article 135(1)(b) of the VAT Directive contains an exemption for *"the granting and the negotiation of credit and the management of credit by the person granting it"*.

At the outset it should be noted that the Court of Justice of the European Union (CJEU) has repeatedly stressed that the exemptions referred to in Article 135 of the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person<sup>3</sup>. Furthermore, they constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another and which must be placed in the general context of the common system of VAT<sup>4</sup>.

It is commonly accepted that the supply of financial advisory services in principle falls within the scope of VAT and cannot be exempted on the basis of Article 135(1) of the VAT Directive, which lays down the exemptions for financial services. If doubts arise in the particular case tabled by the French authorities this is mainly because the financial advice in question is supplied in a specific context (whereby a potential borrower seeks to conclude a credit agreement with a credit provider), where some of the activities involved

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<sup>3</sup> Judgment of 19 July 2012, *Deutsche Bank*, C-44/11, EU:C:2012:484, paragraph 42 and the case-law cited.

<sup>4</sup> Judgment of 22 October 2009, *Swiss Re*, C-242/08, EU:C:2009:647, paragraph 33 and the case-law cited.

may be exempted pursuant to Article 135(1)(b) of the VAT Directive (to the extent that they qualify as granting or negotiation of credit). In this case, the relevant exempt supply, if any, would be the negotiation of credit and not the granting of credit, since the scenario tabled by France focuses on cases where no credit agreement is concluded.

It seems that an advisory service supplied in such context could fall within the scope of Article 135(1)(b) of the VAT Directive and therefore be exempt under the following two circumstances:

- i. If the advisory service could be said to constitute in itself, and due to the nature of the activities carried out by the credit intermediary, a service consisting in the "negotiation of credit".
- ii. If the advisory service, even without qualifying in itself as "negotiation of credit" could be said to constitute a service ancillary to an exempt principal service (i.e. negotiation of credit), which would then see it enjoy the same VAT treatment.

Both scenarios shall be analysed below.

### **3.1. Advisory service qualifying in itself as "negotiation of credit"**

Although the concept of "negotiation of credit" has never been defined as such by the CJEU, existing case-law has shed some light on the nature of negotiation activities in respect of other provisions of Article 135(1) of the VAT Directive.

Notably, in *CSC*<sup>5</sup> the CJEU has held, in the context of Article 135(1)(f) of the VAT Directive, that the concept of "negotiation" applies to the activity of an *"intermediary who does not occupy the position of a party to a contract relating to a financial product and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation (...). The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract"*.

Attention must also be paid to the negative definition of "negotiation" given by the CJEU in that same case: *"On the other hand, it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract, such as providing information to the other party and receiving and processing applications for subscription to the securities which form the subject matter of the contract. In such a case, the subcontractor occupies the same position as the party selling the financial product and is not therefore an intermediary who does not occupy the position of one of the parties to the contract, within the meaning of the provision in question"*<sup>6</sup>.

The interpretation given was referred to by the CJEU in *Ludwig*<sup>7</sup> in the context of Article 135(1)(b) of the VAT Directive and also confirmed by the VAT Committee in

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<sup>5</sup> Judgment of 13 December 2001, *CSC*, C-235/00, EU:C:2001:696, paragraph 39.

<sup>6</sup> *CSC*, paragraph 40.

<sup>7</sup> Judgment of 21 June 2007, *Ludwig*, C-453/05, EU:C:2007:369, paragraph 23.

guidelines agreed in respect of the concept "negotiation in securities" laid down in Article 135(1)(f) of the VAT Directive<sup>8</sup>. Those guidelines are reproduced below.

*"1. The VAT Committee **almost unanimously** confirms that for the purposes of Article 135(1)(f) of the VAT Directive, and in accordance with settled case-law of the Court of Justice of the European Union (CJEU), the concept of "negotiation" shall be taken to refer to a service rendered by an intermediary as a distinct act of mediation, whose purpose is to do all that is necessary in order for two parties to enter into a contract, without the intermediary having any interest of his own in the terms of the contract.*

*The VAT Committee **almost unanimously** agrees that services consisting in the provision of investment advice in respect of securities shall only be seen as an activity of negotiation if the activity meets the conditions of being a distinct act of mediation as laid down by the CJEU.*

*2. The VAT Committee is of the **almost unanimous** view that an advisory service concerning investment in securities, where the provider of the advisory service is not involved in the negotiation and completion of the contract between the client and the party marketing the securities, shall not fall within the scope of Article 135(1)(f) of the VAT Directive".*

Concerning the scenario at hand, it follows that in order to be seen as performing an activity of negotiation for the purposes of Article 135(1)(b) of the VAT Directive the credit intermediary should act as a "mediator" between his client (the potential borrower) and the third party credit provider, having no interest of his own in the terms of the contract – which also implies having a sufficient degree of independence from the parties involved.

Although it is true that negotiation may consist in "*pointing out to one party to the contract suitable opportunities for the conclusion of such contract*", as the CJEU stated in *CSC*<sup>9</sup> and *Ludwig*<sup>10</sup>, this is not the essential characteristic that a service must have in order to be considered "negotiation" and, therefore, being able to benefit from exemption. For a service to be considered to constitute "negotiation", what is fundamental is that it constitutes a "distinct act of mediation". The very use of the word "mediation" reinforces the idea that the person performing the negotiation must act as a go-between between the parties involved in the credit contract.

With this in mind, and considering the question at stake, it does not seem that the activity of carrying out an analysis of the financial situation of the client and advising on suitable opportunities for the conclusion of a credit contract would in itself qualify as "negotiation of credit". In fact, the financial advisory service provided by the credit intermediary could simply consist in a one-to-one relationship with the potential borrower whereby the credit intermediary gives financial advice to a client, which the latter may or may not follow. In such circumstances, it is difficult to see how the advisory service can qualify as

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<sup>8</sup> Guidelines resulting from the 104<sup>th</sup> meeting of 4-5 June 2015 – Document B – taxud.c.1(2015)4694162 – 875 (p. 203): [VAT Committee guidelines](#). See also Working paper No 849.

<sup>9</sup> *CSC*, paragraph 39

<sup>10</sup> *Ludwig*, paragraph 39.

negotiation and benefit from the exemption pursuant to Article 135(1)(b) of the VAT Directive.

Some may argue that the CJEU in *Ludwig* concluded that "*the concept of negotiation does not necessarily presuppose that the negotiator (...) enters into direct contact with both parties to the contract*"<sup>11</sup>. Accordingly, a taxable person would still qualify as "negotiator" even if he does not establish direct contact with one of the parties of the contract. This would be an interpretation that is broader than the one exposed and one to which the Commission services cannot subscribe.

In this respect, the case facts in *Ludwig* must be borne in mind. As a matter of fact, the activity of negotiation in that case implied mediation between the two parties of the contract, but it was just so that the activity of negotiation of credit had been divided into two services, the first one provided by the agent DVAG (negotiation with the lenders) and the second by the financial adviser (negotiation with the borrowers)<sup>12</sup>. The CJEU stated that it was possible for such services to individually qualify as a service of negotiation in a context where the two services actually complemented each other and constituted a link between the two contractual parties.

The fact that the advice is provided by a so-called "credit intermediary", a terminology which to some may suggest that such person is acting as a mediator, should not, however, lead to the automatic conclusion that any activity undertaken by a credit intermediary constitutes "negotiation of credit". Instead, it is the nature of the supply made which has to be looked at.

The assessment of whether a supply of services consisting in the negotiation of credit has then actually taken place is not dependent upon the identity of the person from which the supplier receives payment (i.e. the potential borrower or the credit provider). Negotiation, if present, will take place before and regardless of the possible conclusion of a credit agreement. Therefore, the fact that in the case at hand the credit intermediary is remunerated by the potential borrower (i.e. there is no credit agreement) should not be seen as precluding an activity of negotiation from being possible.

Neither should it be a decisive factor that the advisory services are supplied in respect of credits relating to immovable property, given that the exemption pursuant to Article 135(1)(b) is not restricted to any credits in particular.

Where a credit intermediary is supplying a service consisting in the provision of financial advice in respect of credits to a client (potential borrower), but without being further involved in the negotiation and completion of the contract between the client and the third party credit provider, it is difficult to see how the credit intermediary could be said to act as a mediator between the parties to a credit contract. In this scenario the conclusion would be that the credit intermediary is not performing an activity of "negotiation of credit" and that the exemption pursuant to Article 135(1)(b) of the VAT Directive would therefore not be applicable.

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<sup>11</sup> *Ludwig*, paragraphs 38 and 40.

<sup>12</sup> *Ludwig*, paragraph 37.

### **3.2. Advisory service, ancillary to an exempt principal service**

Although not exempt in its own right, the advisory services supplied by the credit intermediary could be said to fall under the umbrella of an exempt supply if seen as ancillary to an exempt principal supply.

Article 135(1)(b) of the VAT Directive exempts two distinct activities: the negotiation and the granting of credit. Each of these activities constitutes an exempt supply, to which the provision of advisory services could be seen as ancillary. However, given that in the scenario tabled by France there will have been no credit agreement, the exempt supply in the case at hand could only be the negotiation of credit and not the granting of credit. Therefore, what has to be assessed is whether advisory services could be seen as an ancillary supply to an exempt principal supply, i.e. the negotiation of credit.

The existence of a multiple supply of services comprising financial advice and negotiation of credit for the purposes of Article 135(1)(b) of the VAT Directive was examined by the CJEU in *Ludwig*.

In that case, a financial adviser acted on behalf of a third party credit supplier ("DVAG"), with whom he had a commercial agency agreement. The financial adviser role consisted in both the giving of financial advice and the negotiation of credit. More specifically, the adviser approached potential clients in the name of DVAG, reviewed their financial situation, and proposed financial products appropriate to their needs; and if the client indicated his willingness to enter into a credit contract, the financial adviser also arranged the conclusion of the agreement between the borrower and the lender. The financial adviser was rewarded by DVAG with a commission for every concluded contract, while the client paid nothing.

The CJEU was asked whether the term "negotiation of credit" could include all activities carried out by the financial adviser, the advisory service being ancillary to the principal one, which would be the negotiation of credit (exempt); or whether, in contrast, the ancillary service was in reality the negotiation of credit with the principal service being the financial advice (not exempt).

Referring to its findings in *CPP*<sup>13</sup>, the CJEU concluded that *"the fact that a taxable person analyses the financial situation of clients canvassed by him with a view to obtaining credit for them does not preclude recognition of the service supplied as being a negotiation of credit which is exempt under Article 13B(d)(1) of the Sixth Directive [present Article 135(1)(b) of the VAT Directive] if, in the light of the foregoing interpretative criteria, the negotiation of credit offered by that taxable person falls to be considered as the principal service to which the provision of financial advice is ancillary, in such a way that the latter shares the same tax treatment as the former"*. That is, in the case of a multiple supply of services (advisory services and negotiation of credit) where the

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<sup>13</sup> Judgment of 25 February 1999, *CPP*, C-349/96, EU:C:1999:93, paragraph 30: *"There is in particular a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service; and that a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied"*.

principal service is the negotiation of credit to which the financial advice is ancillary, both services are considered to constitute "negotiation of credit" and can therefore be exempt.

Concerning the case at hand, it follows that the financial advice provided by a credit intermediary could be exempted under Article 135(1)(b) of the VAT Directive provided that that service is ancillary to a principal service consisting in the negotiation of credit, which is the financial activity in respect of which the exemption is actually granted. The fact that services provided by the credit intermediary are remunerated by the lenders only on the condition that the potential borrowers enter into a credit agreement suggests that in either case the negotiation should be regarded as the principal supply and the giving of advice as merely ancillary. Moreover, as stated in *Ludwig*<sup>14</sup>, the negotiation of credit appears to be the decisive service both for the borrowers and for the lenders, in so far as the activity of giving financial advice occurs only in a preliminary phase and is limited to helping the client choose, from among the various financial products, those which are best adapted to his situation and to his needs.

In that regard, it is worth noting that the provision of financial advice may not necessarily lead to there being a supply consisting in the negotiation of credit (and *vice versa*), no matter how close such services may seem to be. The nature of such services is different and, therefore, their existence must be assessed independently.

That stems not only from the question presented by France (where advisory services are described as "preparatory" to the negotiation of credit implying the existence of two consecutive independent activities), but also from Article 5 of Directive 2014/17/EU. In that provision, the activities which can be carried out by a credit intermediary are described autonomously and in a non-cumulative way. Notably, the credit intermediary can "(a) present or offer credit agreement to consumer", which would possibly involve the provision of an advisory service; or "(b) assist consumers by undertaking preparatory work or other pre-contractual administration in respect of credit agreements...", which may be part of an activity of negotiation of credit. In this respect, however, it should be noted that taking care of some of the clerical formalities related to the contract only would not qualify as negotiation of credit<sup>15</sup>.

In *Ludwig*, the existence of two supplies of services (making up a multiple supply) was not at stake, but the crux of the matter was to determine which was the principal supply and which the ancillary one. In our case, however, it is of utmost importance to determine whether there is any negotiation of credit at all or whether, in contrast, the credit intermediary carries out an advisory activity which is the only existing supply.

In the absence of the activity of negotiation of credit, and in line with our conclusions in section 3.1, a single supply consisting in the provision of financial advice (without being further involved in the negotiation and completion of the contract between the client and the third party credit provider) would fall within the scope of VAT and no exemption would apply.

Given that the question tabled by France is rather general, it is beyond the capacity of the Commission services to conclude for all cases involving the provision of financial advice by a credit intermediary. The assessment of whether there is a supply of services

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<sup>14</sup> *Ludwig*, paragraph 19.

<sup>15</sup> As indicated by the CJEU in *CSC*, paragraph 40 (see section 3.1).



consisting in the negotiation of credit (in respect of which an ancillary advisory service may be provided), which could benefit from the exemption pursuant to Article 135(1)(b) of the VAT Directive, should be made on a case-by-case basis.

### **3.3. Conclusions**

- Given the legislation as it stands and taking into account the pertinent case law, the provision of financial advice in respect of credits to a client (the potential borrower) by a credit intermediary would not in itself be sufficient for exemption to be granted pursuant to Article 135(1)(b) of the VAT Directive on the grounds of it being "negotiation of credit". Exemption could only be granted if and to the extent that the adviser acts as a mediator between the parties to the credit contract.
- The provision of financial advice in respect of credits to a client (the potential borrower) by a credit intermediary could benefit from the exemption pursuant to Article 135(1)(b) of the VAT Directive only if the advice is ancillary to an exempt principal supply consisting in the negotiation of credit. In the absence of such a principal supply, the financial advice could not benefit from any exemption.

### **4. DELEGATIONS' OPINION**

The delegations are requested to give their opinion on this matter.

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**Question from France**

**Subject: Rules applicable to a financial analysis and advice service provided by a mortgage credit intermediary not linked to a financial institution**

1. Pursuant to Article 398(4) of Directive 2006/112/EC on the common system of VAT, the French authorities would welcome the opinions of the Commission and of the Member States on the rules applicable to financial analysis and advice supplied by mortgage credit intermediaries for their customers, irrespective of whether a mortgage credit agreement is signed between the customer and the financial institution. In this particular case, the intermediary receives no payment from the financial institution, but is paid by the customer.

**I. Legal background**

2. Pursuant to Article 2 of Directive 2006/112/EC, the supply of services for consideration within the territory of a Member State by a taxable person acting as such are subject to VAT.

3. However, Article 135(1)(b) exempts the granting and the negotiation of credit and the management of credit by the person granting it.

4. In its judgment of 13 December 2001 regarding Case C-235/00 (CSC Financial Services) the Court of Justice of the European Union (CJEU) noted that the activity of negotiation – which may consist of indicating to a party to the contract the possibilities for concluding such a contract, entering into contact with the other party, and negotiating for and on behalf of the customer the details of reciprocal services – is a service rendered to and remunerated by a contractual party as a distinct act of mediation, the purpose of which is to promote the conclusion of a contract without the negotiator having any interest of his own in the terms of the contract.

5. In its judgment of 21 June 2007 regarding Case C-453/05 (Ludwig) the CJEU clarified that the fact that a taxable person is not linked to any of the parties to a credit agreement, to the conclusion of which he has contributed, or is not directly in contact with one of those parties, does not prevent him from providing negotiation exempt from VAT.

6. In the same judgment the CJEU noted that where a taxable person analyses the financial situation of customers canvassed by him with a view to obtaining credits for them, this does not preclude recognition of the credit negotiation as a service exempt from VAT if the negotiation of credit offered by that taxable person constitutes the principal and decisive service for borrowers and for lender institutions to which the supply of the financial advice is ancillary. In such a situation, the latter service receives the same tax treatment as the former.

**II. Issue raised:**

7. The French authorities wish to raise with the VAT Committee the matter of the correct interpretation of Article 135(1)(b) of Directive 2006/112/EU in the case of advisory services in preparation for the negotiation of credit that consist of the provision of personal recommendations to a customer in order for him to take out a credit loan.

8. In theory, the financial analysis/advice services supplied by a self-employed credit intermediary within the framework of his credit-negotiation activities are linked to his principal credit-negotiation operations and receive the same tax treatment. These operations are exempt from VAT.

9. Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property provides a creditor or intermediary with the possibility of advising a customer separate from the granting of credit and the activities of credit intermediaries, for which the supplier is never remunerated by one or more creditors (combined application of Articles 4 and 22 of the Directive).

10. The matter raised with the VAT Committee therefore involves the VAT arrangements applicable when financial advice or analysis, which entails providing a customer with personal recommendations with a view to him taking out a credit loan, is supplied by an independent service provider paid by the customer whether or not the latter signs a mortgage loan agreement.

**III. France's interpretation:**

11. It seems difficult to argue that the supply of a service as described under '9' above is exempt from VAT. In such a case, this service cannot be regarded as ancillary to a principal service of credit negotiation. *In fine*, no principal service will be carried out.

12. Furthermore, given the scope already granted by the CJEU to the exemption scheme of Article 135(1) b), in particular in the Ludwig judgment cited earlier, it could be maintained that such a service, although paid for by the customer, is always supplied in a context of credit negotiation or prior to the possible conclusion of a loan, and could therefore be linked to this activity and exempt from VAT.

13. Consequently, France wishes to have Commission's and the delegations' analysis of and opinions on this interpretation.

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The situation envisaged is one in which the credit intermediary supplies advice (particularly financial) to the potential mortgage loan borrower.

In this case, when the advice is supplied, the customer does not know whether or not he will conclude a mortgage loan with a financial institution. Nevertheless, this is his intention.

That said, the provision of independent advice referred to will exist only where the potential customer does not sign a contract with a mortgage provider; in the opposite case, the advice would be remunerated by the credit institution.

Where no loan agreement is signed, the credit intermediary is paid directly by the potential borrower who becomes the *de facto* customer of the credit intermediary, as opposed to the cases hitherto examined by the CJEU in which, to our knowledge, the credit intermediary was paid by the credit institution upon signature of a contract.

We therefore wonder whether the consideration, in the absence of a signed credit agreement and of payment by a purveyor of credit to the intermediary for conducting a negotiation, should be that there is no need to grant the VAT exemption on the basis of Article 135(1)(b) of the VAT Directive.

That being the case, it might also be considered that the provision of independent advice can always be linked to the negotiation of loans insofar as the potential customer does intend to take out a mortgage loan at the time when the service is supplied.