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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 856**

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

<b>ORIGIN:</b>	<b>Commission</b>
<b>REFERENCE:</b>	<b>Article 132(1)(f)</b>
<b>SUBJECT:</b>	<b>Scope of the exemption for cost-sharing arrangements: a further analysis</b>

## **1. INTRODUCTION**

The scope of the exemption for cost-sharing arrangements provided for in Article 132(1)(f) of the VAT Directive<sup>1</sup> has been the subject of discussion in the 74<sup>th</sup> and the 91<sup>st</sup> meetings of the VAT Committee, held in June 2004 and May 2010, respectively. In this respect, Working papers<sup>2</sup> were produced by the Commission services but this did not result in any guidelines.

Given the divergence of views among Member States as to the application of this exemption and taking into account discussions already had on VAT groupings, the Commission services feel the need to revisit this issue.

## **2. SUBJECT MATTER**

The wording of the provision which sets out the exemption for cost-sharing arrangements, contained in Article 132(1)(f) of the VAT Directive, proves to be ambiguous and Member States appear to interpret and apply it in different ways. For instance, some Member States restrict the application of the exemption to some sectors of activity, or make it dependent upon fulfilment of conditions other than those strictly following from the wording of this provision. In some cases, the exemption has not even been transposed into national law, even though it is a mandatory provision allowing Member States no choice in the matter.

In previous Working papers, the Commission services endeavoured to provide guidance on some aspects of Article 132(1)(f) of the VAT Directive, mainly concerning the requirements which need to be fulfilled with regard to the services provided by the cost-sharing group, as well as the services provided by its members.

Besides, the proposals put forward by the Commission as regards the VAT treatment of insurance and financial services<sup>3</sup>, dating back to 2007, contained a measure inspired by the present Article 132(1)(f) of the VAT Directive which sought to clarify the functioning of cost-sharing arrangements in the context of insurance and financial services. The scope of the measure proposed differed significantly from the present rules but although the proposals have been under discussion in Council for many years, no agreement is in sight at this stage.

Despite all the efforts made, at this point the interpretation and application of Article 132(1)(f) of the VAT Directive is still far from being harmonised. Against this background, it seems necessary to further develop the analysis of the exemption for cost-sharing arrangements. The aim is to discuss some of the topics which have never been the subject of an in-depth examination in the VAT Committee – mainly, the application of the exemption in cross-border situations, as well as its interaction with the VAT grouping

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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> Working papers No 450 and 654.

<sup>3</sup> Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services ([COM\(2007\) 747](#)); and Proposal for a Council Regulation laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services ([COM\(2007\) 746](#)).

provisions – but also some further questions concerning the conditions laid down in Article 132(1)(f) of the VAT Directive, such as the existence of "independent groups" or the characteristics of the services provided.

To allow for the discussion to take account of all aspects of the exemption, a brief summing-up of the most relevant points already covered in previous Working papers is also included.

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

Our analysis of the exemption provided for in Article 132(1)(f) of the VAT Directive covers the following:

- Conditions for the cost-sharing arrangement exemption to apply,
- Application of the exemption in cross-border scenarios,
- Interaction of the exemption with VAT groups
- Final considerations

#### **I. Conditions for the cost-sharing arrangement exemption to apply**

Article 132(1)(f) of the VAT Directive provides an exemption for cost-sharing arrangements, whereby Member States shall exempt:

*"... (f) 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".*

The purpose of this exemption is to allow economic operators to pool services and re-distribute the costs for these services exempt from VAT, from the group to its members. So, the members of cost-sharing groups are able to achieve economies of scale ensuring a level playing field with larger competitors which have the capacity to perform the same activities internally<sup>4</sup>. From a VAT perspective, the services supplied under the exemption for cost-sharing arrangements are treated in the same way as in-house services provided within the same company.

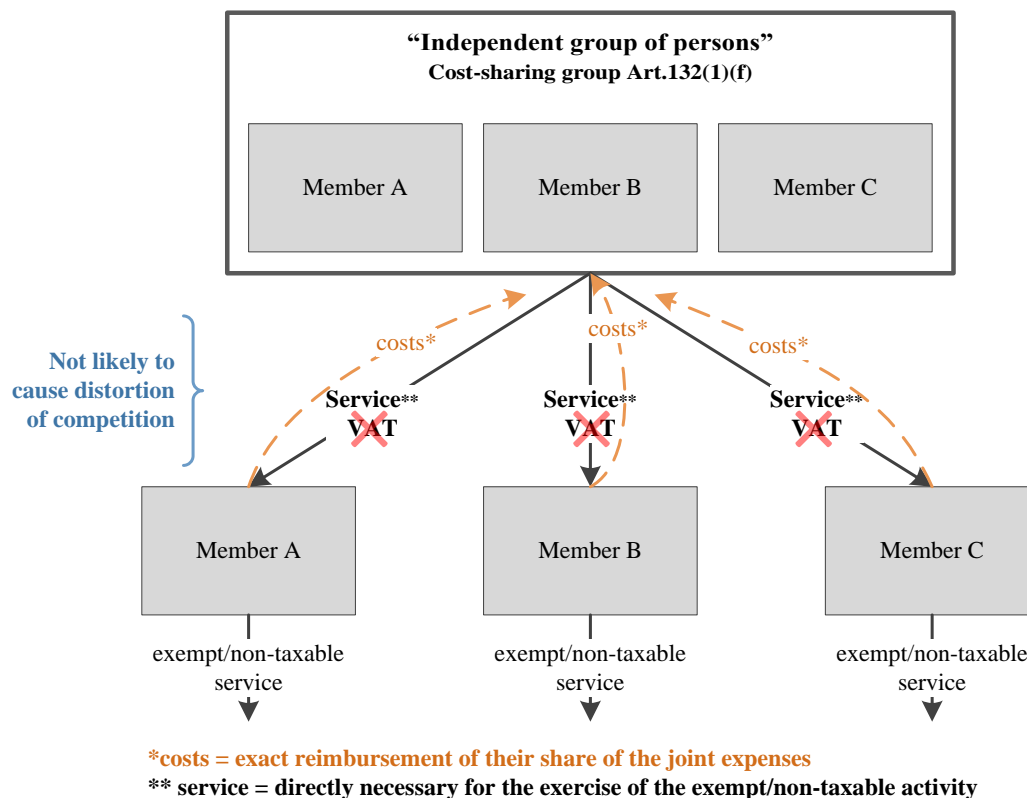
As a general remark, it must be noted that the terms used to specify exemptions such as that provided for under Article 132(1)(f) of the VAT Directive must be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. It is settled case-law that those exemptions constitute independent concepts of EU law whose purpose it is to avoid divergence in the application of the VAT system from one Member State to another.

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<sup>4</sup> In the same line, see CJEU, opinion of Advocate General Mischo in case C-8/01 *Taksatorringen*, points 118-119.

In order for the exemption to apply, Article 132(1)(f) of the VAT Directive lays down five conditions to be met:

1. there must be an entity<sup>5</sup> ("independent group") supplying services to persons who are members of it;
2. the members must be either taxable persons carrying on a downstream activity which is exempt from VAT or out of scope or non-taxable persons;
3. the services supplied by the group must be "directly necessary" for the exercise of the members' exempt or non-taxable downstream activities;
4. the services supplied by the independent group must be rewarded at cost ("exact reimbursement") and so the group must not make a profit out of the exempt services supplied to its members;
5. the exemption from VAT of the supplies must not be likely to cause distortion of competition.



Various questions concerning the interpretation and application of those conditions shall be briefly addressed. Some of the issues are raised for the first time in the VAT Committee.

<sup>5</sup> This entity is often referred to as a "cost-sharing group" or "cost-sharing association". The CJEU has also used the term "umbrella organisation". In this respect, see CJEU, judgment of 15 June 1989 in case 348/87 *Stichting Uitvoering Financiële Acties*, paragraph 15.

**3.1. Condition 1: There must be an entity ("independent group") supplying services to persons who are members of it**

*3.1.1. (New) Which is the status required from an "independent group"?*

Article 132(1)(f) of the VAT Directive is silent as to the status that the independent group supplying services to persons who are its members needs to have, be it from a legal perspective or for VAT purposes. The only requirement set out by the provision is that the independent group must be integrated by "persons".

Therefore, it does not stem from the wording of the provision that there should be any restrictions on the nature of the entity that can be used as a vehicle for forming an "independent group". Although exemptions must be given a narrow interpretation, it seems that any such restriction would hamper the purpose of the exemption for no obvious reason. It follows that an independent group for the purposes of Article 132(1)(f) of the VAT Directive could be crystallised, for example, in a company, a foundation, an association, a cooperative, a consortium, or an European Economic Interest Group (EEIG)<sup>6</sup>.

The CJEU has never directly dealt with this issue, but the cases where the scope of Article 132(1)(f) of the VAT Directive has been examined seem to indicate that the legal form of cost-sharing groups may be different. For example, in *SUFA*<sup>7</sup> and *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsin*<sup>8</sup>, the cost-sharing groups for the purposes of Article 132(1)(f) of the VAT Directive took the form of foundations, while in *Taksatorringen* the independent group was an association.

For VAT purposes, there seems to be no option but for the independent group to be seen as qualifying as a taxable person. This may not be explicitly required under the provision, but Article 132(1)(f) of the VAT Directive presupposes the existence of a taxable supply, *i.e.*, it exempts the (taxable) supply of services by independent groups of persons – that would otherwise have been taxed. Since one of the conditions for a supply of services to fall within the scope of VAT is to be provided by a taxable person<sup>9</sup>, it follows that the supplies of services which are exempted pursuant to Article 132(1)(f) of the VAT Directive must be provided by taxable persons.

In this respect, it should be noted that the concept of taxable person is defined in Article 9(1) of the VAT Directive as any person who, independently, carries out in any place any economic activity. From this perspective, and in line with the above reflections on the legal status of a cost-sharing group, what is ultimately relevant is the economic unit that the cost-sharing group constitutes, rather than its specific legal form. Such reasoning has been supported by the CJEU, for example, in *Heerma*<sup>10</sup>, where it was concluded that a partnership with no legal personality could be considered to be a taxable person distinct from its partners.

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<sup>6</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>7</sup> *Ibid.*

<sup>8</sup> CJEU, judgment of 11 December 2008 in case C-407/07 *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsin*.

<sup>9</sup> Article 2(1)(c) of the VAT Directive.

<sup>10</sup> CJEU judgment of 27 January 2000 in case C-23/98 *Heerma*, paragraph 8.

*3.1.2. (New) Must the "independent group" be a separate entity?*

Although the independent group should be able to adopt any legal form, the use of the word "independent" in the provision suggests that it must at least be an autonomous entity different from its members. Also the use of the term "members" implies the existence of a separate body, consisting of all the persons intending to share in the costs. For the application of the exemption it would therefore not suffice for several persons to merely agree to share costs among themselves, but rather it is necessary to constitute a platform – *i.e.*, the cost-sharing group – from which those exempt services are to be provided.

It should be noted that the use in Article 132(1)(f) of the VAT Directive of the term "members" in plural suggests the presence of at least two of them. Taking into account the reasoning above with regard to the existence of an independent group, it follows that at least three different bodies must be involved in the cost-sharing arrangements: two members and the independent group that they decide to set up in order to outsource the services.

As Article 132(1)(f) of the VAT Directive stands, it does not seem to allow a cost-sharing group to be formed by means of contractual arrangements without having a separate entity – such could be the case, for example, if one of the "members" assumed the provision of services to other "members". In that case, there would be no basis for exemption.

*3.1.3. (New) Is a particular status required for "persons" to be members of a cost-sharing group?*

From a legal perspective, the wording of the provision simply states in respect of members of cost-sharing groups that they need to be "persons" which could include natural or legal persons, in any legal form.

For VAT purposes, the use of the word "persons" seems to imply the possible inclusion of both taxable and non-taxable persons. This seems confirmed by Article 132(1)(f) of the VAT Directive which in respect of the activities which the members of the cost-sharing group must carry out refers to: "*either an activity exempt from VAT, or in relation to which they are not taxable persons*".

This is in line with the interpretation adopted by the CJEU for the purposes of Article 11 of the VAT Directive<sup>11</sup>. The notion of "persons" was by the Commission in its VAT Grouping Communication<sup>12</sup> taken to comprise only "taxable persons". This position has been overruled by the CJEU according to which the inclusion of non-taxable persons in a VAT group is not contrary to the VAT Directive. So, the members of a cost-sharing group could for VAT purposes be either non-taxable persons or taxable persons carrying out an exempt activity or having out-of-scope activities. For example, public bodies that carry out activities for which they are not considered to be taxable persons may also be members of cost-sharing groups.

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<sup>11</sup> CJEU, judgments of 9 April 2013 in case C-85/11 *Commission v. Ireland*; CJEU and of 25 April 2013 in cases C-74/11 *Commission v. Finland*; C-65/11 *Commission v. Netherlands*; C-95/11 *Commission v. Denmark*; and C-109/11 *Commission v. Czech Republic*.

<sup>12</sup> Communication of the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax (COM(2009) 325), section 3.3.1.

*3.1.4. (New) What does the use of the term "member" (of an independent group) imply?*

Not only do the provider and the recipients of the exempt services need to be independent entities according to Article 132(1)(f) of the VAT Directive, but the recipients must be "members" of the independent group supplying the services.

The use of the word "members" suggests that only the persons which make up the cost-sharing group are entitled to a supply of services exempt under the conditions laid down in Article 132(1)(f) of the VAT Directive. Given the purpose of the exemption, which is to allow several economic operators to pool services for themselves, the cost-sharing group could be seen as an extension of such entities. This seems to imply that the cost-sharing group "belongs" to its members, a relationship which may not necessarily entail legal ownership.

*3.1.5. (New) Can a member act individually in the capacity of being the cost-sharing group?*

In other words, the question is whether a member of a cost-sharing group can act as the provider of the services the costs of which are being shared among all the members of the group.

It seems difficult to consider that the services supplied by a member of a cost-sharing group to other members could be exempted under Article 132(1)(f) of the VAT Directive. One of the conditions for the exemption being available is that the services must be supplied by the independent group – that is a separate entity – to its members. Such requirement would not be met, in the case of "member-to-member" supplies of services.

In consequence, the services rendered by one member of the cost-sharing group to another member would fall outside the scope of the exemption, and may therefore have to be taxed.

*3.1.6. (New) Can a subsidiary company act as cost-sharing group for its parent company?*

Where a company acquires a significant participation in the ownership of another business, it becomes the parent company – or holding company – of the latter. The company whose shares have been acquired by the parent company is referred to as the subsidiary.

At this point, the question tabled is whether a subsidiary company could be seen as a cost-sharing group for the purposes of Article 132(1)(f) of the VAT Directive, where one of the members of the cost-sharing group is the holding company which has a participation in the subsidiary.

A parent company and its subsidiary remain different legal entities and, therefore, they could be seen as independent persons for the purposes of Article 132(1)(f) of the VAT Directive. The subsidiary acting as the cost-sharing group thus seems to meet with the condition that the cost-sharing group must be independent from its members. Therefore, it seems possible for a subsidiary to act as a cost-sharing group, where one of its members is the holding company of such a subsidiary, provided that all the conditions laid down in Article 132(1)(f) of the VAT Directive are met.

According to this reasoning, it also seems possible for a holding company to act as a cost-sharing group, where one of its members is the subsidiary of such holding company, provided that all the conditions laid down in Article 132(1)(f) of the VAT Directive are met.

**3.1.7. (New) Can the head office of a company act as cost-sharing group for its branch?**

"Head office" is commonly referred to as the principal establishment or the main establishment of a business. In this sense, "place of business" has been defined by the CJEU as *"the place where the essential decisions concerning its general management are taken and where the functions of its central administration are exercised"*<sup>13</sup>.

On the other hand, "branch" is commonly referred to as the fixed establishment of a business. In terms of VAT, the CJEU has provided guidance on the meaning of "fixed establishment" for the purpose of determining the place of supply, making clear that *"an establishment must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis"*<sup>14</sup>. This test has been codified in Article 11 of the VAT Implementing Regulation<sup>15</sup>.

Concerning Article 132(1)(f) of the VAT Directive, it must be considered whether it is possible to apply the exemption in a scenario where a head office acts as a cost-sharing group supplying certain services at cost and exempted from VAT, and one of the members of such a group is a branch of that head office.

A head office and its branch make up one and the same legal entity. Therefore, in this scenario, the cost-sharing group (head office) and one of its members (branch) would basically constitute the same person. It follows that, for the purposes of Article 132(1)(f) of the VAT Directive, it would be as if one of the members of the cost-sharing group provided services individually to the rest of the members.

As set out in section 3.1.2, one of the conditions for the exemption being available is that the services must be supplied by the independent group – that is a separate entity – to its members. That requirement would not be met in the circumstances described. The conclusion would not be different had the branch acted as a cost-sharing group, with its head office being one of the members of the group, since they would still be the same entity.

**3.1.8. Can a VAT group of the kind referred to in Article 11 of the VAT Directive be a member of a cost-sharing group<sup>16</sup>?**

See section 3.10 of this document.

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<sup>13</sup> CJEU, judgment of 28 June 2007 in case C-73/06 *Planzer*, paragraphs 61 and 63.

<sup>14</sup> CJEU, judgment of 17 July 1997 in case C-190/95 *ARO Lease*, paragraph 16.

<sup>15</sup> Council Implementing Regulation (EU) No 282/2011, of 15 March 2011, laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

<sup>16</sup> Question dealt with in the Working paper No 654.



*3.1.9. (New) May a cost-sharing group provide different services to its members?*

According to the doctrine of the CJEU in *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*<sup>17</sup>, where an independent group is made up of many members whose needs differ, it is perfectly possible that the services supplied to them by that group are not necessarily the same. This would not stand in the way of applying the exemption in Article 132(1)(f) of the VAT Directive.

*3.1.10. May a cost-sharing group provide services to third parties (non-members)*<sup>18</sup>?

This question was raised before the CJEU in *AXA*<sup>19</sup>. The question referred was whether Member States may grant an exemption from VAT pursuant to Article 132(1)(f) of the VAT Directive only where independent groups of persons supply services exclusively for the benefit of their members, to the exclusion of non-members. Unfortunately, the President of the CJEU ordered the removal of this case in 2009 so no guidance was given.

There, however, seems to be no obstacle for the independent group also being able to supply services to third parties other than the members of the group, provided that those services (in so far as they are not covered by another exemption) are taxed.

Neither the special character of the exemption in question nor the need to interpret it restrictively justify the conclusion that the group allowing its members to benefit from exemption may not also carry out (taxed) activities supplying services to third parties. There may be practical difficulties, but they are no different from those which arise in a host of other situations in which it is necessary to apportion inputs between taxed and exempt (or out-of-scope) activities.

*3.1.11. (New) May a cost-sharing group provide (i) exempt services to those of its members meeting the conditions laid down in Article 132(1)(f) of the VAT Directive; and (ii) taxed services to other members not meeting those conditions?*

Indeed, the question is whether the VAT treatment of the services supplied by a cost-sharing group to its members can differ, depending on whether or not the member individually fulfils the conditions laid down in Article 132(1)(f) of the VAT Directive.

There is nothing in the wording of Article 132(1)(f) of the VAT Directive to suggest that each and every one of the supplies of services made to the members of a cost-sharing group need to comply with the requirements, in order for exemption to be available. On the contrary, it seems that each supply of services by the cost-sharing group to a member needs to be looked at separately.

Requiring all supplies of services to qualify for exemption appears to be a restriction not envisaged by the VAT Directive. If the cost-sharing group is made up by numerous members, it seems a step too far to make the availability of the exemption conditional upon compliance by all of them. If that were the case, the requirement that the exemption must not be likely to cause distortion of competition could seriously hamper use of the exemption in cross-border scenarios, for example. Since this condition may be dependent

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<sup>17</sup> *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, paragraph 43.

<sup>18</sup> *Ibid.*

<sup>19</sup> CJEU, case C-168/07 *AXA, Belgium* (withdrawn).

upon the characteristics of every market<sup>20</sup>, it might be so that the application of the exemption causes distortion of competition in one but not in other markets, and already this fact would preclude the exemption being available to all the other members of a cost-sharing group.

Where a supply of services by a cost-sharing group to one of its members does not meet the conditions in Article 132(1)(f) of the VAT Directive for being exempted, that supply would be equated to a taxed supply of services to a non-member.

Therefore, according to such an individual application of the exemption, the same cost-sharing group could provide, depending on the circumstances governing each supply, either exempt or taxed services.

**3.2. Condition 2: Members of the independent group must be either taxable persons carrying on a downstream activity which is exempt from VAT or out of scope or non-taxable persons**

*3.2.1. May members of a cost-sharing group who are taxable persons also carry out taxed activities<sup>21</sup>?*

Given the absence of any indication in the wording of Article 132(1)(f) of the VAT Directive that the exemption is only for the use of groups whose members "exclusively" carry on exempt or non-taxable activities, the Commission services are of the opinion that there is no basis for such a restriction. Moreover, there seems to be no foundation either for the application of an eventual ceiling limiting up to a maximum the number of taxable activities that a member of the cost-sharing group can undertake.

There is certainly the risk that the members of a cost-sharing group may try to take advantage of the tool provided for in Article 132(1)(f) of the VAT Directive by acquiring exempt services from the cost-sharing group that would be subsequently used for the provision of downstream taxed activities – and not the exempt or non-taxable activities required in Article 132(1)(f) of the VAT Directive.

Any potential misuse of the exemption could be minimised by a strict application of the condition that the only services provided by the cost-sharing group to its members which can be exempted are those directly necessary for the exempt or non-taxable activities of the members.

For practical reasons and in order to facilitate the correct and straightforward application of the exemption, it seems reasonable requiring the exempt activities of the member to be carried on in a consistent manner rather than merely sporadically, and to represent a significant part of the member's business. An eventual decision in this matter is left to the discretion of the Member States, on the grounds of Article 131 of the VAT Directive, which states that *"the exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward*

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<sup>20</sup> Concerning the assessment of the distortion of competition in cross-border scenarios, we refer to our comments in section 3.6.3.

<sup>21</sup> Question dealt with in Working paper No 654.

*application of those exemptions and of preventing any possible evasion, avoidance or abuse".*

**3.3. Condition 3: The services supplied by the group must be "directly necessary" for the exercise of the members' exempt or non-taxable downstream activities**

*3.3.1. How should the expression "directly necessary" be interpreted<sup>22</sup>?*

The need to avoid competitive distortions, the principle of neutrality and the fact that exemptions constitute derogations to the general rule according to which VAT is levied on all supplies, counsel a strict interpretation of this condition. Consequently, the exemption should only be applicable to services which are directly connected with the exempt supplies or the non-taxable activities in which the members of the group are engaged.

The ruling in *Taksatorringen* constitutes a useful example of how the expression "directly necessary" must be interpreted. The case involved a cost-sharing association whose members were small or medium-sized insurance companies authorised to underwrite motor-vehicle insurance policies in Denmark. The services supplied at cost by the cost-sharing association to its members consisted in the assessment of damage to motor vehicles caused by car accidents in Denmark, which was directly necessary for the economic activity of the insurance companies. In other words, without the services provided by the cost-sharing group, the subsequent supply of insurance services by the members of the group would have been very difficult, if not impossible.

So, the expression "directly necessary" must be considered to refer to services which are specifically related to the downstream activity and which constitute an indispensable input. In contrast, other services of a general nature such as cleaning services, security services, or legal and tax advice should not qualify for the exemption since they could not be seen as directly connected with the exempt supplies.

The fact that the services may be used for other activities should not preclude the members of a cost-sharing group to benefit from the exemption, since it does not follow from the fact that the services may be used for other activities that they are not directly necessary for an exempt activity.

*3.3.2. Must the services supplied by a cost-sharing group exempt from VAT under Article 132(1)(f) of the VAT Directive be services in the public interest or can they be of a commercial nature<sup>23</sup>?*

The exemption provided for under Article 132(1)(f) of the VAT Directive is contained in Title IX of the VAT Directive, under Chapter 2 "Exemptions for certain activities in the public interest". Hence the question is whether the services exempted under cost-sharing arrangements must be restricted to those which are considered to be of public interest.

The Commission services are of the opinion that the exemption provided for under Article 132(1)(f) of the VAT Directive may also cover services of a commercial nature, including those falling within the scope of Article 135 of the VAT Directive.

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<sup>22</sup> Question dealt with in Working papers No 450 and No 654.

<sup>23</sup> Question dealt with in Working paper No 654.

Firstly, each of the exemptions laid down in Article 132 of the VAT Directive is self-contained and clearly defined. There is nothing in the wording of the provision to exclude its application to commercial services. Moreover, the CJEU held that the commercial character of a service does not prevent it from falling within the scope of the exemptions provided for in Article 132, making clear that *"the heading of Article 13(A) of the Sixth Directive, the wording of which is 'Exemptions for certain activities in the public interest', does not, of itself, entail restrictions on the possibilities of exemption provided for by that provision"*<sup>24</sup>.

**3.4. Condition 4: The services supplied by the independent group must be rewarded at cost ("exact reimbursement") – the group must not make a profit**

3.4.1. *How must the element "joint expenses" be interpreted*<sup>25</sup>? *More specifically, does this term include non-deductible VAT paid by the cost-sharing group?*

The cost-sharing group is to be regarded as a (separate) taxable person pursuant to Article 9 of the VAT Directive. As its activities are exempt from VAT, the non-deductible VAT incurred by the cost-sharing group will inevitably constitute a cost for the group and can therefore be included as a part of its expenses, to be refunded by the members.

**3.5. Condition 5: The exemption from VAT of the supplies must not be likely to cause distortion of competition**

3.5.1. (New) *How should the requirement that the exemption must "not be likely to cause distortion of competition" be interpreted?*

As confirmed by the CJEU in *Taksatorringen*<sup>26</sup>, the requirement that the exemption must not be likely to produce distortion of competition is not directed solely at distortions of competition with an immediate effect, but also at future distortions of competition. However, in order to refuse the application of the exemption, the risk that the exemption may give rise to distortions of competition must be real. In this respect, the CJEU seems to require the risk of distortion of competition being "real", as opposed to what is a purely hypothetical possibility that could never be excluded, and which would render the exemption pursuant to Article 132(1)(f) of the VAT Directive impossible to apply.

It follows that the granting of VAT 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.

3.5.2. *How should the distortion of competition be assessed, in case of cross-border supplies of services*<sup>27</sup>?

See section 3.6.3 of this document.

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<sup>24</sup> CJEU, judgment of 3 April 2003 in case C-144/00 *Hoffman*, paragraphs 37.

<sup>25</sup> Question partially dealt with in Working papers No 450 and No 654.

<sup>26</sup> *Taksatorringen*, paragraphs 63 and 64.

<sup>27</sup> Question dealt with in Working paper No 450.

## **II. Application of the exemption in cross-border scenarios**

### **3.6. General remarks**

It should be noted from the outset that there is no basis in the wording of Article 132(1)(f) of the VAT Directive for the exemption for cost-sharing arrangements to be limited to domestic transactions<sup>28</sup>. Other provisions of the VAT Directive which are limited in territorial scope expressly indicate so in their wording. Such is the case, for example, with Article 11 of the VAT Directive, which provides that only persons established in the territory of a Member State may be regarded as a single taxable person.

Therefore, it does not seem necessary for the cost-sharing group and/or its members to be established in one and the same Member State in order for the exemption pursuant to Article 132(1)(f) of the VAT Directive to be available. Indeed, from the literal wording of the provision, it cannot be discarded that a cost-sharing group may extend to more than one Member State – *e.g.*, this is definitely the case with an EEIG, often used for the purposes of this exemption – or even to a non-EU country.

Having said so, and although the exemption does not contain any explicit territorial limitation, it should be examined whether the exemption is feasible to apply in cross-border scenarios – be it within the EU, or worldwide. In this respect, it must be noted that differences in interpretation and application of Article 132(1)(f) of the VAT Directive could in practice hinder the setting up of cross-border structures.

Some issues of particular relevance when it comes to the analysis of cross-border scenarios need to be highlighted.

#### *3.6.1. Taxable supply and place of supply rules*

Article 132(1)(f) of the VAT Directive presupposes the existence of a taxable supply falling within the scope of EU VAT, *i.e.*, it exempts the (taxable) supply of services by independent groups of persons – that would otherwise have had to be taxed.

In this respect, based on Article 2(1)(c) of the VAT Directive, the scope of VAT for services is, in principle, limited to the supply of services for consideration within the territory of a Member State by a taxable person acting as such. The rules concerning the place of supply of services allow for that purpose to determine whether a supply of services is made "within the territory of a Member State". Where the place of supply of services is outside the territory of the European Union<sup>29</sup>, that supply falls outside the scope of EU VAT.

The use of the exemption for cost-sharing arrangements should not preclude the application of the place of supply rules contained in Articles 43 to 59a of the VAT Directive<sup>30</sup>.

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<sup>28</sup> See Working paper No 654, section 3.1.

<sup>29</sup> For a more detailed view of the territorial scope of VAT, see Articles 5 and 6 of the VAT Directive.

<sup>30</sup> There are two general rules for the place of supply of services: one for supplies to taxable persons (B2B), according to which the place of supply is the place where the customer is established or has a fixed establishment to which the service is provided (Article 44 of the VAT Directive); and another one for supplies to non-taxable persons (B2C), which states that the place of supply is the place where the

As stated in section 3.1.3, members of the cost-sharing group could for VAT purposes be either taxable persons carrying out an activity which is exempt or out of scope or non-taxable persons. Therefore, both B2B and B2C place-of-supply rules could be applicable in relation to cost-sharing arrangements, depending on the nature of the service and the quality and the location of the member receiving the service.

The existence of a cross-border taxable supply of services falling within the scope of the EU VAT, and possible application of the exemption for cost-sharing arrangements, would need to be assessed on a case-by-case basis. Where there is a taxable supply of services pursuant to Article 2(1)(c) of the VAT Directive, the exemption for cost-sharing arrangements should be available no matter whether the supply is domestic or cross-border.

### *3.6.2. Individual application of the exemption*

As set out in section 3.1.11, it would seem that the exemption for cost-sharing arrangements needs to be applied on a case-by-case basis, *i.e.*, the conditions under which a service is supplied by a cost-sharing group to one of its members must be individually assessed. It could therefore be that the same cost-sharing group would provide, depending on the characteristics of the members receiving the services and the conditions of the supply:

- exempt services: where there is a supply of services falling within the scope of VAT and the conditions for exemption laid down in Article 132(1)(f) of the VAT Directive are met;
- taxed services: where there is a supply of services falling within the scope of VAT pursuant to Article 2(1)(c) of the VAT Directive, and the conditions for exemption of Article 132(1)(f) of the VAT Directive are not met;
- services falling outside the scope of VAT where there is not a taxable supply of services pursuant to Article 2(1)(c) of the VAT Directive.

### *3.6.3. Assessment of the conditions for application of the exemption*

The Commission services, on a previous occasion, briefly referred to the assessment of the conditions required for the exemption in Article 132(1)(f) of the VAT Directive to apply to cross-border supplies of services within the EU<sup>31</sup>. It was pointed out that where the services benefiting from the exemption are supplied at the place where the recipient is established or has a fixed establishment, it will be that Member State's legislation, not the legislation of the Member State where the cost-sharing group is established, which will have to be applied when determining whether the conditions laid down in Article 132(1)(f) of the VAT Directive are met.

It follows, taking into account the place-of-supply rules, that the legislation to be applied is that of the country where the transaction takes place, which may not necessarily be the

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service provider is established or has a fixed establishment from which the service is provided (Article 45 of the VAT Directive).

<sup>31</sup> See Working paper No 450.

country where the recipient is established. The scenario where the services benefiting from the exemption are not supplied at the place where the recipient is established or has a fixed establishment has not been examined in the past.

*i. Assessment of "distortion of competition"*

In assessing whether the conditions for applying the exemption in Article 132(1)(f) of the VAT Directive in a cross-border scenario are met, some questions may arise, in particular as regards the condition that the exemption must not be likely to cause distortion of competition. Despite the trend towards a global market, where the cost-sharing group and one or more of its members are established in different countries, it could still be so that the characteristics of their respective markets vary. It is therefore necessary to clarify how to assess the risk of a possible distortion of competition, notably whether this requirement needs to be examined in relation to a particular market and, if so, which is the market (that of the cost-sharing group, or that of the member) that needs to be taken into account.

The VAT Directive does not provide any guidance on the cross-border assessment of the "distortion of competition" risk, and this is an issue never tackled by the CJEU in the context of cost-sharing groups. Although the Commission services are yet to take a stance on this issue, some non-conclusive reflections can be outlined below. For the sake of simplicity, a cross-border scenario within the EU is assumed.

- In *Isle of Wight*<sup>32</sup>, a similar situation was tabled for the purposes of Article 13 of the VAT Directive. This case concerned the provision of services (parking facilities) by four local authorities in the United Kingdom, where the private sector also provided similar services in each of the local authority areas. According to the second subparagraph of Article 13(1) of the VAT Directive, certain public bodies must be regarded as taxable persons for some activities "where their treatment as non-taxable persons would lead to significant distortions of competition". The CJEU was asked whether the distortion of competition was to be assessed at a local level, which would require the conditions of competition on the relevant market to be established, or whether it had to be assessed by reference to the activity of the local authorities in the abstract. In its judgment, the CJEU took the approach that distortion of competition had to be evaluated in that case by reference to the activities carried out by the authorities, and without evaluation relating to any local market in particular<sup>33</sup>.

Due to the particularities of the facts in *Isle of Wight*, it is unclear whether a parallel can be drawn between the reasoning of the CJEU in that case and the assessment of distortion of competition within the context of Article 132(1)(f) of the VAT Directive. It should be kept in mind that public bodies are always to be treated as taxable persons in respect of certain activities (those listed in Annex I of the VAT Directive) according to the third subparagraph of Article 13(1) of the VAT Directive, irrespective of whether a particular public body faces competition at the level of the local market on which it carries on those same activities. Hence in the view of the CJEU it is the nature of the activity, and not the local conditions of competition, which has to be taken into account to assess the likelihood of distortions of competition.

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<sup>32</sup> CJEU, judgment of 16 September 2008 in case C-288/07 *Isle of Wight*.

<sup>33</sup> *Isle of Wight*, paragraphs 25-49

As an additional argument, the CJEU pointed out in *Isle of Wight* that a case-by-case analysis of the competition on the relevant markets could jeopardise the principles of fiscal neutrality and legal certainty, since neither the local authorities nor the private operators could know with certainty whether the supply of services would be subject to VAT<sup>34</sup>.

Finally, it must also be noted that in *Isle of Wight* all the markets examined were placed in the UK and the supplies of services were thus domestic. It cannot be disregarded that differences between markets increase in cross-border supplies.

- In a more recent judgment, *K*<sup>35</sup>, the CJEU makes clear that in view of the principle of neutrality the assessment of a market's characteristics must be made for the whole of each Member State.

In this case it was assessed whether a Member State which has chosen to subject the supply of books printed on paper to a reduced rate of VAT is compelled to extend the application of the reduced rate also to supplies of books on all physical supports other than paper. This is said to depend on the perception of the average consumer, *i.e.*, whether books published in paper form and books published on other physical supports are goods which are liable to be regarded by the average consumer as similar. As the average consumer's assessment is liable to vary according to the different degree of penetration of new technologies in each national market and the degree of access to the technical equipment enabling the consumer to make use of books published on physical supports other than paper, it is the average consumer in each Member State who must be taken as a point of reference.

- The condition of "distortion of competition" was also the object of analysis by the CJEU in *Taksatorringen*<sup>36</sup> for the purposes of Article 132(1)(f) of the VAT Directive. Although the question referred to the existence of an actual or hypothetical risk, some reflections were made as to the requirement linked to distortion of competition and its purposes.

As pointed out by the Advocate General, it needs to be considered whether an exemption given to one party (the cost-sharing group) and the imposition of liability to tax on another is the *determining* cause of independent operators being excluded from the market, *i.e.*, it is causing distortion of competition<sup>37</sup>.

According to the Advocate General, the cost-sharing group must not have the characteristics of an independent operator seeking to create a customer base in order to generate profits; and if the group keeps its members' customer base, it could not be suggested that it is the exemption from which it benefits that closes the market to independent operators<sup>38</sup>. The CJEU explicitly validated this by saying that "*if, irrespective of any taxation or exemption, the groups are assured of keeping their*

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<sup>34</sup> *Isle of Wight*, paragraphs 50-52.

<sup>35</sup> CJEU, judgment of 11 September 2014 in case C-219/13 *K*, paragraph 30.

<sup>36</sup> *Taksatorringen*, opinion of Advocate General Mischo, point 134.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Taksatorringen*, opinion of Advocate General Mischo, point 131.



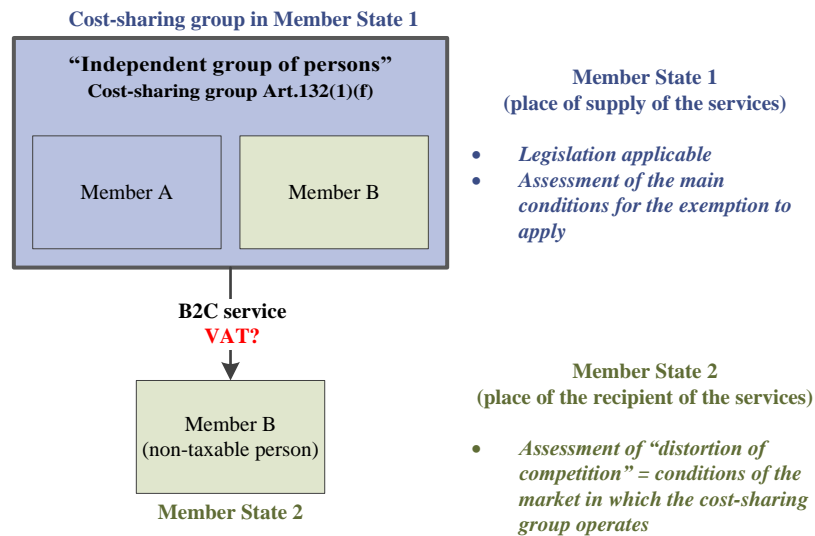
*members' custom, there is no reason to take the view that it is the exemption granted to them that closes the market to independent operators*<sup>39</sup>.

Under this approach, it seems that the assessment of whether the exemption is likely to cause distortion of competition could be limited to the characteristics of the cost-sharing group and its supplies (groups have to keep their customer base to their members), rather than the conditions of the market in which the cost-sharing group operates.

- Another approach could be to assess the distortion of competition on the basis of the actual characteristics of the relevant market and any competing operators. From this perspective, it seems that the requirement should be examined in the market of the recipient of the services (who could have acquired the same services from other operators), and not the market of the place where the cost-sharing group is established.

The fulfilment of this condition could only be monitored by the tax authorities of the place where the member of the cost-sharing group receiving exempt supplies is located, that is to say, the place where the recipient of the services is established.

This could create tension in cases involving services where the place of supply of the services is not the place where the recipient actually receives the services (but the place where the provider, *i.e.* the cost-sharing group, is established). This scenario is illustrated in the following example:



### 3.7. Cross-border supplies of services to non-EU countries

It seems clear that there could be only two scenarios concerning a cross-border supply of services involving non-EU countries: (i) a supply of services by a non-EU cost-sharing group to a EU member; and (ii) the supply of services by a EU cost-sharing group to a

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<sup>39</sup> *Taksatorringen*, paragraph 59.

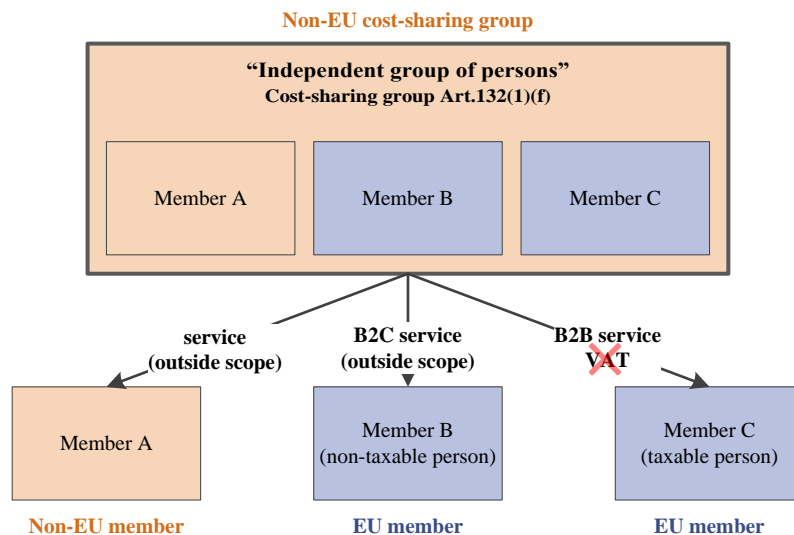
non-EU member. For each of the scenarios, we will examine by way of examples<sup>40</sup> the effects of a potential application of the exemption for cost-sharing arrangements.

*i. Supply of services by a non-EU cost-sharing group to an EU member*

A supply of services by a non-EU cost-sharing group to one of its members established in a Member State could fall within the scope of VAT. As outlined in the diagram below, such could be the case, for example, with a B2B supply of services by a non-EU cost-sharing group to one of its members (C) established in a Member State, where the services fall under the general rule contained in Article 44 of the VAT Directive. Since the service provider is not established in the customer's Member State, the EU member would need to account for VAT under the reverse charge mechanism.

Under these circumstances, it could seem possible to apply the exemption pursuant to Article 132(1)(f) of the VAT Directive for services provided by a non-EU entity, provided that all the conditions laid down in the provision are met. In practice, it is however uncertain up to which extent it could be possible for the tax authorities of the Member State in which the member C is established to carry out an assessment of the requirements laid down in Article 132(1)(f) of the VAT Directive, which may depend on information about the cost-sharing group established abroad (e.g., it needs to be verified that the recipient of the services is a member of the cost-sharing group, that the services were supplied at cost...).

Had the same supply of services by a non-EU cost-sharing group to one of its members (B) been supplied in a B2C scenario, the place of supply of services would be the place where the service provider is established or has a fixed establishment pursuant to Article 45 of the VAT Directive. Accordingly, the place of supply would be outside the EU, and that transaction would not, in principle, fall within the scope of VAT.




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<sup>40</sup> The examples given should not be seen as an exhaustive list. In the scenarios described, and for the sake of simplicity, we assume that the effective use and enjoyment rule provided for in Article 59a of the VAT Directive is not applied. We also assume in the examples that the services supplied by the cost-sharing group do not fall within any of the particular provisions laid down in Articles 46 to 58 of the VAT Directive.

*ii. Supply of services by an EU cost-sharing group to a non-EU member*

As shall be seen in the drawing below, a supply of services by an EU cost-sharing group to one of its non-EU members (B) could constitute a taxable transaction, for instance, in cases involving a supply of B2C services governed by the general rule of Article 45 of the VAT Directive, supplied by the group to one of its members established abroad. The exemption pursuant to Article 132(1)(f) of the VAT Directive could seem available in this scenario.

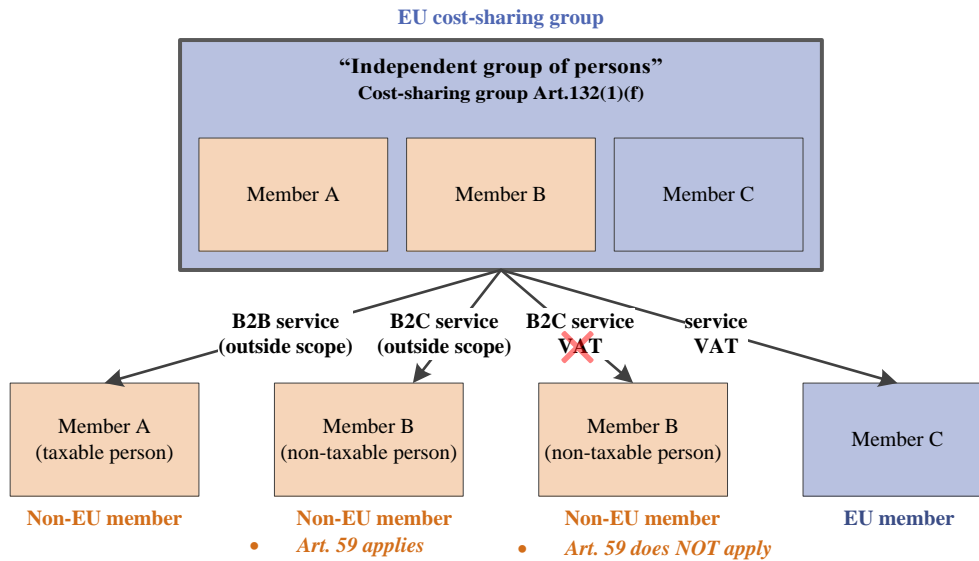
It is nonetheless difficult to see how compliance with the requirements laid down in Article 132(1)(f) of the VAT Directive for the application of the exemption could be ensured in practice. For example, in case that the assessment regarding the distortion of competition risk had to be carried out in the market of the recipient of the services<sup>41</sup>, situated outside the EU, that valuation would become a cumbersome burden for the tax authorities of the Member State where the cost-sharing group is established. It would be also necessary to assess the activities performed by the recipient of the services abroad, in order to verify that they are exempt or non-taxable activities and that the exempt services are directly necessary for the performance of those activities. The Commission services are inclined to think that in such circumstances, it could be almost impossible to apply the exemption in practice.

For services which, as a result of the customer being located outside the EU, fall under Article 59 of the VAT Directive, this may not be relevant as in that case the supply would not, in any event, be subject to VAT. Article 59 of the VAT Directive establishes for certain services supplied to non-taxable persons outside the EU that the place of supply shall be the place where that person is established. This scenario is illustrated below through the B2C supply from the EU cost-sharing group to a non-EU member (B), where Article 59 of the VAT Directive applies.

On the other hand, with a B2B supply of services by an EU cost-sharing group to a non-EU member (A), the place of supply of services would be the place where the customer is established or has a fixed establishment pursuant to Article 44 of the VAT Directive. Accordingly, the place of supply would be outside the EU, and the transaction would fall outside the scope of VAT.

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<sup>41</sup> Concerning the assessment of the distortion of competition in cross-border scenarios, we refer to our comments in section 3.6.3.



### 3.8. Cross-border supplies of services within the EU

The existence of a cross-border taxable supply of services falling within the scope of VAT, and possible application of the exemption for cost-sharing arrangements, should be assessed on a case-by-case basis. Where there is a taxable supply of services pursuant to Article 2(1)(c) of the VAT Directive, even if it is a cross-border transaction, the exemption for cost-sharing arrangements should be available.

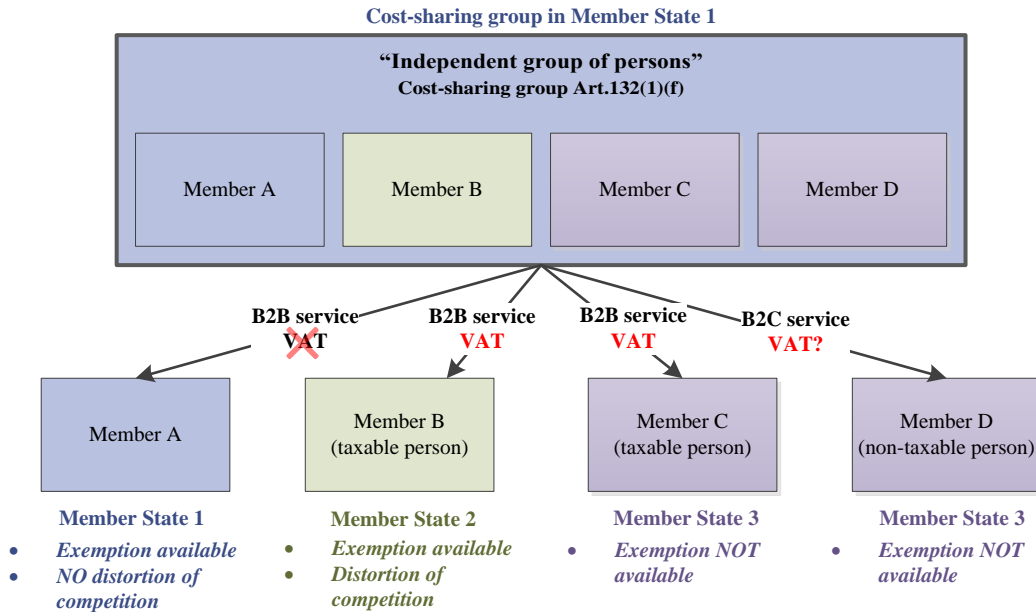
Given the individual application of the exemption, for every supply of services by the cost-sharing group to its member, we can outline several outcomes in cross-border scenarios. Some of these outcomes derive from the transposition made of Article 132(1)(f) of the VAT Directive by Member States.

As shown in the diagram below, for example, a B2B supply of services by a cost-sharing group established in Member State 1 could be made to one of its members (A) in the same Member State. The conditions for applying the exemption in Article 132(1)(f) of the VAT Directive would in this one scenario have to be assessed by Member State 1.

There could also be a taxable B2B supply of services by a cost-sharing group established in Member State 1 to one of its members (B) established in Member State 2, where the place of supply would be Member State 2 according to Article 44 of the VAT Directive. In this second scenario, all conditions laid down in Article 132(1)(f) of the VAT Directive would need to be met for the exemption to be available. Concerning the assessment of the distortion of competition in cross-border scenarios, we refer to our comments in section 3.6.3.

Another scenario could be to have a taxable B2B supply of services by a cost-sharing group established in Member State 1 to one of its members (C), established in Member State 3 which may not have transposed Article 132(1)(f) of the VAT Directive. In this case, it is difficult to see how the tax authorities of Member State 3, in which the place of supply of the services would be, could be willing to acknowledge application of the exemption.

There could be a variation of the scenario where a taxable B2C supply of services by a cost-sharing group established in Member State 1 to one of its members (D) established in Member State 3, in which the place of supply would be Member State 1. Having in mind that the national legislation of Member State 3 may not foresee any cost-sharing arrangements, the question is whether the exemption could be applied on the basis of the legislation of Member State 1.



### **III. Interaction of the exemption with VAT groups**

#### **3.9. Similarities and differences between cost-sharing groups and VAT groups**

Article 11 of the VAT Directive contains a provision allowing Member States to introduce VAT grouping provisions. More specifically, it is envisaged that a Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

The main consequence of this provision is that upon joining a VAT group the group member dissolves itself from any possible, simultaneously existing legal form and instead becomes part of a new separate taxable person for VAT purposes – namely, the VAT group – as confirmed by the CJEU in *Ampliscientifica*<sup>42</sup> and *Skandia America*<sup>43</sup>.

Cost-sharing arrangements are in fact totally different from the concept of a VAT group, as they do not, for instance, have the effect of creating a new single taxable person<sup>44</sup>. Find below a summary of the main differences between the two provisions in terms of impact.

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<sup>42</sup> CJEU, judgment of 22 May 2008 in case C-162/07 *Ampliscientifica*, paragraph 19.

<sup>43</sup> CJEU, judgment of 17 September 2014 in case C-7/13 *Skandia America Corporation USA, filial Sverige*.

<sup>44</sup> VAT Grouping Communication, *op.cit.*, section 2.

	<b>Cost-sharing group</b> <i>Article 132(1)(f)</i>	<b>VAT group</b> <i>Article 11</i>
<i>Optional for Member States?</i>	Mandatory	Optional
<i>Creation of a single taxable person?</i>	It does not create a single taxable person	It creates a single taxable person (the VAT group)
<i>Which supplies may benefit from the provision</i>	Services supplied by the cost-sharing group to its members	Goods or services supplied within the VAT group
<i>VAT treatment of the supplies?</i>	Exempt	Out of scope (supplied within the same taxable person)
<i>Main conditions to be fulfilled, for the provision to be applied?</i>	<ul style="list-style-type: none"> <li>• Members of the cost-sharing group must carry on an activity which is exempt from VAT or in relation to which they are not taxable persons.</li> <li>• The exempt supplies must be directly necessary for the exercise of the member's activity.</li> <li>• The exempt supplies must be rewarded at cost.</li> <li>• The exemption must not be likely to cause distortion of competition.</li> </ul>	<ul style="list-style-type: none"> <li>• Persons regarded as a single taxable person must be established in the territory of the Member State of the VAT group.</li> <li>• While legally independent, persons of the VAT group must be closely bound to one another by financial, economic and organisational links.</li> </ul>

### **3.10. VAT group as a member of a cost-sharing group**

At this point, it must be considered whether a VAT group pursuant to Article 11 of the VAT Directive can be a member of a cost-sharing group for the purposes of Article 132(1)(f) of the VAT Directive and, therefore, receive exempt supplies of services from the cost-sharing group.

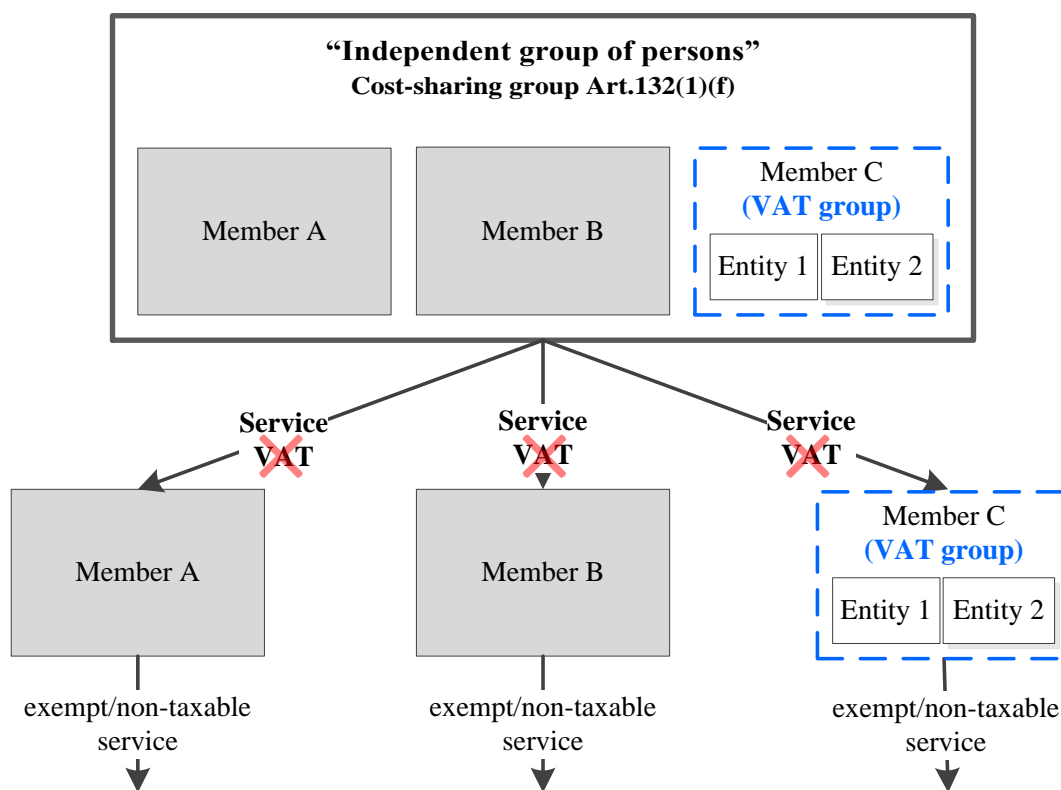
This question was already examined<sup>45</sup>. On that occasion, it was concluded that while Articles 11 and 132(1)(f) of the VAT Directive deal with independent concepts, there is no obvious reason for excluding single taxable persons who are themselves composite entities, such as VAT groups, from the benefit of exemption. There is no basis for such a conclusion in the wording of Article 132(1)(f) of the VAT Directive, taking into account that the exemption is granted to "*supplies of services by independent groups of persons*", nor is there any reason *a priori* to believe that the inclusion of such persons would run counter to the correct and straightforward application of the exemption. The fact that a VAT group is a taxable person which may contain more than one legal entity should not be seen as problematic.

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<sup>45</sup> Working paper No 654.

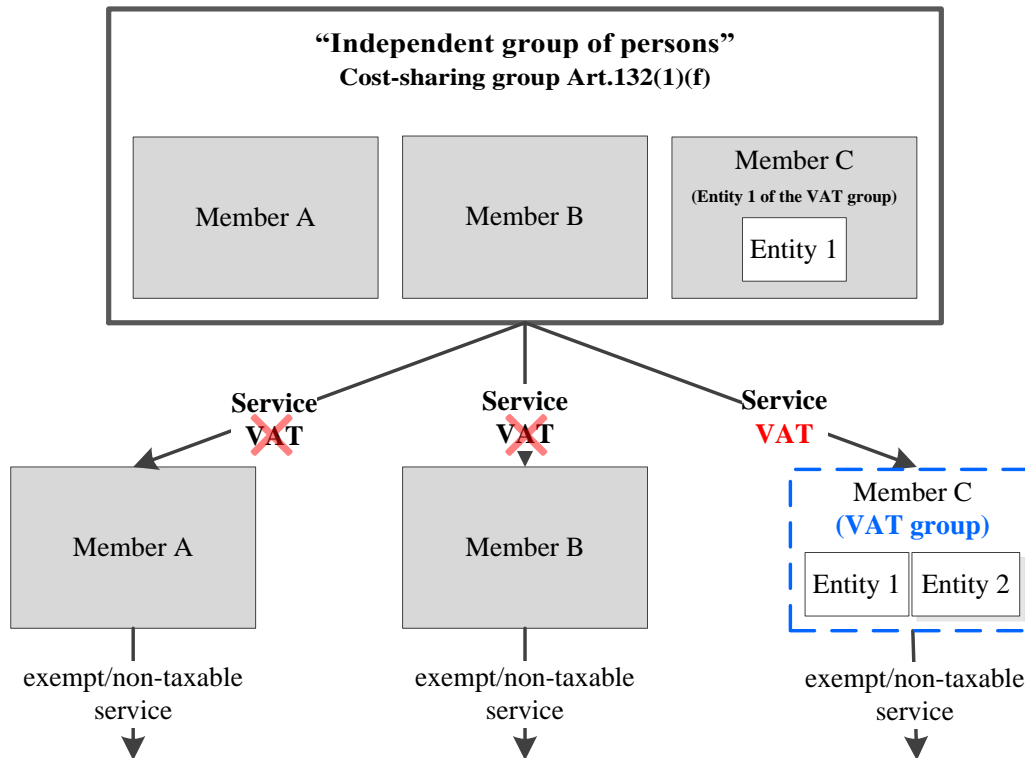
The Commission services therefore consider that there is no obstacle to the inclusion of "single taxable persons" in a cost-sharing group organised for the purposes of Article 132(1)(f) of the VAT Directive.

Having said so, it must be underlined that the conditions provided for under the VAT Directive concerning the members of the cost-sharing group would need to be fulfilled by the VAT group as a whole. If so, the VAT group could be seen as a member of the cost-sharing group for the purposes of Article 132(1)(f) of the VAT Directive, as outlined in the diagram below.



If the conditions laid out in Article 132(1)(f) of the VAT Directive are not met by the VAT group as a whole, the latter cannot be seen as a member of a cost-sharing group entitled to receive exempt supplies of services.

Where only one of the entities making up the VAT group under Article 11 of the VAT Directive would be a member of a cost-sharing group, as in the scenario presented below, it does not seem possible that the exemption pursuant to Article 132(1)(f) of the VAT Directive could be applicable to supplies of services made by the cost-sharing group to the VAT group as a whole. Nor would it be possible to argue that the supplies of services are provided by the cost-sharing group to the entity forming part of the VAT group, since for VAT purposes the VAT group as a whole is the only existing taxable person.



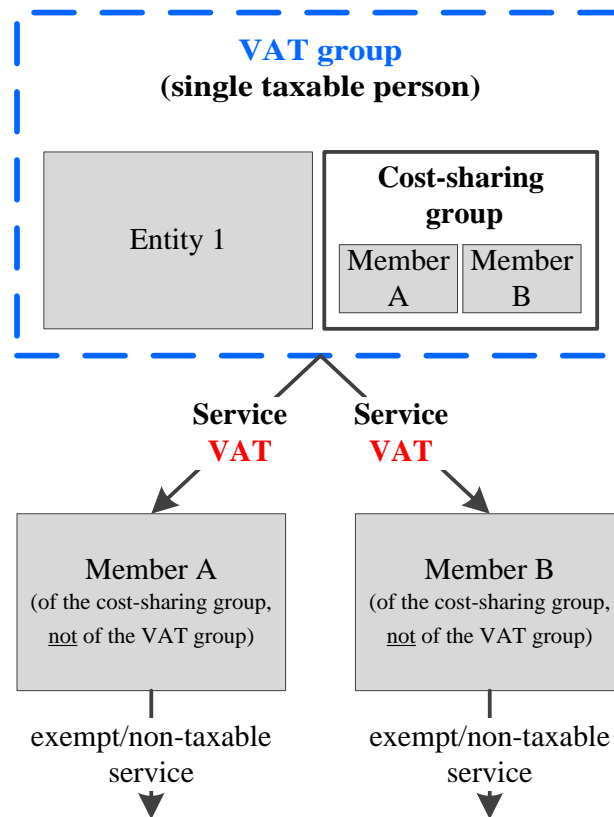
### 3.11. Cost-sharing group as a member of a VAT group

Article 11 of the VAT Directive simply refers to "persons", when describing which members are eligible to join a VAT group. Provided that such persons are established in the territory of the Member State where the VAT group is formed, and that the persons legally independent are closely bound to one another by financial, economic and organisational links, there seems to be no reason, looking at the wording of the legal provision, for precluding a cost-sharing group from joining a VAT group.

However, it must be taken into account that upon joining a VAT group, the cost-sharing group would dissociate itself from any previous and simultaneously existing legal form and would instead become part of a new separate taxable person for VAT purposes (the VAT group as a whole).

In consequence, once a cost-sharing group belongs to a VAT group it is difficult to see how for the purposes of Article 132(1)(f) of the VAT Directive the cost-sharing group could be seen as supplying services to another party. Given that the VAT group is the only remaining taxable person for VAT purposes, in such circumstances, it seems that the entity supplying the services would then be the VAT group and not the cost-sharing group. Therefore the supply made by the VAT group could not benefit from the exemption pursuant to Article 132(1)(f) of the VAT Directive.





#### IV. Final considerations

The provision which sets out the exemption for cost-sharing arrangements, contained in Article 132(1)(f) of the VAT Directive, can be seen as ambiguous in its wording and it seems that Member States interpret and apply it in diverse ways. Hence there is a need for clarification.

In order for the exemption to apply, Article 132(1)(f) of the VAT Directive lays down five conditions to be met:

- (i) there must be an entity ("independent group") supplying services to persons who are members of it;
- (ii) the members must be either taxable persons carrying on a downstream activity which is exempt from VAT or out of scope or non-taxable persons;
- (iii) the services supplied by the group must be "directly necessary" for the exercise of the members' exempt or non-taxable downstream activities;
- (iv) the services supplied by the independent group must be rewarded at cost ("exact reimbursement") and so the group must not make a profit out of the exempt services supplied to its members; and
- (v) the exemption from VAT of the supplies must not be likely to cause distortion of competition.

The main findings concerning these conditions can be summarised as follows:

- It is necessary for the exemption to apply to have a separate entity – a taxable person, with any legal form – acting as a cost-sharing group. Therefore, a subsidiary company could act as a cost-sharing group, even if one of the members of the cost-sharing group is the holding company with a participation in the subsidiary; but a head office could not act as a cost-sharing group, where one of the members of the cost-sharing group is the branch, since they are the same entity.
- A cost-sharing group must be constituted by "members" of the cost-sharing group, which may be taxable or non-taxable persons. The exemption should be applied individually to every supply of services from the cost-sharing group to a member; and should not be restricted to the supply of services in the public interest, but should also be available to those of a commercial nature.
- The exempt services must be specifically related to the downstream activity performed by the member of a cost-sharing group, and must constitute an indispensable input in that respect. The members of a cost-sharing group who are taxable persons may carry out taxed activities, besides performing downstream activities that are exempt or out of scope.
- The cost-sharing group must recover no more than the exact reimbursement of the joint expenses. In this respect, non-deductible VAT incurred by the cost-sharing group could be included as a part of the costs.
- The exemption must not be likely to cause distortion of competition, in order to be available. But the application of the exemption should be refused only if there is a genuine risk that it may itself, immediately or in the future, give rise to distortions of competition.

The existence of a cross-border taxable supply of services falling within the scope of VAT, and a possible application of the exemption for cost-sharing arrangements, should be assessed on a case-by-case basis. Where there is a taxable supply of services pursuant to Article 2(1)(c) of the VAT Directive, even if it is a cross-border transaction, the exemption for cost-sharing arrangements should be available. However, some cross-border scenarios examined – as regards supplies with non-EU countries or within the EU – point to a cumbersome application of the exemption. Notably, it is unclear how to carry out the assessment of the requirement in Article 132(1)(f) of the VAT Directive that the exemption must not be likely to cause distortion of competition.

Concerning the interaction between cost-sharing arrangements and VAT groups set up under Article 11 of the VAT Directive, the two concepts and their implications are in fact totally different. It seems possible for VAT groups to be a member of a cost-sharing group provided that the VAT group as a whole meets the requirements laid down in Article 132(1)(f) of the VAT Directive.

It also seems possible for a cost-sharing group to join a VAT group. However, given that upon joining a VAT group the cost-sharing group would dissociate from any previous and simultaneously existing legal form and would instead become part of a new separate taxable person for VAT purposes (the VAT group as a whole), it is difficult to see how for

the purposes of Article 132(1)(f) of the VAT Directive the cost-sharing group could be seen as the entity supplying the services and thus being able to benefit from the exemption.

**4. DELEGATIONS' OPINION**

The delegations are requested to give their opinion on the issues raised.

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