On Thursday 21 September 2017, the Court of Justice of the European Union (CJEU) released its long awaited decisions in cases DNB Banka (C-326/15), Aviva (C-605/15) and Commission against Germany (C-616/15), concerning the operation of the Independent Group of Persons (IGP), sometimes also referred to as cost sharing agreement.

These decisions come as last in the series of the CJEU judgments concerning the application of the IGP exemption regime across the European Union. We can notably recall the decision issued on 4 May 2017 in the case Commission against Luxembourg (C-274/15) in which the Court found a number of features of the Luxembourg IGP model as contradictory with the broadly defined EU VAT rules on the subject matter.

The CJEU in its decisions in cases DNB Banka and Aviva followed the opinion of the Advocate General Julianne Kokott stating that the services rendered by an IGP, of which members carry out activities of financial or insurance sectors, cannot benefit from a VAT exemption.

Instead, in all of its three decisions the CJEU stated that the VAT exemption should be applicable to the services provided by an IGP of which members carry out activities of “general interest” (notably such as medical care, welfare, certain sport and cultural services, or any other activities of general interest listed in the VAT directive).

Finally, the Court has concluded in the decision in the case Commission against Germany. Member State where the application of the IGP exemption is restricted to members operating in specific fields of activities of general interest, such as the health and welfare sectors, is contrary to the VAT Directive.
Background

The IGP regime exempts services supplied from the group to its “members”, which must be taxpayers with exempt and/or non-business activities. These services must be “directly necessary” for each member’s exempt/non-business activities and must also be delivered at cost under the “exact reimbursement” criterion. Finally, application of the IGP cannot produce a “distortion of competition”. To clarify its use and scope a number of cases have recently been referred to the CJEU.

In the Latvian case of DNB Banka (C-326/15) and the Polish case of Aviva (C-605/15), the Court has clarified the IGP’s use as follows:

- The Article 132(1)(f) of the VAT directive must be interpreted to the effect that the exemption provided for in that provision relates only to IGPs whose members carry on an activity in the public interest referred to in Article 132 of the VAT directive
- The supply of services which do not contribute directly to the exercise of activities in the public interest referred to in Article 132 of the VAT directive, but to the exercise of other exempt activities, such as in particular those referred to in Article 135 of the VAT directive, cannot come under the VAT exemption provided for in Article 132(1)(f) of the VAT directive
- On such basis, the services supplied by IGPs whose members carry on an economic activity in the area of insurance, banking or financial services are not entitled to that VAT exemption

In the case of Commission against Germany (C-616/15), the Court stated that the scope of the VAT exemption for the services rendered by IGPs cannot be restricted to a limited number of professions acting in general interest, which was the case of the German IGP regime.

Nevertheless, the Court has consistently held that its decision cannot have a retroactive effect for the businesses and cannot have a direct effect of imposing the obligations on an individual, and, as such, cannot therefore be relied upon against an individual. In that sense, the CJEU appears to stress the principle of legal certainty. In its view, the businesses which have relied on earlier court decisions should not be disadvantaged in respect of prior periods.

Implications

The Luxembourg IGP was already subject to some changes following the decision in the case Commission against Luxembourg (C-274/15). Today’s decisions of the CJEU will further lead to revamping of the Luxembourg IGP regime rendering its application impossible for businesses within the financial and insurance sectors.

Therefore, from a Luxembourg perspective, where the IGP regime is used extensively in the broadly defined financial and insurance sectors, the taxpayers should consider the impact of the withdrawal of the IGP regime in terms of additional VAT costs, and any alternative options that may be available, including within the Brexit context. This is likely to include discussions around the introduction of VAT grouping into the national law which in the light of the developments on the subject matter should accelerate its pace considerably, the sharing of resources based on Global Employment Contract, and any other alternative that could be developed on a case by case basis with our clients.

For further information, please contact your usual EY contact or one of our EY Luxembourg VAT specialist.