REFIT Platform Opinion on EU VAT Directive (2006/112/EC) affecting insurance and financial services by the Board of Swedish Industry and Commerce (NNR)

The REFIT Platform has considered the submission from the Board of Swedish Industry and Commerce (NNR) that refers to issues related to the tax exemptions granted to financial and insurance services in the context of the VAT Directive (2006/112/EC). The submitter asks the European Commission to, 1) Re-examine the scope of exemptions and clarify the definition of the different exempted insurance and financial services in Art 135.1 a)-g); 2) Amend Art 137 to introduce a wide option to tax for the industry; 3) Review Art. 132.1.f) and introduce cost-sharing for entities carrying out insurance and financial services and 4) Amend and clarify the rules on VAT grouping in Art 11.

The Stakeholder group recognizes the problems described in the submission and supports its proposals. The Stakeholder group invites the European Commission to relaunch the package to amend the Directive as started in 2007, encompassing also the review of exemptions including cost-sharing.

The majority of Member States that contributed to the opinion agrees in principle, partially or totally with the recommendations of the Stakeholder group. Some Member States acknowledge that after lengthy discussions at the Council, Member States decided not to proceed with the suggested amendments to the VAT Directive. Other Member States would support an evaluation by the Commission. As regards the cost sharing exemption, a few Member States indicate that it does not apply to financial services and insurance and acknowledge that ECOFIN has agreed to further exploration of this issue by Commission; some of them recall the ECJ case-law as this regard.
I Submission XVIII.19.a by the Board of Swedish Industry and Commerce (NNR)

EU VAT Directive Council 2006/112


Area Taxation/VAT

Legislation Directive 2006/112/EC on the common system of value added tax

Burden on business

According to the current EU VAT legislation no VAT is charged to the customers on most financial and insurance services. However, the financial industry, including the insurance industry, does indeed also supply many taxable services. This means that financial entities are constantly faced with the obligation to determine whether the service supplied is a single taxable or exempt service, a supply which is ancillary to the main taxable or exempt supply or a distinct and independent taxable or exempt supply of a service. This analysis affects the company’s tax liabilities and if the result is not shared by the Tax Agency it may lead to heavy penalties and charges of additional tax. The fact that the price of financial services often involves high amounts, the effect of diverging views regarding tax liability may be extremely costly. Thus, a better definition of the exempted services according to the Directive is urgent.

New products and business models, technical development and a new market structure with new financial operators within the EU enhances the tax problems further. In order to avoid the burden of having to distinguish what part or parts in a bundled service to a customer is an exempt service or a taxable service financial companies should be given a strict option to tax exempted services.

Moreover, the exemption for financial and insurance services is not applied uniformly within the EU. This uncertainty has led to a significant growth in litigation with the Court of Justice of the European Union (CJEU) being asked to interpret the legislation with increasing frequency. This process can be initiated by either businesses or tax administrations, both of whom are faced with ambiguity and uncertainty. It is a slow and cumbersome process and the decisions by the CJEU are far from clear and very often create new problems. Divergent interpretation of the CJEU cases by individual Member States has increased legal uncertainty for financial companies
operating in several countries on the EU single market. Some of the most recent cases creating huge uncertainty and burden are C-7/13, Skandia America (VAT grouping), C-605/15, Aviva, C-326/15, DNB Banka and C-616/15, Commission v Germany (cost sharing). The increased administrative burden created by the court cases should be solved by amending the rules on cost sharing and VAT grouping.

Since the legislation in the VAT Directive was adopted in 1977 it had not been revisited until 2007 when the European commission presented a package to review the exemption including cost sharing. Unfortunately, the package was withdrawn by the Commission in 2016 due to lack of progress in Council. However, due to progress in other areas for the free movement of capital and supply of financial services cross border within the EU, the need for a review is now greater than ever.

Simplification proposal

Re-examine the scope of the exemptions and clarify the definitions of the different exempted insurance and financial services in Article 135.1 a)-g). Amend Article 137 and introduce a wide option to tax for the industry. Review Article 132.1 f) and introduce cost sharing for entities carrying out insurance and financial services. Amend and clarify the rules on VAT grouping in Article 11 by treating supplies for internal use between a branch and the headquarters as out of scope for VAT, even if one of the entities belong to a VAT group, and allow for grouping to be applied cross-border.

Effects of the simplification proposal

- Substantive reduction in administrative burden and costs
- Better functioning of the internal market for financial and insurance services, in line with other policy areas such as the Capital Markets Union (CMU) and cross-border financing.

For further information. These reports illustrate the administrative burden and costs related to the exemption for financial and insurance services:


Copenhagen economics: Effects of VAT-exemption for financial services in Sweden:
Impact on Swedish banks and their customers compared to a full VAT system, 2016

see annexes (by clicking right on each paper clip)
2 Policy Context


Financial and insurance services are generally exempt from VAT (Article 135). A natural consequence is that VAT constitutes a cost for financial and insurance operators, because they cannot deduct input VAT paid. They often therefore seek to alleviate this cost by means of existing instruments such as VAT groups (Article 11 of the VAT Directive) or cost-sharing arrangements (Article 132(1)(f)), although the characteristics of these provisions vary.

Cost-sharing arrangements are widely used by financial and insurance operators as a remedy for their input VAT burden. This practice, allowed by most Member States, has, however, been recently overruled by the Court of Justice of the European Union (CJEU). As a result, pressure has increased to address the issues resulting from this judgement.

Independently of the above, the VAT treatment of financial and insurance services raises many other problems. The reason is that current rules date back to 1977 and are complex and outdated. Attempts have been made to clarify and modernise VAT rules for financial and insurance services, but negotiations on the Commission’s 2007 proposals in Council came to a deadlock and the proposals were withdrawn in 2016. The problems linked to the VAT treatment of financial and insurance services, however, remain and have since worsened, in particular due to the rise of digital economy and the increase in the outsourcing of input services by financial and insurance operators, in part driven by regulatory changes.

While the most recent discussion on the VAT treatment of the financial and insurance services has been very much triggered by the loss of the cost-sharing exemption, it therefore has a broader context and relates to problems that have affected the taxpayers and national tax administrations for a longer while.

3 Opinion of the REFIT Platform

3.1 Considerations of the REFIT Platform Stakeholder group

The REFIT Stakeholder group recognises the problems described in the submission and finds the current situation unsustainable. Financial and insurance service providers as well as the national tax administrations are faced with unnecessary burdens and uncertainties, as a result of the outdated and complex rules.

It is necessary to update the rules from 1977 to ensure that they reflect our reality today. Both the financial and the digital sector are evolving fast and the rules governing them have to follow the developments.

The Stakeholder group therefore recommends the Commission to review this issue further and evaluate the appropriateness of the existing rules in the current context, taking into account the digitalisation of the financial sector.
### 3.2 Considerations of the REFIT Platform Government group

Seventeen Member States contributed to this opinion.

Twelve out of the seventeen contributing Member States agree in principle, partially or totally with the recommendations of the Stakeholder group. Some of them acknowledge that after lengthy discussions over years Member States decided not to proceed with the suggested amendments to the VAT Directive. Others would support an evaluation by the Commission.

A few Member States make a particular reference to the cost sharing exemption. Two indicate that it does not apply to financial services and insurance; one Member State acknowledges that ECOFIN has agreed to further exploration of this issue by the Commission. Two Member States recall the ECJ case-law as this regard.

Two Member States do not support the extension of the scope of the VAT exemption to financial and insurance services. Moreover, one Member State cannot agree with a cost-sharing mechanism. One Member State needs more analysis at national level.

One Member State indicates that points of contact with the ongoing review of the VAT Directive must be considered.

#### Member State 1

MS1 maintains its previously expressed position that it does not support the extension of the scope of the VAT exemption for supplies of financial and insurance services provided for in the VAT Directive. So far, the discussions in Council's Working Party on Tax Questions - VAT have shown that adopting precise and unambiguous definitions for VAT exempt supplies is extremely difficult, or even almost impossible. In view of this, the introduction of new definitions will hardly lead to the elimination of cases of preliminary ruling before the Court of Justice of the European Union.

For the purpose of reducing the burden of unambiguously determining whether a bundled service is exempt or taxable, MS1 would support the introduction of an option for VAT taxation of such supplies of financial or insurance services.

As far as, in accordance with the option provided by the VAT Directive, MS1 has not introduced VAT grouping but, in line with the practice of the CJEU, it has introduced rules for the supply of a service between an entity established and participating in a VAT group in another Member State and its branch established in MS1 territory, and vice versa, we would not oppose work in this direction if the option for Member States not to introduce VAT group rules on their own territory remains.
In this sense and within the framework of the above, during meetings of Council's Working Party on Tax Questions - VAT MS1 would participate in a discussion of a Commission's proposal for amendment of the VAT Directive with regard to exempt supplies of financial and insurance services.

**Member State 4**

MS4 recognizes the need to re-examine and clarify the definitions of the exempted insurance and financial services in Article 135 of the VAT Directive.

In general, MS4 invites the Commission to analyse this issue in detail, with the view of better reflecting the developments in this sector.

However, we have remained sceptical about some of the above-mentioned initiatives, in particular about the benefits of cross-border approaches in VAT grouping rules.

**Member State 5**

MS 5 finds that even if special attention lately has been drawn to the VAT cost-sharing rules in relation to the financial sector, as recently interpreted by the ECJ, those rules are only a part of the large number of rules influencing the overall VAT treatment of the financial sector. Therefore, MS5 agrees with the Stakeholder group in that the Commission should be advised to make a broad analysis of the VAT rules applicable for the financial sector and to propose possible changes hereto.

**Member State 6**

In general, MS6 agrees with the need of a review of rules in the VAT Directive (2006/112/EC) affecting insurance and financial services especially as far as regards the clarity of the definitions of the different exempted insurance and financial services. However, this is a complex area and before position can be taken on any proposal its effects should be examined and evaluated carefully.

**Member State 7**

The main three elements contained in the Simplification package proposed, are to

1. Re-examine the scope of the exemptions on financial services,
2. Introduce wide option to tax for the industry for financial and insurance,
3. Introduce cost sharing for entities for insurance and financial services.
While MS7 acknowledges the problems described regarding the treatment of financial and insurance services, unfortunately, MS7 cannot agree neither with an option to tax nor with a cost sharing mechanism for financial and insurance services. It is our belief though, that if MS7 continues work on the definitions of the financial and insurance services, so that MS7 clarifies the scope in a harmonized way, that is already a great step forward.

Member State 8

ECOFIN has previously considered a proposal from the European Commission along the lines set out in the simplification proposal. After lengthy discussions they decided not to proceed with the suggested amendments to the VAT Directive. MS8 is always happy to reconsider these issues, but does not think the option to tax rules need to be taken beyond what is currently available in the current VAT Directive. The European Court has made very clear that the cost sharing exemption does not apply to financial services and insurance. ECOFIN has agreed to further exploration of this issue by Commission. MS8 is always happy to consider further representations regarding VAT grouping rules.

Member State 9

MS9 agrees that there is a need to revisit this area at EU level. MS9 would welcome an all-encompassing review of the VAT on financial and insurance services, and would be open to the best method of treating these services for VAT purposes going forward. However, this is a vast and complex area, and Council is already heavily engaged in trying to reach agreement on the definitive VAT regime which will continue to be the major focus of discussion on VAT for the foreseeable future.

Member State 10

MS10 recognizes the aforementioned issue regarding the VAT exemption for financials. The modernization of this particular part of the VAT directive has been negotiated for the last 10 years, without success. MS10 can however support an evaluation by the Commission and would like to stress that every measure regarding the financials has to be financially covered and needs to be agreed on by our parliament.

Member State 13

MS13 agrees that Commission could study the impact of value added tax to financial services.

Member State 15

MS15 agrees with the analysis in principle. It should be noted, however, that the current regulations also have a positive effect on the banking industry because they offer opportunities
for legal design. With regard to the adequately analysed demarcation difficulties in the distinction between taxable and tax-exempt benefits, also taking into account the current case-law of the European Court of Justice, reference should be made to the right of initiative of the COM. It also announced a solution to solve the practical problems arising from ECJ case-law on the shared-cost communities.

**Member State 16**

MS16 favours the modification of article 135 in the VAT Directive (2006/112/EC) affecting insurance and financial services, as this article has not been modified since 1977. Since then, new business models, the development of new technologies, new products and financial markets have made obsolete the delimitation between financial services and insurance services contemplated in article 135. This legal situation creates discrepancies in its interpretation by the Tax Administrations and the consequent high costs for firms.

There was a Commission proposal in 2007, but was finally discarded in 2016 due to lack of progress at Council level. MS16 supported its modification and advocated as an alternative to the modification of article 135, the adoption of guidelines on this matter by the VAT Advisory Committee regulated in article 398 of the aforementioned Directive.

**Member State 17**

The possible REFIT proposal must consider points of contact with the ongoing review of the VAT Directive.

**Member State 18**

MS18 supports the Stakeholder opinion that enhancing transparency of implementation process improve the adopted legislation and make it more effective. Sharing experience and best practices among Member States and EU institutions in this regard is welcomed but should be done on voluntary basis. Greater transparency could be built on existing mechanisms and instruments.

MS18 is not against making the national transposition text publicly available (e.g. via the EUR-LEX website).

The implementation of the proposed measures recommended by the Stakeholder group would require reopening of discussion about principles in VAT treatment of financial and insurance services. Both case-law and practice show that taxation of these services should be re-examined and redefined. MS18 fully understands the need to tackle this problem, nevertheless, the question whether MS18 support opening a discussion in the area of taxation in the field of financial and insurance services requires further analysis, having regard in particular ongoing legislative proposals currently processed in the Council of the European Union.
**Member State 19**

MS19 agrees with the opinion of the REFIT Platform Stakeholder group about the need to update the rules of the financial and insurance sectors. In particular, MS19 supports the re-examination of the scope of the exemptions and the clarification of the definitions of the different exempted insurance and financial services (article 135.1. a) – g) of VAT Directive) and the introduction of cost sharing for entities carrying out insurance and financial services (review article 132.1. f) of VAT Directive). In fact, the current EU VAT legislation is ambiguous and uncertain and there is the need to clarify VAT rules on independent groups of persons.

During the Ecofin of 2 October 2018, when the Council reached a general approach on the "VAT quick-fix" legislative package, the Commission agreed to analyse this matter in detail in a study to be launched shortly, with a view to a possible legislative proposal, that MS19 strongly supports.

**Member State 21**

MS21 welcomes a proposal to review Article 132.1 f), so as to reinstate the scope of the cost sharing exemption which supposedly applied prior to the recent rulings of the ECJ. The exemption should apply to the insurance and financial sectors, as it was the previous common understanding. As such a proposal would address an actual problem stemming from those decisions, and in order to facilitate the decision-making process in the Council, this proposal should be given the status of a standalone proposal or a quick fix measure. MS21 considers that this proposal should be given top priority.

As for the remaining proposals put forward by BSIC, although the MS21 Tax Administration agrees on re-examining the scope of the exemptions and clarifying the definitions therein, as well as the taxation of the financial sector, MS21 does not consider this analysis to be as urgent. MS21 is also not totally in line with all the technical assumptions put forward by BSIC.

**Member State 22**

MS22 understands that new products and business models, technical development and a new market structure with new financial operators within the EU creates tax problems. MS22 highly appreciates the review of the VAT Directive regulation, taking into account the development of the financial and insurance sector.