Provisional text

JUDGMENT OF THE COURT (First Chamber)

1 December 2022 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Sixth Directive 77/388/EEC – Second subparagraph of Article 4(4) – Taxable persons – Option for Member States to treat as a single taxable person entities that are legally independent but closely bound to one another by financial, economic and organisational links ('VAT group') – National legislation designating the controlling company of a VAT group as a single taxable person – Concept of 'close financial links' – Need for the controlling company to have a majority of voting rights as well as a majority shareholding – No need – Assessment of the independence of an economic entity in the light of standardised criteria – Scope)

In Case C?141/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 11 December 2019, received at the Court on 23 March 2020, in the proceedings

Finanzamt Kiel

v

Norddeutsche Gesellschaft für Diakonie mbH,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb (Rapporteur), T. von Danwitz, A. Kumin and I. Ziemele, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Norddeutsche Gesellschaft für Diakonie mbH, by B. Richter, Rechtsanwalt,

– the German Government, by J. Möller, S. Eisenberg and S. Heimerl, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the European Commission, by A. Armenia and R. Pethke, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) and (4), and Article 21(1)(a) and (3) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2000/65/EC of 17 October 2000 (OJ 2000 L 269, p. 44) ('the Sixth Directive').

2 The request has been made in proceedings between the Finanzamt Kiel (Tax Office, Kiel, Germany) ('the tax authority') and Norddeutsche Gesellschaft für Diakonie mbH ('NGD mbH') concerning that company's liability for value added tax (VAT) for the 2005 tax year.

Legal context

European Union law

3 The Sixth Directive was repealed and replaced, from 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1). However, in view of the date of the facts at issue in the dispute in the main proceedings, the dispute is still governed by the Sixth Directive.

4 Article 4 of the Sixth Directive provided:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

…

4. The use of the word "independently" in paragraph 1 shall exclude employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.

…'

5 Under the heading 'Persons liable for payment for tax', Article 21 of the Sixth Directive, in the version resulting from Article 28g of the directive, provided:

'1. Under the internal system, the following shall be liable to pay [VAT]:

(a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b) and (c).

…

3. In the situations referred to in paragraphs 1 and 2, Member States may provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax.

…’

German law

6 Paragraph 2 of the Umsatzsteuergesetz (Law on turnover tax), in the version applicable to the dispute in the main proceedings (‘the UStG’), provides:

‘(1) A trader is any person who independently carries out an industrial activity, commercial activity, craft, or professional activity. An undertaking comprises the whole of a trader’s industrial, commercial or professional activity. An industrial, commercial or professional activity shall mean any permanent activity carried out for the purpose of obtaining income, even where there is no intention to make a profit or a group of persons carries out its activities only in relation to its members.

(2) The industrial activity, commercial activity, craft or professional activity is not exercised independently:

…

2. if, in the light of the overall actual circumstances, a legal entity is financially, economically and organisationally integrated into the undertaking of the controlling company (tax group). The effects of the affiliation are limited to internal supplies between the constituent parts of the undertaking located in the country. These constituent parts are to be treated as a single undertaking. If the management functions of the controlling company are located abroad, the most economically important part of the company in the country shall be treated as the trader.

…’

7 According to Paragraph 13a(1) of that law:

‘The person liable for payment of the tax shall be:

1. in the case of Paragraph 1(1)(1) and Paragraph 14c(1), the trader;

…’

8 Paragraph 73 of the Abgabenordnung (Tax Code), in the version applicable to the dispute in the main proceedings (‘the AO’), provides:

‘A controlled company shall be liable for the taxes of the controlling company for which their tax group is relevant for tax purposes. …’

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 NGD mbH is a limited liability company incorporated under German law, formed by notarial act of 29 August 2005, the members of which, namely A, a public-law body and C eV, a registered association, have shareholdings of 51% and 49% respectively. In 2005, E, the manager of that company, was both the manager of A and the executive chairman of C eV.

10 Under Article 7(2) of the articles of association of NGD mbH, concerning the composition and voting rights of the general assembly:

‘The general assembly shall be composed of members of A’s charitable committee and of C eV’s main committee. Each member shall have seven votes and, at the general assembly, shall

designate up to seven representatives who, in respect of that company, are to act exclusively on a voluntary basis. Subject to the following provisions, each representative shall have one vote and shall cast his or her vote in accordance with his or her own professional assessment, without being bound in that regard by the instructions of the member who appointed him or her.

An exception shall be made to the foregoing only in respect of resolutions which directly concern the contributions made available to the company by each member; in that case, the votes may be cast only in one bloc per member and the representatives shall be bound by the instructions given by the member who designated them. If the representatives fail to reach an agreement, the seven votes of the member concerned shall be deemed to be cast in the manner in which the majority of the representatives designated by the member voted'.

11 At a general assembly held on 1 December 2005, it was decided to amend the articles of association of NGD mbH and to word the second subparagraph of Article 7(2) as follows:

'An exception shall be made to the foregoing only in respect of resolutions which directly concern the contributions made available to the company by each member or as regards decisions in respect of which a member seeks a bloc vote. In that case, the votes may be cast only in one bloc per member and the representatives shall be bound by the instructions given by the member who designated them. If the representatives fail to reach an agreement, the seven votes of the member concerned shall be deemed to be cast in the manner in which the majority of the representatives designated by the member voted. In the case of a bloc vote, the votes shall be assessed on the basis of the shareholding in the company'.

12 According to the explanations provided by the referring court, that amendment did not, however, take effect until after the general assembly of 9 December 2010, when the articles of association thus amended were the subject of a new notarial act and entered into the commercial register.

13 It is apparent from the order for reference that, during an audit carried out by an external auditor at NGD mbH, the auditor took the view that, for the tax year in question, NGD mbH was not integrated financially into the controlling company A. Accordingly, they could not be regarded as forming a 'tax group' within the meaning of Paragraph 2(2)(2) of the UStG, which is intended to implement, in German law, the option provided for in the second subparagraph of Article 4(4) of the Sixth Directive.

14 That conclusion was based on the fact that, in view of the provisions of Article 7 of the articles of association of NGD mbH, whether in its original or amended version, A did not have a majority of the voting rights and therefore was not in a position to impose decisions on that company, even though A held a majority holding of 51% of the share capital in it. Consequently, the turnover achieved by that company at the standard rate with third parties and from services supplied to A would have be accounted for by NGD mbH in its capacity as a 'trader' within the meaning of Paragraph 2(1) of the UStG.

15 By decision of 30 May 2014, the tax authority endorsed the external auditor's position.

16 Since the objection made by NGD mbH against that decision was rejected by the tax authority's decision of 3 February 2017, NGD mbH brought an action against that decision.

17 The Schleswig-Holsteinisches Finanzgericht (Finance Court of the Land of Schleswig-Holstein, Germany) upheld that action by judgment of 6 February 2018 and held that the condition relating to financial integration into the controlling company A was satisfied on the basis of both the amended version of the articles of association of NGD mbH and the original version, which was in

force during the tax year in question.

18 In that regard, that court considered that it was apparent from the case-law of the Court of Justice that a relationship of subordination binding a company organically integrated into the controlling company is not a condition which is necessary for the constitution of a group made up of persons who are legally independent, but closely bound to one another by financial, economic and organisational links ('the VAT group') (judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraphs 44 and 45), and that, therefore, the tax authority's requirement relating to the need for the controlling company to have, in addition to a majority shareholding, a majority of voting rights in the other entities forming part of the tax group, went beyond what was necessary to attain the objectives seeking to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance.

19 The tax authority brought an appeal on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court, Germany), alleging infringement of the first sentence of Paragraph 2(2)(2) of the UStG, on the basis that NGD mbH was not integrated financially into the controlling company A.

20 The referring court states, first of all, that, if the dispute in the main proceedings were to be assessed solely in the light of the applicable national law, the appeal on a point of law would be well founded, given that that law makes the classification as a tax group dependent on the condition relating to financial integration, which requires the controlling company to have a majority of the voting rights. It states that, even after the judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496), in accordance with the case-law of the Bundesfinanzhof (Federal Finance Court), the condition relating to the relationship of authority and subordination, which is now classified as an 'integration together with rights to intervene', continues to be required under the first sentence of Paragraph 2(2)(2) of the UStG.

21 Next, it is apparent from the case-law of the Bundesfinanzhof (Federal Finance Court) that, under national law, the tax debt is transferred to the controlling company, which must be able to satisfy itself that the turnover achieved by each of the entities forming part of the tax group is correctly taxed. Thus, the controlling company must act, as VAT collector, in respect of all the services which those entities provide to third parties and is the only entity in a position to draw up the tax return for all those entities.

22 Lastly, that court states that, in the context of the examination which it is required to carry out under the first sentence of Paragraph 2(2)(2) of the UStG, it is supposed to take into account and apply per se the fact that, according to that provision, the economic and professional activities of the entities integrated into the controlling company of the tax group of which those entities form part are not regarded as being carried out independently. Thus, all of the turnover achieved by those entities is attributed to the controlling company, which is liable for the VAT corresponding to all of that turnover.

23 However, the referring court has doubts as to whether the national legislation at issue in the main proceedings is compatible with the first subparagraph of Article 4(4) of the Sixth Directive, as interpreted by the Court, in view of, inter alia, the requirement relating to the relationship of authority and subordination under that legislation.

24 In particular, since it follows from the Court's case-law that, where a VAT group is deemed to exist, it is the VAT group itself which is liable for the VAT corresponding to the turnover of all its members (judgments of 22 May 2008, *Ampliscientifica and Amplifin*, C?162/07, EU:C:2008:301, paragraph 20, and of 17 September 2014, *Skandia America (USA), filial Sverige*, C?7/13, EU:C:2014:2225, paragraphs 29, 35 and 37, and the operative part), the treatment of such a VAT

group as a single taxable person, within the meaning of the second subparagraph of Article 4(4) of the Sixth Directive, precludes the members of that group, including its controlling company, from continuing to submit VAT declarations and from continuing to be identified as individual taxable persons.

25 If the Court were to rule that Article 4(4) of the Sixth Directive precludes the practice of designating, as a single taxable person, not the VAT group itself but a member of that group, namely its controlling company, the question then arises as to whether an entity forming part of that group may rely on the possible incompatibility of national law with EU law. In that regard, while stating that it follows from the judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496), that Article 4(4) of the Sixth Directive does not have direct effect, the referring court asks whether such an entity could, in that regard, possibly rely on Article 21(1)(a) of that directive.

26 The referring court also raises the question of the level of requirements that are necessary, in the context of the assessment which it must carry out, in order to determine whether or not the criterion of financial integration under the first sentence of Paragraph 2(2)(2) of the UStG is satisfied in the present case. In particular, it asks whether that criterion must be interpreted as requiring the controlling company of the tax group to have, in addition to a majority shareholding in the entities which are part of that group, a majority of the voting rights in those entities.

27 It points out, in that regard, that, according to the applicable national rules, the controlling company of a tax group could, where appropriate, in legal proceedings, rely on a right to financial compensation from the other members of that group in order to ensure that, in the context of internal relations within it, the tax burden is borne by each of those members respectively in a manner corresponding to the turnover which generated the VAT to be paid in respect of each of them.

28 The referring court also asks whether the German system regarding a tax group (*Organschaft*) could possibly be justified, alternatively, by means of a reading of Article 4(1) of the Sixth Directive in conjunction with the first subparagraph of Article 4(4) of that directive. If that were the case, the appeal on a point of law brought by the tax authority would be well founded, irrespective of the answers to the first three questions referred for a preliminary ruling.

29 In that regard, the referring court considers, in essence, that it cannot be ruled out that the very strict criteria for the requirement of subordination of the entities forming a tax group to the controlling company of that group, required under German law, for the purposes of assessing the existence of a tax group, may be justified on the basis of a combined reading of the provisions referred to in the preceding paragraph.

30 In view of the fact that, under the applicable national rules, those entities are regarded as not having their own will, in so far as they are in a relationship of subordination to the controlling company of the tax group of which they form part, it must be considered that those entities do not satisfy the condition of independence within the meaning of Article 4(1) of the Sixth Directive. The Member States are entitled to take the view that entities which do not meet the criteria of independence cannot be regarded as taxable persons, since their respective turnover and, therefore, the corresponding VAT must thus be attributed to the controlling company, in view of the relationship of subordination between that controlling company and those entities.

31 However, the referring court expresses doubts as to whether the Member States are actually entitled to specify, by categorisation, the cases in which it must be considered that given entities do not have their own will and, therefore, are not independent within the meaning of Article 4(1) of the Sixth Directive.

32 In that regard, the referring court states that German constitutional law grants the national legislature such a power of categorisation, which is justified by the fact that, in so far as the determination of the status of taxable person entails financial burdens, the entities which have that status should not find themselves in a position of uncertainty as regards their tax obligations. Furthermore, the categorisation thus made by the German legislature could be supported by an interpretation of the first subparagraph of Article 4(4) of the Sixth Directive, carried out in the light of the context and origin of that provision.

33 On the latter point, account must also be taken of the fact that Annex A to Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax (OJ, English Special Edition, 1967(I), p. 16) had supposedly served to confer legitimacy, under EU law, on the pre-existing German system regarding a tax group arrangement, so that that Member State could retain that system.

34 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the second subparagraph of Article 4(4) in conjunction with Article 21(1)(a) and Article 21(3) of [the Sixth Directive] to be interpreted as permitting a Member State to designate, instead of the VAT group [(“*Organkreis*”, group treated as a single entity for tax purposes)], a member of that group (controlling company) as the taxable person?

(2) If the first question is answered in the negative: can the second subparagraph of Article 4(4) in conjunction with Article 21(1)(a) and Article 21(3) of [the Sixth Directive] be invoked in this regard?

(3) Must a strict or lenient standard be applied in the assessment to be carried out in accordance with paragraph 46 of the judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C?108/14 and C?109/14, EU:C:2015:496, paragraphs 44 and 45), as to whether the requirement of financial integration contained in the first sentence of point 2 of Paragraph 2(2) of the [UstG] constitutes a permissible measure which is necessary and appropriate for attaining the objectives seeking to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance?

(4) Are Article 4(1) and the first subparagraph of Article 4(4) of [the Sixth Directive] to be interpreted as permitting a Member State to regard a person as not being independent within the meaning of Article 4(1) of [that directive] if that person is integrated into the undertaking of another undertaking (controlling company) in financial, economic and organisational terms in such a way that the controlling company is able to impose its will on the person and thus prevent the person from forming his [or her] own will, which diverges from that of the controlling company?’

Consideration of the questions referred for a preliminary ruling

Admissibility

35 The German Government submits, primarily, that the first, second and fourth questions must

be declared inadmissible, since they are not relevant to the resolution of the dispute in the main proceedings, because the dispute concerns only whether or not there is, between NGD mbH and the controlling company A, sufficient financial integration within the meaning of the first sentence of Paragraph 2(2)(2) of the UStG, read in the light of the second subparagraph of Article 4(4) of the Sixth Directive.

36 It is only if that question were to be answered in the affirmative, which would suggest, in essence, that the two abovementioned entities would have to be regarded as constituting a VAT group – which that government disputes – that the issues underlying the other questions referred for a preliminary ruling would arise.

37 In that regard that, it should be noted that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, inter alia, judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C?110/15, EU:C:2016:717, paragraph 18 and the case-law cited).

38 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C?110/15, EU:C:2016:717, paragraph 19 and the case-law cited).

39 However, that is not the case here, since the first, second and fourth questions referred to the Court, which, moreover, concern the interpretation of EU law, are in no way hypothetical, and are related to the actual facts of the dispute in the main proceedings, since those questions concern the interpretation of provisions of EU law which are decisive for the decision in the main proceedings, as the referring court expressly states in its decision.

40 More specifically, the questions of whether, on the one hand, the requirements laid down by the German legislation in terms of the designation of the single taxable person of a VAT group and, on the other hand, the way in which that legislation treats the lack of independence of the entities forming part of such a group vis-à-vis the controlling body of that group, are compatible with the second subparagraph of Article 4(4) of the Sixth Directive are relevant for the resolution of the dispute in the main proceedings, since they will determine whether the appeal on a point of law by the tax authority should be upheld.

41 It follows that the first, second and fourth questions referred are admissible.

Substance

The first question

42 By its first question, the referring court asks, in essence, whether the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as precluding a Member State from designating, as a single taxable person for VAT purposes, not the VAT group itself, but a member of that group, namely the controlling company of that group.

43 It should be noted that, in accordance with settled case-law of the Court, in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the legislation of which it forms part (see, inter alia, judgment of 24 February 2022, *Airhelp (Delay of re-routing flight)* (C?451/20, EU:C:2022:123, paragraph 22 and the case-law cited).

44 In that regard, it is apparent from the wording of the second subparagraph of Article 4(4) of the Sixth Directive that that directive permits each Member State to regard a number of entities as a single taxable person if they are established in the territory of that Member State and if, although they are legally independent, they are closely bound to one another by financial, economic and organisational links. The application of that article is not, according to its wording, made subject to other conditions. Nor does it provide that the Member States are able to impose other conditions on economic operators in order to form a VAT group (see, to that effect, judgment of 25 April 2013, *Commission* v *Sweden*, C?480/10, EU:C:2013:263, paragraph 35 and the case-law cited).

45 The effect of implementing the scheme established in the second subparagraph of Article 4(4) of the Sixth Directive is that national legislation adopted on the basis of that provision allows entities which are bound to one another by financial, economic and organisational links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person. Thus, where that provision is implemented by a Member State, the closely linked entity or entities within the meaning of that provision cannot be treated as a taxable person or persons within the meaning of Article 4(1) of the Sixth Directive (see, to that effect, judgment of 22 May 2008, *Ampliscientifica and Amplifin*, C?162/07, EU:C:2008:301, paragraph 19 and the case-law cited).

46 It follows that treatment as a single taxable person under the second subparagraph of Article 4(4) of the Sixth Directive precludes members of the VAT group from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations. That provision therefore necessarily requires, where it is implemented by a Member State, the national implementing legislation to provide that the taxable person is a single taxable person and that a single VAT number be allocated to the group (judgment of 22 May 2008, *Ampliscientifica and Amplifin* (C?162/07, EU:C:2008:301, paragraphs 19 and 20).

47 It follows that, in such a situation, supplies of services provided by a third party to a member of a VAT group must be considered, for VAT purposes, to have been provided not to that member but to the actual VAT group to which that member belongs (see, to that effect, judgment of 18 November 2020, *Kaplan International Colleges UK*, C?77/19, EU:C:2020:934, paragraph 46 and the case-law cited).

48 As regards the context of the second subparagraph of Article 4(4) of the Sixth Directive, it is not apparent from either that provision or the system established by that directive, that it is a derogating or special provision which must be interpreted narrowly. As follows from the Court’s case-law, the condition relating to the existence of a close financial link cannot be interpreted narrowly (see, by analogy, as regards Article 11 of Directive 2006/112, judgments of 25 April 2013, *Commission* v *Sweden*, C?480/10, EU:C:2013:263, paragraph 36, and of 15 April 2021, *Finanzamt für Körperschaften Berlin*, C?868/19, not published, EU:C:2021:285, paragraph 45).

49 As regards the objectives pursued by the second subparagraph of Article 4(4) of the Sixth Directive, it should be noted at the outset that it is apparent from the Commission Proposal (COM(73) 950 final) which resulted in the adoption of the Sixth Directive that the EU legislature, by adopting that provision, intended, either in the interests of simplifying administration or with a view

to combating abuses such as the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that Member States would not be obliged to treat as taxable persons those whose ‘independence’ is purely a legal technicality (see, to that effect, judgments of 25 April 2013, *Commission* v *Sweden*, C?480/10, EU:C:2013:263, paragraph 37 and the case-law cited, and of 15 April 2021, *Finanzamt für Körperschaften Berlin*, C?868/19, not published, EU:C:2021:285, paragraph 35 and the case-law cited).

50 In that regard, although the Sixth Directive did not contain, before the entry into force of the third subparagraph of Article 4(4) thereof, inserted by Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388 as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations (OJ 2006 L 221, p. 9), express provisions conferring on Member States the power to adopt measures necessary for the purpose of combating tax evasion or avoidance, that fact did not deprive the Member States of the possibility of adopting, before the entry into force thereof, such measures, since the prevention, by the Member States, of tax evasion and tax avoidance is an objective recognised and encouraged by the Sixth Directive, even in the absence of express powers granted by the EU legislature (see, to that effect, judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraph 42 and the case-law cited).

51 Thus, for the application of the second subparagraph of Article 4(4) of the Sixth Directive, the Member States, in the context of their margin of discretion, were entitled to make the application of the VAT group scheme subject to certain restrictions provided that they fall within the objectives of that directive to prevent abusive practices and behaviour or to combat tax evasion or tax avoidance (see, to that effect, judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt,* C?108/14 and C?109/14, EU:C:2015:496, paragraph 41 and the case-law cited).

52 In the present case, it follows from the explanations provided by the referring court and by the German Government, first of all, that the German legislature exercised the option offered by the second subparagraph of Article 4(4) of the Sixth Directive, by means of Paragraph 2(2)(2) of the UStG, which provides for the possibility of forming ‘tax groups’.

53 Next, it follows from those same explanations that, under German law, although the controlling company of a VAT group is treated as the single taxable person of that group, within the meaning of the second subparagraph of Article 4(4) of the Sixth Directive, Paragraph 73 of the AO provides, however, that a controlled company may, where appropriate, be liable for the taxes corresponding to the other members of the tax group of which that company forms part, including the controlling company of that tax group. In respect of those taxes, the tax group which they form is relevant for tax purposes.

54 Finally, it follows from the explanations provided by the referring court that, under German law, an entity forming part of a VAT group may be regarded as being financially integrated into the undertaking of the controlling company, within the meaning of the first sentence of Paragraph 2(2)(2) of the UStG, read in the light of the second subparagraph of Article 4(4) of the Sixth Directive, only if that controlling company is in a position to exercise its own will, which would require that controlling company to have, in respect of that entity, both a majority shareholding and a majority of the voting rights.

55 As regards, first of all, the question of whether the second subparagraph of Article 4(4) of the Sixth Directive precludes the German practice of designating, as a single taxable person, not the VAT group itself but a member of that group, namely its controlling company, it must be stated that, although the Court has, in essence, ruled, in the judgments of 22 May 2008, *Ampliscientifica and Amplifin*, (C?162/07, EU:C:2008:301, paragraphs 19 and 20), and of 17 September 2014, *Skandia America (USA), filial Sverige*

(C?7/13, EU:C:2014:2225, paragraphs 34, 35 and 37), that the VAT group is, as a taxable person, liable for VAT, the fact remains that, as the Advocate General stated in point 79 of her Opinion, where several legally independent members of a VAT group together constitute a single taxable person, there must be a single interlocutor, which assumes the group's VAT obligations vis-à-vis the tax authorities. The second subparagraph of Article 4(4) of the Sixth Directive does not contain any requirement concerning the designation of the representative entity of the VAT group or regarding the manner in which that entity is to take on the obligations as the taxable person of such a group.

56 In that regard, and irrespective of the possibility of providing for a representation of the VAT group by one of those members, the objectives referred to in paragraph 49 may justify the designation of the controlling company of the VAT group as a single taxable person, where that controlling company is in a position to impose its will on the other entities forming part of that group, to ensure the correct levying of VAT.

57 That being so, it is still necessary that the fact that it is not the VAT group itself but the controlling company representing it that fulfils the role of a single taxable person, within the meaning of the second subparagraph of Article 4(4) of the Sixth Directive, does not entail a risk of tax losses.

58 It is apparent from those explanations provided by the referring court, as set out in paragraph 27 of the present judgment, and by the German Government in its written observations, that, in so far as that controlling company's obligation to submit a tax declaration extends to the services provided and received by all the members of that group and in so far as the resulting tax debt covers all those services, that would lead to the same result as if the VAT group were itself liable for that tax.

59 It is also apparent from those explanations that, even if, under German law, that controlling company bore all the VAT obligations, in its capacity as the VAT group's representative with the tax authorities, the fact remains that those tax authorities may, where appropriate, turn to the other entities forming part of that group, by relying on Paragraph 73 of the AO.

60 In view of the foregoing, it must be held that the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as not precluding a Member State from designating, as a single taxable person liable for VAT purposes, not the VAT group itself but a member of that group, namely the controlling company of that group, where that controlling company is in a position to impose its will on the other entities forming part of that group and provided that that designation does not entail a risk of tax losses.

The second question

61 By its second question, the referring court asks, in essence, whether the second subparagraph of Article 4(4) of the Sixth Directive, read in conjunction with Article 21(1)(a) and (3) of that directive, may regarded as having direct effect enabling taxable persons to claim the benefit thereof vis-à-vis their Member State in the event that the latter's legislation is incompatible with those provisions and cannot be interpreted in a manner that is consistent with them. The second question has been asked by the referring court only in the event that the answer to the first question is that the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as precluding a Member State from designating, as a single taxable person liable for VAT, not the VAT group itself but a member of that group, namely the controlling company of that group.

62 In view of the answer to the first question, there is no need to answer to the second question.

The third question

63 By its third question, the referring court asks, in essence, whether the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as precluding national legislation which makes the possibility for a given entity to form, with the undertaking of the controlling company, a VAT group conditional upon that controlling company having, in that entity, a majority of the voting rights in addition to a majority holding in the share capital of that entity.

64 It should be noted at the outset that the condition laid down in the second subparagraph of Article 4(4) of the Sixth Directive that the formation of a VAT group is subject to the existence of close financial, economic and organisational links between the persons concerned needs to be specified at national level, with the result that that provision is conditional inasmuch as it involves the application of national provisions determining the actual scope of such links (see, to that effect, judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*, C?108/14 and C?109/14, EU:C:2015:496, paragraph 50).

65 However, it is important, for the uniform application of the Sixth Directive that the concept of ‘close financial links’, within the meaning of the second subparagraph of Article 4(4) of that directive, is given an autonomous and uniform interpretation. Such an interpretation is necessary, despite the optional nature, as regards the Member States, of the scheme for which that article provides, in order to avoid differences in application of that scheme between one Member State and another when it is implemented (see, by analogy, judgment of 15 April 2021, *Finanzamt für Körperschaften Berlin*, C?868/19, not published, EU:C:2021:285, paragraph 44 and the case-law cited).

66 In that regard, it should be noted that, although, as stated in paragraphs 44 and 51 of the present judgment, the second subparagraph of Article 4(4) of the Sixth Directive does not expressly provide for the possibility for Member States to impose other conditions on economic operators in order to be able to form a VAT group, those Member States are, in the context of their margin of discretion, entitled to make the application of the VAT group scheme subject to certain restrictions provided that they fall within the objectives of that directive to prevent abusive practices and behaviour or to combat tax evasion or tax avoidance, and provided that EU law and its general principles, in particular the principles of proportionality and fiscal neutrality are respected (see, by analogy, judgment of 15 April 2021, *Finanzamt für Körperschaften Berlin*, C?868/19, not published, EU:C:2021:285, paragraph 57 and the case-law cited).

67 It must also be noted that, according to the case-law referred to in paragraph 48 of the present judgment, the condition relating to the existence of a close financial link cannot be interpreted narrowly.

68 More specifically, the Court has already stated, in view of the actual wording of the second subparagraph of Article 4(4) of the Sixth Directive, that the fact that the nature of the relationship binding the entities within a VAT group is merely one of closeness may, in the absence of any other requirement, not therefore lead to the conclusion that the EU legislature intended to reserve the benefit of the VAT group scheme only to entities in a relationship of subordination with the controlling company of the group of undertakings considered. Although the existence of such a relationship of subordination allows it to be presumed that relations between the persons at issue are close, it cannot however, in principle, be regarded as a condition which is necessary for the constitution of a VAT group. It could be so regarded only in exceptional circumstances where such a condition is, in a given national context, a measure which is both necessary and appropriate for attaining the objectives seeking to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance (see, to that effect, judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt*

, C?108/14 and C?109/14, EU:C:2015:496, paragraphs 44 and 45).

69 It follows that the requirement for a majority of voting rights, in addition to the requirement relating to a majority shareholding, in terms of the requirement of financial integration, within the meaning of the first sentence of Paragraph 2(2)(2) of the UStG, does not, a priori, constitute, which, however, it is for the referring court to ascertain, a measure that is necessary and appropriate for attaining the objectives of preventing abusive practices or behaviour or of combating tax evasion or tax avoidance, so that such a requirement cannot, in principle, be imposed with regard to the second subparagraph of Article 4(4) of the Sixth Directive.

70 In that context, it is not irrelevant that, as is apparent from the German Government's response to the written questions put by the Court, the former accepts, in essence, that neither of the two requirements mentioned in the preceding paragraph of the present judgment is absolutely necessary, provided that the controlling company is in a position to impose its will on the other entities forming part of the VAT group.

71 In the light of the foregoing considerations, the answer to the third question is that the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as precluding national legislation which makes the possibility for a given entity to form, with the undertaking of the controlling company, a VAT group conditional upon that controlling company having, in that entity, a majority of the voting rights in addition to a majority holding in the share capital of that entity.

The fourth question

72 By its fourth question, the referring court asks, in essence, whether Article 4(4) of the Sixth Directive, read in conjunction with the first subparagraph of Article 4(1) of that directive, must be interpreted as precluding a Member State from classifying, by categorisation, given entities as non-independent, where those entities are integrated, in financial, economic and organisational terms, into the controlling company of a VAT group.

73 It should be recalled from the outset that under Article 4(1) of the Sixth Directive, a taxable person is any person who independently carries out any economic activity specified in paragraph 2 of that article.

74 The first subparagraph of Article 4(4) of the Sixth Directive states that the word 'independently' excludes employed and other persons from the tax in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

75 The second subparagraph of Article 4(4) provides that Member States may, subject to the consultations provided for in Article 29 of the Sixth Directive, treat as a single taxable person persons established in the territory of the country who, while 'legally independent', are closely bound to one another by financial, economic and organisational links.

76 It should also be noted that, as the Commission stated in the first and second paragraphs of point 3.2 of its Communication COM(2009) 0325 final, by setting up a VAT group, pursuant to the second subparagraph of Article 4(4) of the Sixth Directive, a number of closely bound taxable persons merge in order to form a new single taxable person for VAT purposes. That institution also stated that 'a VAT group could be described as a "fiction" created for VAT purposes, where economic substance is given precedence over legal form. A VAT group is a particular type of taxable person who exists only for VAT purposes. It is based on the actual financial, economic and organisational bonds between companies. Whilst each member of the group retains its own legal

form, for VAT purposes only, the formation of the VAT group is given precedence over legal forms according to e.g. civil law or company law'.

77 It also follows from settled case-law that a supply of services is taxable only if there exists between the service supplier and the recipient a legal relationship in which there is a reciprocal performance (see, to that effect, judgment of 17 September 2014, *Skandia America (USA), filial Sverige* (C?7/13, EU:C:2014:2225, paragraph 24 and the case-law cited).

78 To establish whether such a legal relationship exists between an entity forming part of a VAT group and the other members of that group, including that group's controlling company, so that the supplies made by that entity may be liable to VAT, it is necessary to determine whether that entity carries out an independent economic activity. It is necessary in that regard to determine whether such an entity may be regarded as being independent, in that it performs its activities in its own name, on its own behalf and under its own responsibility and, in particular, in that it bears the economic risk arising from its business (see, by analogy, judgments of 17 September 2014, *Skandia America (USA), filial Sverige*, C?7/13, EU:C:2014:2225, paragraph 25, and of 13 June 2019, *IO (VAT – Activity as a member of a supervisory board)*, C?420/18, EU:C:2019:490, paragraph 39 and the case-law cited).

79 In the present case, although, in its capacity as a single taxable person and representative of the VAT group, the controlling company A is responsible for submitting the tax return on behalf of all the entities forming part of that group, including NGD mbH, the fact remains that, as follows from paragraphs 27 and 57 to 59 of the present judgment, those entities themselves bear the economic risks associated with carrying out their respective economic activities. It follows that those entities must be regarded as carrying out independent economic activities, with the result that they cannot be classified, by categorisation, as 'non-independent entities' for the purposes of Article 4(1) and the first subparagraph of Article 4(4) of the Sixth Directive simply because they belong to a VAT group.

80 That interpretation is, moreover, supported by the fact that, although it follows from the second subparagraph of Article 4(4) of the Sixth Directive that the entities which can constitute a VAT group must have close financial, economic and organisational links, that provision does not, however, provide that the existence of such links would involve the exercise of a non-independent economic activity by an entity of the group other than the controlling company. Thus, it does not follow from that provision that that entity would cease to carry out independent economic activities, for the purposes of the first subparagraph of Article 4(4) of that directive, solely because it belongs to the VAT group.

81 In the light of the foregoing considerations, the answer to the fourth question is that the second subparagraph of Article 4(4) of the Sixth Directive, read in conjunction with the first subparagraph of Article 4(1) of that directive, must be interpreted as precluding a Member State from classifying, by categorisation, given entities as non-independent, where those entities are integrated, in financial, economic and organisational terms, into the controlling company of a VAT group.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **The second subparagraph of Article 4(4) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2000/65/EC of 17 October 2000,**

must be interpreted as not precluding a Member State from designating, as a single taxable person of a group formed by persons who are legally independent but closely bound to one another by financial, economic and organisational links, the controlling company of that group, where that controlling company is in a position to impose its will on the other entities forming part of that group and provided that that designation does not entail a risk of tax losses.

2. **The second subparagraph of Article 4(4) of Sixth Directive 77/388, as amended by Directive 2000/65,**

must be interpreted as precluding national legislation which makes the possibility for a given entity to form, with the undertaking of the controlling company, a group formed by persons who are legally independent but closely bound to one another by financial, economic and organisational links conditional upon that controlling company having, in that entity, a majority of the voting rights in addition to a majority holding in the share capital of that entity.

3. **The second subparagraph of Article 4(4) of Sixth Directive 77/388, as amended by Directive 2000/65, read in conjunction with the first subparagraph of Article 4(1) of Directive 77/388, as amended,**

must be interpreted as precluding a Member State from classifying, by categorisation, given entities as non-independent, where those entities are integrated, in financial, economic and organisational terms, into the controlling company of a group formed by persons who are legally independent but closely bound to one another by financial, economic and organisational links.

[Signatures]

* Language of the case: German.