Provisional text

OPINION OF ADVOCATE GENERAL

MEDINA

delivered on 13 January 2022(1)

Case C?141/20

Finanzamt Kiel

v

Norddeutsche Gesellschaft für Diakonie mbH

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling – VAT – VAT groups – Designation of a member of a VAT group as the taxable person – Economic activities carried out independently – Judgment in Larentia + Minerva (C?108/14 and C?109/14))

1. The present reference for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany) relates to the interpretation of Article 4(1) and (4) and of Article 21(1)(a) and (3) of Sixth Council Directive 77/388/EEC. (2) It arose in the context of an action between Norddeutsche Gesellschaft für Diakonie mbH ('NGD') and the Finanzamt Kiel (Tax Office, Kiel, Germany, 'the Finanzamt') concerning the designation of a value added tax (VAT) group as a taxable person.

2. VAT groups are a legal fiction for VAT purposes under the Sixth Directive and allow those groups to be treated in the same way as a single taxable person registered for VAT in their own right. They are aimed at simplifying VAT compliance (that is, to facilitate significantly the VAT reporting of groups of companies which can thus file a single consolidated VAT return covering the activities of all the group members) and at combating tax abuse. Moreover, VAT is not to be accounted for on goods and services supplied between group members.

3. However, the German VAT group regime has been described in the academic commentary as akin to the fairy tales of the Brothers Grimm: '[that regime] reminds [one of] the poisoned apple given by the evil queen to sweet Snow White. Albeit designed as a facilitation measure, VAT grouping has become a focal point of audit for the German tax authorities … led to numerous court cases … resulting [in] a bureaucratic jungle for taxpayers who are often lost when wondering if their supposed VAT group is likely to withstand an audit'. (3)

4. The present Opinion should be read together with another Opinion I am presenting in a

parallel case, C?269/20, *Finanzamt T*, notably because the scope of the first question referred by the XI Chamber of the Bundesfinanzhof (Federal Finance Court) in the present case corresponds to the first question referred by the V Chamber of that court in Case C?269/20.

I. **Legal framework**

A. **European Union law**

5. The Sixth Directive was replaced, from 1 January 2007, by Council Directive 2006/112/EC. (4) Ratione temporis the Sixth Directive remains applicable to the main proceedings.

6. Article 4 of the Sixth Directive, entitled ‘Taxable persons’, 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.

…’

7. Article 21 of the Sixth Directive, entitled ‘Persons liable for payment for tax’, provided, in particular:

‘1. Under the internal system, the following shall be liable to pay value added tax:(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.

…’

B. **National law**

8. Paragraph 2 of the Umsatzsteuergesetz (Law on value added tax; ‘UStG’), entitled ‘Entrepreneurs, businesses’, provides:

‘(1) A trader is any person who independently carries out a commercial or professional activity. An undertaking comprises the whole of a trader’s commercial or professional activity. A 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 commercial 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, ‘*Organschaft*’). The effects of the tax group are limited to internal supplies between the constituent parts of the undertaking located in [Germany]. 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 [Germany] shall be treated as the trader.

…’

II. **The facts giving rise to the dispute in the main proceedings and the questions referred for a preliminary ruling**

9. The parties are in dispute as to whether a VAT group arrangement existed between ‘A’ as the controlling company and NGD, the applicant in the main proceedings, as the controlled company in 2005 (‘the year at issue’).

10. NGD is a Gesellschaft mit beschränkter Haftung (limited liability company) governed by German law, formed by notarial act of 29 August 2005. Its shareholders are A (51%) and C eV (49%). A is a public-law body and C eV is a registered association. In the year at issue, NGD’s sole manager was E, who was also the sole manager of A and an executive board member of C eV.

11. Before NGD was founded, two versions of its articles of association were presented to the Finanzamt in order for the latter to take position on the existence of a tax-group-arrangement scheme between A and C eV. The Finanzamt informed NGD that only the second version of those articles of association fulfilled the applicable conditions in relation to financial integration. However, NGD was founded on the basis of the first version of the articles of association. It was only in 2010 that the second version of the articles of association was the subject of a notarial act and entered into the commercial register.

12. In the course of an external audit of NGD, the auditor reached the conclusion that a VAT group arrangement did not exist between NGD and A in the year at issue, as NGD was not financially integrated into A’s company. Although A held a 51% majority shareholding in NGD’s share capital, it did not hold a majority of the voting rights, owing to the provisions of the articles of association, and was therefore unable to impose its decisions on NGD.

13. On 30 December 2013, NGD made its VAT declaration for 2005. In that declaration, it reserved its position as to the outcome of any *ex post* control of whether it constituted a single entity for tax purposes with A.

14. By decision of 30 May 2014, the Finanzamt endorsed the position of the external auditor and, as a result, lifted the reservation concerning the *ex post* control.

15. The objection lodged by NGD against that decision was rejected as unfounded by the Finanzamt, on 3 February 2017, on the ground that there was no tax-group-arrangement scheme between NGD and A due to the absence of financial integration.

16. However, the action brought by NGD against that decision was upheld by the Schleswig?Holsteinisches Finanzgericht (Finance Court, Schleswig?Holstein, Germany) by

judgment of 6 February 2018, which set the amount of VAT required from that company at EUR 0. According to that court, the condition relating to financial integration with controlling company A was also met by the first version of NGD's articles of association, which were in force during the tax year in question. The Finanzamt therefore incorrectly held that no tax-group-arrangement scheme existed. In that regard, that court referred to paragraphs 44 and 45 of the judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrts* (C?108/14 and C?109/14, EU:C:2015:496 *, hereafter 'the* judgment in *Larentia + Minerva*'). As a result, that court ruled that the requirement of the Finanzamt – that the controlling company must not only have a majority shareholding but must also hold a majority of the voting rights in NGD – went beyond what was necessary to attain the objectives seeking to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance.

17. The Finanzamt brought an appeal on a point of law (*Revision*) against that judgment before the Bundesfinanzhof (Federal Finance Court, that is, the referring court).

18. The Bundesfinanzhof (Federal Finance Court), sitting in its XI Chamber, stated at the outset that, if the dispute in the main proceedings were to be assessed solely in the light of the applicable national law, the appeal would be well founded. That is because the classification as a tax group is dependent on the condition relating to financial integration, which requires a controlling company to have a majority of the voting rights. There was no change in the legislation following the judgment in *Larentia + Minerva*. The requirement relating to the relationship of authority and subordination between the controlling company and the controlled company continues to be required under German law, notwithstanding the clarification provided in that regard by the Court of Justice in that judgment.

19. In the light of those factors, the referring court raises the question, first, as to whether the German tax-group-arrangement scheme ('*Organschaft*') is compatible with EU law and, in particular, whether the condition of financial integration, as required under the first sentence of Point 2 of Paragraph 2(2) of the UStG, may still be maintained as such. (5) Second, it asks whether the German tax-group-arrangement scheme may be justified by a combined reading of Article 4(1) of the Sixth Directive and the first subparagraph of Article 4(4) thereof. (6)

20. Therefore, the XI Chamber of the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and 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 the VAT group ('*Organträger*', controlling company) as the taxable person?

(2) If question 1 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 [the judgment in *Larentia + Minerva*, 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 (‘*Organträger*’, 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?’

III. **Analysis**

21. In line with the request of the Court of Justice, I will only focus on the first and fourth questions referred.

A. **Brief summary of the arguments of the parties**

22. Written observations were submitted by NGD, the German and Italian Governments and the European Commission.

1. ***On the first question referred***

23. NGD considers that the referring court has rightly pointed out that the assessment in paragraphs 45 and 46 of the judgment in *Larentia + Minerva* – in order to determine whether the condition of financial integration, laid down in German law, is necessary and appropriate for the objectives seeking to prevent abusive practices or to combat tax fraud or avoidance – is relevant only as long as the first sentence of Point 2 of Paragraph 2(2) of the UStG is not contrary to EU law (when it designates the taxable person by derogating from EU law). If that approach were to be accepted, the appeal on a point of law brought by the Finanzamt would be dismissed from the outset on the ground that that provision is incompatible with EU law.

24. The German Government challenges the admissibility of the first question. It argues that it is not relevant to the outcome of the dispute in the main proceedings, which concerns, in essence, whether or not there is sufficient financial integration between NGD and the controlling company A.

25. In the alternative, it submits observations both on the question relating to the conformity of the national tax-group-arrangement scheme (‘*Organschaft*’) with EU law and on the question relating to the lawfulness of that scheme of designating one specific member of the VAT group as the single taxable person representing that group.

26. As regards the first question in the point above, the German single entity tax regime, as provided for in the first sentence of Point 2 of Paragraph 2(2) of the UStG, corresponds in every respect to that under the second subparagraph of Article 4(4) of the Sixth Directive, read in conjunction with Article 21(1)(a) and (3) of that directive, under which all the members of a VAT group must be regarded as a single taxable person and must submit a common VAT return. The fact that, under national law, it is not the tax group (VAT group) itself, but its controlling company, which fulfils those roles does not entail consequences in terms of compliance with EU law.

27. As regards the second question in point 25 of the present Opinion, the German Government points out that the introduction of the VAT group taxation regime is optional for Member States and that the detailed rules governing the operation of such a system are left to their discretion.

28. That position is also borne out in the drafting history of the Sixth Directive. Furthermore, the appointment of the controlling company as a single taxable person is appropriate given that, in its capacity as a body that is hierarchically superior, it is the only entity capable of ensuring effective fulfilment of the tax obligations for the whole group. In any case, there is no difference in the tax burden if the single taxable person is designated as the VAT group or as its controlling company.

29. The Italian Government argues, in essence, that the second subparagraph of Article 4(4) of

the Sixth Directive must be interpreted as allowing Member States to regard as a single taxable person a company considered in isolation, even if it is closely linked to other companies from a financial, economic and organisational point of view, where that is justified by considerations relating to the objective of preventing tax fraud, tax evasion and tax avoidance.

30. The Commission considers, in essence, that, although the controlling company of a VAT group may be the taxable person and the sole interlocutor of that group, the requirement under German law that that controlling company must have a majority of the voting rights in that group is contrary to the second subparagraph of Article 4(4) of the Sixth Directive.

2. ***On the fourth question referred***

31. NGD considers that the fourth question should be answered in the negative, that is, that the Sixth Directive does not allow a Member State to determine, by categorisation, that certain units are not independent when they are integrated into the controlling company of a VAT group in financial, economic and organisational terms.

32. The German Government submits, primarily, that the fourth question referred is also inadmissible, since it does not allow conclusions to be drawn as to whether the requirement of financial integration is satisfied in a situation where, as in the present case, the controlling company, although it has a majority shareholding, does not hold a majority of the voting rights. Therefore, in its view, the question is not decisive for the resolution of the dispute in the main proceedings.

33. In the alternative, that government considers that, if the Court were to find that that question were admissible, it should be answered in the affirmative. That is because Article 4(1) of the Sixth Directive and the first subparagraph of Article 4(4) thereof allow a Member State to consider, by categorisation, an entity as not independent under Article 4(1) of that directive, where that entity is integrated in financial, economic and organisational terms into another company (the controlling company) in such a way that the latter is able to exert its will over the former and to prevent that entity from entering into an alternative course of action. The German Government adds, in that context, that Member States have a certain discretion when determining the degree of independence enjoyed by an entity in the pursuit of an economic activity when transposing that provision.

34. The Italian Government argues, in essence, that the fourth question referred is inadmissible, as it has no connection with the factual context of the case in the main proceedings. However, in the event that it is deemed admissible, the answer should be that Article 4(1) of the Sixth Directive cannot be regarded as capable of precluding an entity carrying on an economic activity in a legally independent manner from being considered a taxable person, even if it is closely linked to another entity in financial, economic and organisational terms, so as to create a situation of dependence or economic integration in relation to that entity.

35. The Commission, having addressed all the questions referred together, has not submitted observations on this question separately.

B. **Assessment**

1. ***Admissibility***

36. The German Government challenges the admissibility of the first and fourth questions referred (see points 24 and 32 of the present Opinion), whereas the Italian Government submits that the fourth question is inadmissible.

37. I consider that those arguments must be rejected. First, the answers to the questions referred are manifestly necessary for the purposes of resolving the case in the main proceedings. Secondly, the fact that two chambers of the Bundesfinanzhof (Federal Finance Court; the XI Chamber in the present case and the V Chamber in Case C?269/20) referred to diametrically different interpretations of the relevant provisions of the Sixth Directive (7) shows that there is a real need for the Court to provide guidance on those provisions. That is also reflected in the significant divergence of the national case-law of these two chambers of such an elevated jurisdiction (in particular, as to the manner in which the second subparagraph of Article 4(4) of the Sixth Directive should be implemented in national law). That is also underscored in the academic commentary cited by the Bundesfinanzhof (Federal Finance Court) in those two references for a preliminary ruling.

2. ***Substance***

38. By its first 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, must be interpreted as precluding a Member State from designating, as a taxable person for VAT purposes, not the VAT group itself (‘*Organkreis*’) but a member of that group, in particular, the controlling company of that group (‘*Organträger*’).

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

40. It is appropriate to consider those questions together, whose underlying issues I will analyse in three steps. Step one will reflect the conditions set out by EU law for a VAT group to be formed. In step two I will discuss the rules related to the status of the VAT group and of its members once that group is established and operating, including the group’s relations vis-à-vis the tax authorities, and which member owes the VAT debt for the group. I will conclude with step three, where I will examine whether the German Government may derogate from the EU law rules on VAT groups in order to maintain its VAT group regime.

(a) ***Introductory remarks***

41. In accordance with the firm conclusions of the referring court in its order for reference, the reasoning followed to justify the existence of a tax group in Germany is linked conceptually and historically, as well as from the point of view of the general scheme of the German legislation, to the characteristic of independence in the pursuit of an economic activity.

42. For a number of years there have been considerable doubts as to the conformity of the relevant provisions of the UStG with the Sixth Directive, set out both in the German courts’ case-law (8) and in academic commentary. (9) As my Opinion will show, those doubts are justified.

43. Some of the Court's case-law that is relevant to the present case relates to Article 11 of Directive 2006/112, given that the wording of the second subparagraph of Article 4(4) of the Sixth Directive corresponds to that provision.

44. It should be borne in mind at the outset that, in determining the scope of a provision of EU law, its wording, context and objectives must all be taken into account. (10)

(b) ***Step 1: The conditions set out in EU law for VAT groups***

45. The wording of the second subparagraph of Article 4(4) of the Sixth Directive is as follows: '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'.

46. In general, the Sixth Directive provides Member States with rather limited guidance on how to implement the VAT group regime in their domestic legislation. Many details are left to the discretion of the Member States, which runs the risk of disturbing the unified application of VAT across the European Union. Directive 2006/112 has not improved that situation. Indeed, wide divergences have been noted among the Member States. (11)

47. In particular, as far as the German legislation (the UStG) is concerned, the gist of the problem with that legislation is the fact that, under the Sixth Directive, independent companies that are closely linked to one another for VAT purposes do not lose their quality as taxable persons simply because of that link. The concept of a VAT group in no way results in each taxable person in that group being replaced by a single member of that group.

The context and wording of the provisions at issue

48. The Court has already made clear that 'the terms used in Article 4(1) of the Sixth Directive and in Article 9(1) of [Directive 2006/112], in particular the term "any person who", give to the notion of "taxable person"' *a broad definition* focused on independence in the pursuit of an economic activity to the effect that all persons – natural or legal, both public and private, even entities devoid of legal personality – which, in an objective manner, satisfy the criteria set out in that provision must be regarded as being taxable persons for the purposes of VAT'. (12)

49. Furthermore, the person concerned must act in his or her own name, on his or her behalf and under his or her own responsibility and must bear the economic risk inherent in the activities he or she carries out independently in any place. (13)

50. In addition, Article 4(1) of the Sixth Directive states that a 'taxable person' carries out its economic activity independently in any place, whatever their purpose or results.

51. Given that Article 4(1) of the Sixth Directive as well as the first subparagraph of Article 4(4) thereof define the scope of the expression '*independently* carries out … economic activity', (14) the reference to the concept of a VAT group in the second subparagraph of Article 4(4) requires that that concept be understood as giving concrete form to the concept of carrying out economic activity *independently.*

52. In other words, the first subparagraph of Article 4(4) of the Sixth Directive further defines the term 'independently' and then refers, in its second subparagraph, to the concept of a VAT group, the implementation of which has been conferred on the Member States by virtue of their discretionary implementing power.

53. The inclusion of the concept of a VAT group in the second subparagraph of Article 4(4) of the Sixth Directive requires that that concept be understood in a manner consistent with the general scheme of that directive as rendering the concept of independence tangible. Under Article 4(4) of that directive, legally independent persons may be treated together as one taxable person in a situation where liability to tax could otherwise not be justified under Article 4(1) thereof due to the absence of a sufficient link between those persons.

54. Next, it is important to compare the wording of the relevant provisions of the UStG with those of the Sixth Directive.

55. As regards the first sentence of Point 2 of Paragraph 2(2) of the UStG, that provision disregards the fact that Article 4(4) of the Sixth Directive does not provide additional conditions concerning the status of taxable person of the various members of the VAT group. Moreover, the latter provision does not require that the member acting in the name and on behalf of that group solely be a parent company with both a majority shareholding and a majority of the voting rights, or in fact any other conditions related to their legal capacity, ownership or rights inherent to the ownership of a legal entity.

56. The second subparagraph of Article 4(4) of the Sixth Directive provides that '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'.

57. Whereas point 2 of Paragraph 2(2) of the UStG provides that 'the commercial or professional activity is not exercised independently, … 2. if, in the light of the overall actual circumstances, a *legal entity* [(i)] is financially, economically and organisationally *integrated* [(ii)] into the *undertaking of the controlling company* [(iii)] ("*Organschaft*"). The effects of the tax group are limited to internal supplies between the constituent parts of the undertaking located in [Germany]. These constituent parts are to be treated as a single undertaking. …' (15)

58. It is clear that the German measure transposing the Sixth Directive is overly restrictive as it provides that the VAT group (and, as a result of that transposition, the controlling company) is the sole taxable person, whereas the second subparagraph of Article 4(4) of the Sixth Directive is more general in that it only allows, for the purposes of VAT, to be treated as a single taxable person persons who are independent but who are bound to one another by financial, economic and organisational links.

59. Indeed, the wording of Article 4(4) of the Sixth Directive is: 'each Member State may *treat as a single taxable person [(iii)] persons [(i)]* established in the territory of the country who, while legally independent, are *closely bound to one another [(ii)]* by financial, economic and organisational links'. (16)

60. The textual analysis reveals the differences between 'a legal entity' and 'a person' (i); (17) between '*integration* of a controlled company into the controlling company' and 'independent legal entities being closely *bound* to one another' (ii); and between 'solely the controlling company' and 'the VAT group' as a single taxable person (iii).

61. All three elements of the comparison above, that is between the German provisions and the actual wording of the Sixth Directive, show that the UStG goes beyond what is provided for by the Sixth Directive.

62. In that regard, it follows from the Court's case-law that when Member States exercise the

choice afforded to them by Article 4(4) of the Sixth Directive and when they lay down certain conditions and modalities for VAT groups, they may not fundamentally alter the nature of the concept of a VAT group (18) and the aim of that provision. (19) An analogy may be drawn with the Court's case-law (20) to the effect that, in transposing the Sixth Directive and in defining the arrangements for giving effect to the rights VAT groups and persons may derive from Article 4(4) thereof, the Member States' legislation may not have the effect of depriving certain VAT groups and persons, which otherwise fulfil the related requirements under that directive, of the benefit of those rights (which is, in fact, the case for the persons at issue in the present case and those in Case C-269/20). As noted in the academic commentary, Member States should consider the scope of the remaining legislative freedom that is afforded to them under that directive when implementing the VAT group option in order not to exceed it. (21)

63. Indeed, the fact that the UStG and the national case-law are too restrictive has already been shown in another situation pertaining to VAT groups: after the present case was referred to the Court, it had the chance to rule that the UStG had unlawfully prevented partnerships – which were not solely financially integrated persons in the undertaking of the controlling company – from being a member of a VAT group. That was the subject matter of the judgment in *M-GmbH*.

(c) ***Step 2: The rules related to the status of the VAT group and its members once that group is established and operating, including the group's relations vis-à-vis the tax authorities***

64. It follows from the rules under the Sixth Directive relating to the status of the VAT group and of its members that taxable persons belonging to a VAT group remain also taxable persons on an individual basis. VAT obligations exist for each person independently (that is to say, outside the context of the VAT group). The VAT group established by the second subparagraph of Article 4(4) of the Sixth Directive is intended solely to simplify the treatment of VAT. In practice, tax authorities should receive a single VAT return constituting an aggregation of the individual returns of each taxpayer belonging to the group.

(1) *Legislative history*

65. In point 2 (referring to Article 2 – as it appears in the proposal) of Annex A to the Commission proposal, (22) which led to the adoption of the Second Directive, (23) the EUU legislature established that under that directive, tax-group-arrangement schemes should not be equated with lack of independence.

66. That point states that 'the expression "On his own account" is intended particularly to preclude taxation of wage and salary earners bound to their employer by a labour contract, including persons working in their own home. This wording also leaves each Member State free to treat persons who are independent from a juridical point of view but interlinked by economic, financial or organisational ties not as separate taxpayers, but as one single taxpayer. However, a Member State proposing to adopt such treatment, shall engage in consultations as under Article 13.'

67. It is true that, at the time of the adoption of the Second Directive, the aim was to legitimise, under EU law, rules of the Member States, such as the German regime relating to single entities for tax purposes, in order to avoid the necessity to create the concept of a VAT group in German law.

68. The abovementioned Commission proposal for the Second Directive explained in 'Ad Article 2' that:

‘Under the laws currently in force in certain Member States, persons who are legally independent but organically bound to one another by economic, financial and organisational links are regarded as a single taxable person, as a result of which the transactions carried out between them do not in general constitute taxable transactions. In view thereof, undertakings constituting an “*Organschaft*” are therefore placed under the same tax conditions as an integrated undertaking constituting a single legal person.

It should be noted that if the VAT system is applied correctly, the tax regime referred to above does not offer competitive advantages over a tax system which treats members of an “*Organschaft* ” as separate taxable persons.

In those circumstances, there does not appear to be any major drawback to some Member States continuing to consider an “*Organschaft*” to be a single taxable person, while others do not do so. However, in the former case, the Member State concerned must hold preliminary consultations to have the recommended scheme examined whether it does not cause disruption of competition between Member States [COM(65) 144 final, pp. 7 and 8].’

69. The Second Directive was replaced by the Sixth Directive and these arguments remained valid (as they still are, moreover, under Directive 2006/112, which in turn replaced the Sixth Directive).

70. It follows clearly from the legislative history of Article 4 of the Sixth Directive that the concept of tax-group-arrangement schemes does not cause its constituent members to cease to exercise independent economic activities and that Article 4(1) of that directive does not preclude that a company remains a taxable person for VAT even where it is controlled or owned by another company.

(2) *A practical example of a VAT group*

71. A simplified example of a VAT group, composed of only two members, which was put forward by the Commission, is instructive in this respect. Company A controls company B; B purchases goods from third-party taxable persons for EUR 100, of which EUR 20 VAT (at a VAT rate of 20%) may be deducted. B resells the goods to A at cost price. Subsequently, A sells the goods for EUR 200 to non-taxable natural persons and invoices EUR 40 by way of VAT. The VAT payable by the various companies making up the VAT group is determined as follows if a single payment is made for the group.

72. (i) B deducted EUR 20 for goods purchased from third parties (minus EUR 20); (ii) B sells the goods at cost price to A and receives EUR 20 (plus EUR 20); (iii) A enters in its accounts the purchase of the goods which it purchased from B and deducts EUR 20 (minus EUR 20); A enters in its accounts the VAT charged for the resale of goods to third parties (200 × 20% = 40, hence plus EUR 40). It follows that the total VAT payable by the VAT group is EUR 20.

73. A discharges the tax obligations of the members of the VAT group and pays the VAT owed by the group. The transactions between taxable persons referred to in (ii) and (iii) are completely neutralised. Where B sells its goods to A, the VAT charged by B is equal to the VAT which A may deduct. Those transactions are therefore not taken into account in determining the amount of VAT payable by the VAT group. In accordance with Article 4(1) of the Sixth Directive, A carries out economic activities independently. As a taxable person, A received EUR 40 by way of VAT. It sold the goods to final consumers and was able to deduct input tax of EUR 20 in respect of that acquisition. For that transaction, it must pay VAT of EUR 20. B is not required to pay VAT in respect of the resale transaction, since that transaction was carried out at cost price.

74. All the members of a VAT group are jointly and severally liable for the VAT debts of the group even if, in practice, it is merely the interlocutor member that pays the (joint) amount of VAT due. As regards VAT groups, the Sixth Directive does not regulate the distribution of responsibility – in relation to the VAT amount due by the group – among its members or the modalities of that responsibility.

75. In accordance with the VAT system set out by the Sixth Directive, each taxable person is responsible for its own obligations as regards VAT. Given that, under the rules set out in Article 4(4) of the Sixth Directive, members of a VAT group do not lose their quality as individual taxable persons, the sharing out of the VAT obligations among the VAT group members is a matter for national law on contracts and torts.

76. Contrary to the VAT group regime under the Sixth Directive, the regime set up by Point 2 of Paragraph 2(2) of the UStG provides that the VAT group members are no longer considered taxable persons – even where they continue selling goods and providing services for consideration and do so independently and where each one of them is a taxable person acting as such within the meaning of Article 2 of the Sixth Directive.

77. In that respect, I share the opinion of the Commission that, under that national system, company B in the example above would not (at all) be taken into account as a taxable person for the purposes of VAT. It would be simply treated as a subsidiary of company A. However, B purchases goods as a taxable person acting as such in accordance with Article 2(1) of the Sixth Directive. A would be the sole taxable person of the VAT group. However, the second subparagraph of Article 4(4) of the Sixth Directive does not allow that B, as a member of a VAT group, is no longer considered a taxable person, in so far as it continues carrying out economic activities in an independent manner within the meaning of Article 4(1) of that directive.

78. Therefore, it is important to bear in mind that the members of a VAT group do not lose their status as a ‘taxable person’ as long as the members of the VAT group do not cease to carry out independent economic activities. As I pointed out above, Article 4(1) of the Sixth Directive does not exclude that a company remains a taxable person in a situation where it is controlled by another company or where it is wholly or partly owned by the latter.

79. 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. That task could be carried out by the controlling company (as stipulated in German law). However, I consider (as does the Commission) that the requirement that, for the purposes of the VAT group, the controlling company have a majority of the voting rights and a majority shareholding in the controlled company in the VAT group is contrary to the second subparagraph of Article 4(4) of the Sixth Directive.

80. As mentioned above, the controlling company may fulfil the tax obligations of the various

taxable persons in the VAT group. However, in accordance with the Sixth Directive, there is no obligation that only the VAT member controlling the group must be the interlocutor representing the group vis-à-vis the tax authorities. In the simplified example in points 71 to 73 above, it is possible, for instance, for company B to have greater liquidity. For the other members of the group who may have less liquidity available, there is therefore an interest in B paying the VAT due for the group. Indeed, a contractual agreement may also be concluded among the members as regards the interlocutor's remuneration for dealing with the tax authorities.

(3) *EU law requirements on who is the taxable person of the VAT group*

81. In its Communication, (24) the Commission refers to VAT groups as 'fiction[al entities]'.

82. The referring court is therefore right, as we shall see, in regarding as irrelevant the fact that the German legislature has not yet laid down the VAT group as a form of company under national law.

83. Indeed, the consideration noted by the Commission in its abovementioned Communication – according to which '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 …' – correctly attests to the primacy of EU VAT law over national civil or company law (this is also the opinion of the referring court; see paragraph 58 of the order for reference).

84. As the referring court itself noted, in the first place, it is apparent from the case-law of the Court that, where a Member State exercises its power under the second subparagraph of Article 4(4) of the Sixth Directive, the national implementing legislation must allow the taxable person to be a single taxable person and a single VAT number to be granted for the group as a whole. (25) Although it does not follow from that case-law that it must be a specific person, the Court has nevertheless subsequently stated that it is the VAT group itself, where such a group exists, which is liable for VAT. (26)

85. Thus, under EU law, the taxable person liable for that tax is the VAT group itself, and not solely the controlling company of that group, namely a specific member thereof, as is the case under German law. Indeed, a considerable section of German academic tax commentary has pointed out that for that reason the first sentence of Point 2 of Paragraph 2(2) of the UStG is contrary to the Sixth Directive. (27)

86. Furthermore, I consider that the above provision of the UStG manifestly goes beyond simplification of taxation of companies which are linked by providing that the controlling company constitutes the taxable person. That drafting of the UStG ignores, first, the independent legal personality of the companies linked and, second, their potential specificities as public bodies (this comes to the fore in my parallel Opinion in Case C?269/20). Moreover, the above provision of the UStG restricts the freedom of the tax-group-arrangement scheme (VAT group) to designate its representative.

(4) *Potential infringement of the principle of fiscal neutrality*

87. Point 2 of Paragraph 2(2) of the UStG is also arguably contrary to the principle of fiscal neutrality, from which it follows that 'traders must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their

transactions excluded from the exemption[s] provided for in … the Sixth Directive'. (28)

88. Indeed, the Court has held that, for VAT purposes, in principle, 'the identity of the operators … and the legal form … are … irrelevant', (29) unless otherwise provided in the Sixth Directive or in the case-law.

89. In that context, I agree with Advocate General Mengozzi: 'I fail to see why a distinction based on legal form or on the existence or non-existence of legal personality of undertakings is necessary and appropriate in order to prevent tax evasion and avoidance … such a distinction is also contrary to the principle of fiscal neutrality … Depriving economic operators of those advantages by reason of the legal form through which one of those operators exercises its activity amounts to a difference in treatment of similar transactions, which are therefore in competition with one another, aside from the fact that the characteristic of the taxable person is precisely the economic activity and not the legal form … The VAT group mechanism must promote fiscal neutrality whilst reflecting economic reality … it must not lead to the creation of artificial distinctions according to the legal form by means of which economic operators exercise their activity'. (30) Therefore, in a manner akin to the conditions relating to the legal form and legal personality above, I consider that conditions such as those imposed by the UStG in the present case (designating solely the member of a VAT group controlling it, which owns a majority of the voting rights and has a majority shareholding in the controlled company in that group, as the representative of the group and the taxable person of that group, to the exclusion of the other group members) appear to go beyond what is necessary and appropriate to achieve the objectives under the Sixth Directive.

(d) ***Step 3: Can the German Governmentrely on an exception under the EU law rules on VAT groups to justify its regime?***

90. As a general rule under EU law, the taxable person must be a person defined in the Sixth Directive and, therefore, I will analyse whether the German measures specifying that the person liable to pay the tax can only be the controlling company serve to prevent abusive fiscal practices.

91. As the Court pointed out in the judgment in *Larentia + Minerva* (paragraph 40), 'it is apparent from the Commission proposal (COM(73) 950 final [(31)]) which resulted in the adoption of the Sixth Directive that the EU legislature, by adopting the second subparagraph of Article 4(4) of that directive, intended, either in the interests of simplifying administration or with a view to combating abuses such as, for example, 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'.

92. Furthermore, the Court ruled that 'the second subparagraph of Article 4(4) of the Sixth Directive must be interpreted as precluding national legislation which reserves the right to form a VAT group, as laid down by that provision, solely to entities with legal personality and linked to the controlling company of that group in a relationship of subordination, except where those two requirements constitute measures which are appropriate and necessary in order to achieve the objectives seeking to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance' (paragraph 46 of the judgment in *Larentia + Minerva*). (32)

93. The objectives of the second subparagraph of Article 4(4) of the Sixth Directive are to prevent abuse and combat tax evasion and avoidance and to simplify administrative operations by exempting intra-group transactions from VAT.

94. Thus, the objective of that provision is to define the single taxable person of the VAT group who is required to complete the tax return and to pay VAT on behalf of that group without,

however, eliminating the tax liability of the other members of that group. However, that provision is silent as to the joint and several liability of the various members of that consortium. In that regard, it is clear, however, from Article 21(1)(a) of the Sixth Directive that Member States may provide that an entity other than the taxable person is to be held jointly and severally liable for payment of VAT. It follows that the member of the VAT group, acting on behalf of that group, may also be held jointly and severally liable for payment of that tax.

95. As the referring court pointed out, Article 21(1)(a) of the Sixth Directive only authorises Member States to designate additional persons as joint and several persons liable for payment of VAT. It does not allow them to make a derogating designation of a person liable for that tax other than the VAT group itself. Indeed, it follows from the case-law that the Member States do not have a right to add supplementary conditions to Article 11 of Directive 2006/112 (and, as a result, to Article 4(4) of the Sixth Directive). (33)

96. Next, the referring court seeks to know whether the approach followed by the Court in the judgment in *Larentia + Minerva* is to be interpreted as meaning that, in order to prevent abuse or to combat tax evasion and avoidance, Member States may designate as the member of a VAT group acting on behalf of that group only the controlling company of that group. The referring court explains that the condition relating to ownership of the majority of the voting rights was intended to facilitate cooperation of the VAT group members in order to ensure that they meet their tax obligations.

97. I consider (as does the Commission) that the purpose of the condition relating to ownership of the majority of the voting rights by that controlling company is not to prevent abuse or combat tax evasion and avoidance.

98. Indeed, first, as the Schleswig?Holsteinisches Finanzgericht (Finance Court, Schleswig?Holstein) ruled in this case, no argument was presented in the main proceedings with respect to the purported justification under EU law, namely to prevent abuse and combat tax evasion and avoidance, and the documents before that court did not contain anything which would bring to light any such conduct of the companies forming the VAT group at issue.

99. Secondly, I agree with the referring court when it states that it ‘does not see how the fact that one [specific] member of the VAT group is considered the taxable person, instead of the VAT group [itself] could be used to prevent abusive practices or conduct or to combat tax fraud or evasion, given that … all the members of that group would [, in any event,] be liable for that tax as joint and several debtors. Doubt is therefore warranted as to whether such a justification allows a derogation’ (paragraph 56 of the order for reference). The referring court also points out in that order for reference that ‘under national law, the purpose of tax-group-arrangement schemes is not to seek administrative simplification, but to avoid unnecessary administrative work in the economy’.

100. Finally, I would point out that the Court has already rejected similar general arguments, such as those raised by the German Government in its judgment in *M-GmbH*, when it ruled that the objective of preventing tax avoidance does not constitute a justification for the overly restrictive German regulation of VAT groups.

101. Indeed, the Court ruled there that ‘in order to be able to conclude that there is an abusive practice, it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage … and so the risk of tax fraud or evasion, under the second subparagraph of Article 11 of [Directive 2006/112 (which Article corresponds to Article 4(4) of the Sixth Directive)], must not be simply theoretical’. (34)

102. It follows from the Court’s case-law that specific justifications are needed when seeking to

show that the restrictive conditions imposed on VAT groups under the German regime in the UStG actually serve the purpose of combating tax fraud or evasion. Similar to the case in the judgment in *M-GmbH*, I consider that the arguments raised by the German Government in that respect are not convincing in the present case.

IV. **Conclusion**

103. I propose that the Court of Justice answer the first and fourth questions referred for a preliminary ruling by the Bundesfinanzhof (Federal Finance Court, Germany) as follows:

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 must be interpreted as allowing closely related persons, who are members of a VAT group, to be treated as a single taxable person for the purposes of VAT obligations.

However, that provision must be interpreted as precluding Member State legislation which designates solely the member controlling the group – which owns a majority of the voting rights and has a majority shareholding in the controlled company in the group of taxable persons – as the representative of the VAT group and the taxable person of that group, to the exclusion of the other group members.

1 Original language: English.

2 Sixth Council Directive 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; hereafter ‘the Sixth Directive’).

3 Müller-Lee, J., Imhof, P., ‘VAT group requirements: a German fairy tale’, *International Tax Review*, 2014, p. 48. On VAT groups in general, see the following publication: Pfeiffer, S., ‘VAT Grouping from a European Perspective’, *IBFD Doctoral Series*, Vol. 34, 2015.

4 Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

5 Those issues are the subject of the first three questions referred.

6 That question was raised in the context of the fourth question referred.

7 See, *ex multis*, Geraats, M., ‘Personengesellschaft als umsatzsteuerrechtliche Organgesellschaft – zugleich Anmerkung zu EuGH, Urteil vom 15.04.2021 – C?868/19**’**, *Steueranwaltsmagazin*, No 3, 2021, p. 87.

8 See Geraats, M., op. cit., p. 87. This is to some extent reflected also in the preliminary references underlying the judgment in *Larentia + Minerva*, and the judgment of 15 April 2021, *M-GmbH* (C?868/19, EU:C:2021:285; hereafter ‘the judgment in *M-GmbH*’).

9 The referring court cites Birkenfeld, *Umsatzsteuer-Rundschau*, 2014, pp. 120 and 126. I can also cite Stadie in Rau/Dürrwächter (eds.), Umsatzsteuergesetz, *§ 2*, July 2011, paras 915 and 993; Reiss in Reiss/Kraeusel/Langer, UStG, *§ 2 UStG*, paras 98.6 and 98.17; Klenk in Sölch/Ringleb, UStG, *§ 2 UStG*, para. 89; Korn in Bunjes, UStG, *§ 2 UStG*, 2013, para. 110; Scharpenberg in Hartmann/Metzenmacher, UStG, *§ 2 UStG*, para. 325; Radeisen in Schwarz/Widmann/Radeisen, UStG, *§ 2 UStG*,2011, para. 179; Meyer in Offerhaus/Söhn/Lange,

UStG, *§ 2 UStG*,2011, para. 64; Korf, *MwStR*, 2016, p. 257; and Lange, *Umsatzsteuer-Rundschau* , 2016, pp. 297, 299 and 302. See, also, Rust, M., *Neue und wiederkehrende Fragen der umsatzsteuerrechtlichen Organschaft*, Sächsischer Steuerkreis, 2021.

10 Judgment of 29 October 2009, *NCC Construction Danmark* (C?174/08*,* EU:C:2009:669, paragraph 23 and the case-law cited).

11 See Gryziak, B., 'VAT Groups and the Right of Deduction across the European Union – Review and Analysis', *International VAT Monitor*, Vol. 32, 2021, p. 205. See Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Directive 2006/112/EC [formerly Article 4(4) of the Sixth Directive] on the common system of [VAT] (COM(2009) 325 final, p. 1).

12 Judgment of 12 October 2016, *Nigl and Others* (C?340/15, EU:C:2016:764, paragraph 27 and the case-law cited), emphasis added.

13 See, to that effect, judgments of 27 January 2000, *Heerma* (C?23/98, EU:C:2000:46, paragraph 18), and of 18 October 2007, *van der Steen* (C?355/06, EU:C:2007:615, paragraph 23).

14 Emphasis added.

15 Emphasis added.

16 Emphasis added.

17 See the judgment in *Larentia* + *Minerva*, paragraphs 45 and 46).

18 See, to that effect, judgments of 4 October 2001, *"Goed Wonen"* (C?326/99, EU:C:2001:506, paragraph 34), and of 5 July 2012, *DTZ Zadelhoff* (C?259/11, EU:C:2012:423, paragraph 34).

19 Sterzinger, C., 'Notwendige Einbeziehung von Nichtsteuerpflichtigen in einen Organkreis', *Umsatzsteuer-Rundschau*, 2014, p. 139.

20 See, by analogy, judgment of 26 June 2001, BECTU (C?173/99, EU:C:2001:356, paragraph 52 et seq.).

21 Korf, R., 'Organschaft – quo vadis?', *Umsatzsteuer- und Verkehrsteuer-Recht*, 2008, p. 179.

22 Proposal for a second directive for the harmonisation among Member States of turnover tax legislation, concerning the form and the methods of application of the common system of taxation on value added (submitted by the Commission to the Council) (COM(1965) 144 final).

23 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. 1303).

24 See second subparagraph of point 3.2 of Commission Communication (COM(2009) 325 final).

25 Judgment of 22 May 2008, Ampliscientifica and Amplifin (C?162/07, EU:C:2008:301, paragraph 20).

26 Judgment of 17 September 2014, Skandia America (USA), filial Sverige(C?7/13, EU:C:2014:2225, paragraphs 29, 35, 37 and the operative part).

27 See footnotes 8 and 9 of the present Opinion.

28 Judgment of 3 April 2008, *J.C.M. Beheer* (C?124/07, EU:C:2008:196, paragraph 28 and the case-law cited). See also, for instance, judgments of 7 September 1999, *Gregg* (C?216/97, EU:C:1999:390, paragraph 20), and of 23 October 2003, *Commission* v *Germany* (C?109/02, EU:C:2003:586, paragraph 23).

29 See, to that effect, judgment of 10 November 2011, *The Rank Group* (C?259/10 and C?260/10, EU:C:2011:719, paragraph 46). See also judgment of 17 February 2005, *Linneweber and Akritidis* (C?453/02 and C?462/02, EU:C:2005:92, paragraph 25).

30 See Opinion of Advocate General Mengozzi delivered on 26 March 2015 in *Larentia + Minerva* (C?108/14 and C?109/14, EU:C:2015:212, points 80 to 83).

31 Commission proposal for a sixth Council Directive on the harmonisation of Member States concerning turnover taxes – Common system of [VAT]: Uniform basis of assessment (OJ 1973 C 80, p. 1).

32 See also the judgment in *M-GmbH*, paragraph 47.

33 See, to that effect, the judgment in *M-GmbH*, paragraph 53.

34 See the judgment in *M-GmbH*, paragraph 61, and the case-law cited.