Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 26 March 2015 [1]

Joined Cases C-108/14 and C-109/14

Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG
v
Finanzamt Nordenham (C-108/14)
and
Finanzamt Hamburg-Mitte
v
Marenave Schiffahrts AG (C-109/14)

(Requests for a preliminary ruling from the Bundesfinanzhof (Germany))

(Reference for a preliminary ruling — Taxation — Common system of value added tax: uniform basis of assessment — Parent (holding) company which received supplies subject to VAT with a view to the procurement of equity capital used to guarantee shareholdings in two subsidiaries to which that same parent company subsequently provided services for remuneration — National legislation limiting tax integration to legal persons in a relationship of subordination in financial, economic and organisational terms)

I – **Introduction**

1. The present requests for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court) (Germany) essentially concern, first, the method used to calculate two holding companies' input value added tax (VAT) deduction in respect of the acquisition of shareholdings in other companies in the management of which those holding companies involve themselves and, second, the question whether 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 [2] ('the Sixth Directive') precludes tax legislation which prohibits partnerships from participating as 'subordinate' entities in a VAT group within the meaning of that article.

2. These questions have been raised in two disputes between, first, Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG ('Larentia + Minerva') and the Finanzamt Nordenham (Tax Office, Nordenham) (C-108/14) and, second, the Finanzamt Hamburg-Mitte (Tax Office, Hamburg-Centre) and Marenave Schiffahrts AG ('Marenave') (C-109/14). [3]

1 — Original language: French.

2 — OJ 1977 L 145, p. 1. As the matters at issue in the main proceedings took place before 1 January 2007, the date of entry into force of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), the latter directive is therefore not applicable.

3 — By decision of the President of the Court of 26 March 2014, these cases were joined for the purposes of the written and oral procedure and the judgment.

3. In the first case, Larentia + Minerva holds, as a limited partner, 98% of the shares in two subsidiaries constituted in the form of limited partnerships with a limited liability company as general partner (GmbH & Co. KG) which each operate a vessel. It also provides those subsidiaries, as a 'management holding company', with administrative and business services for remuneration.

4. In respect of these services subject to VAT, Larentia + Minerva deducted in full the input VAT paid in raising from a third party capital which was used to fund the acquisition of its shareholdings in the subsidiaries and its services, in particular administrative and consultancy services, provided to those subsidiaries for remuneration.

5. The Finanzamt Nordenham allowed that deduction only very partially, in an amount of 22%, as the majority of the costs connected with the acquisition of shareholdings in the subsidiaries were attributed to the non-economic area of the holding company's activity, namely holding shares in subsidiaries, for which there is no input tax deduction. The 2005 VAT amendment notice of 24 September 2007 was challenged by Larentia + Minerva before the Niedersächsisches Finanzgericht (Finance Court of Lower Saxony), which dismissed the claim. Larentia + Minerva thereupon lodged an appeal on a point of law with the Bundesfinanzhof.

6. In the second case, Marenave increased its capital in 2006 and the costs for the issue of shares in connection with that increase gave rise to a VAT payment of EUR 373 347.57.

7. In the same year that company, as a holding company, acquired shares in four 'limited shipping partnerships', which are partnerships in the business management of which it was involved for remuneration. From the VAT payable in respect of the revenue from those management activities in 2006, it deducted, inter alia, the entire sum of EUR 373 347.57 as input VAT.

8. By a decision of 15 January 2009, the Finanzamt Hamburg-Mitte refused to allow the deduction in respect of that sum, given the lack of actual involvement of the holding company in the management of the subsidiaries. However, the Finanzgericht Hamburg-Mitte (Finance Court, Hamburg-Centre) upheld the action brought against that decision and allowed in full the input tax deduction claimed by Marenave. The Finanzamt Hamburg-Mitte lodged an appeal on a point of law with the Bundesfinanzhof against the judgment of the Finanzgericht Hamburg-Mitte.

9. In the two cases before it, the referring court considers that the services purchased by the holding companies are used for both economic activities and non-economic activities and that deduction of input tax can be claimed only to the extent to which the expenses are to be attributed to the economic activity of the holding companies. Consequently, the referring court takes the view that there is no entitlement to full deduction but asks whether the principles identified by the Court in *Cibo Participations* (C-16/00, EU:C:2001:495) do not preclude such a finding. Nevertheless, the referring court does not ask the Court directly about this subject. Its first question simply seeks clarification about the method for calculating the input VAT deduction which objectively reflects the portion of the input expenditure actually to be attributed to economic activities and to non-economic activities in the case of the holding companies. Second, if the question of input VAT deduction by the holding companies were to be resolved by taking into consideration the subsidiaries' taxable output transactions with third parties, the referring court enquires about the scope of the second subparagraph of Article 4(4) of the Sixth Directive relating to VAT groups, invoked for the first time in the appeal proceedings on a point of law by Larentia + Minerva and by Marenave. In this regard, the Bundesfinanzhof asks whether national law is compatible with that provision when, among other things, it precludes such a mechanism for partnerships and whether, if that is not the case, the second subparagraph of Article 4(4) of the Sixth Directive can be relied on directly by taxable persons.

10. In those circumstances, the Bundesfinanzhof decided to stay the proceedings and, in each of these cases, to refer the following questions for a preliminary ruling:

‘(1) Which calculation method is to be used to calculate a holding company’s (pro rata) input [VAT] deduction in respect of input supplies connected with the procurement of capital for the purchase of shares in subsidiary companies, if the holding company subsequently (as intended from the outset) provides various taxable services to those companies?

(2) Does the provision on the consolidation of several persons into a single taxable person in the second subparagraph of Article 4(4) of [the Sixth Directive] ... preclude national legislation under which (firstly) only a legal person, but not a partnership, can be integrated into the undertaking of another taxable person (a so-called “Organträger” (controlling company)) and which (secondly) requires that this legal person “is integrated into the undertaking of the Organträger” in financial, economic and organisational terms (in the sense of a relationship of control and subordination)?

(3) If the previous question is answered in the affirmative: can a taxable person rely directly on the second subparagraph of Article 4(4) of [the Sixth Directive] ...?’

11. Written observations on those questions were submitted by Larentia + Minerva, Marenave, the German Government, Ireland, the Austrian and United Kingdom Governments and the European Commission. With the exception of the Austrian Government, which was not represented in the oral procedure, those interested parties and the Polish Government presented oral argument at the hearing on 7 January 2015.

II – **Analysis**

A – *The first question*

12. As I stated in point 9 of this Opinion, the first question asked by the referring court is based on the premise that VAT paid by the two holding companies in the main proceedings may be partially deducted only in so far as, in the case of Larentia + Minerva, the costs connected with the acquisition of shareholdings in its subsidiaries and, in the case of Marenave, the costs for the issue of shares are attributed, for the most part, to the non-economic activity of those holding companies in respect of the acquisition and holding/management of shares in their respective subsidiaries.

13. Basing itself on that premise, the referring court seeks further explanation from the Court on the calculation method that should be used to apportion input VAT as objectively and uniformly as possible where a holding company’s expenditure is attributed to economic activities and to non-economic activities.

14. If we were to confine ourselves strictly to answering that question, I consider, like all the interested parties participating in these proceedings, that the Court would have to decline jurisdiction to provide further information about such a calculation method in addition to that which is already evident from its present case-law.

15. It should be pointed out in particular that, when it was asked a similar question in *Securenta* (C-437/06, EU:C:2008:166), the Court noted that the provisions of the Sixth Directive do not include rules relating to the methods or criteria which the Member States are required to apply when adopting provisions permitting the apportionment of input VAT paid according to whether the relevant expenditure relates to economic activities or to non-economic activities, as the rules on input VAT deduction laid down in the Sixth Directive are connected exclusively with economic

activities. [4]

16. Consequently, as the Sixth Directive does not contain the guidance necessary for such precise calculations, it is for the Member States to establish methods and criteria appropriate to that aim, exercising their discretion having regard to the aims and broad logic of the directive, in particular in compliance with the principle of fiscal neutrality. [5]

17. The Court accordingly concluded that, in exercising that discretion, the Member States must ensure that deduction is made only for that part of the VAT which is proportional to the amount relating to transactions giving rise to the right to deduct and therefore ensure that the calculation of the proportion of economic activities to non-economic activities objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity. In this context, the Member States nevertheless have the right to apply any appropriate formula, such as the investment formula or the transaction formula (which were mentioned by the national court in *Securenta*), without being required to restrict themselves to only one of those methods. [6]

18. The Court confirmed these findings in paragraphs 42 and 47 of the judgment in *Portugal Telecom* (C-496/11, EU:C:2012:557), stating, in essence, that, irrespective of the methods of calculation chosen or applied by the Member States, those methods must objectively reflect the part of the input expenditure actually to be attributed, respectively, to economic activities and to non-economic activities.

19. In the present cases, the referring court states that the German legislature has not yet adopted any formula of the kind mentioned by the Court in *Securenta*, giving rise to considerable legal uncertainty which must, in its view, be alleviated by the Court.

20. I consider that the Court cannot accede to that request both on grounds connected with respect for the residual jurisdiction of the Member States and for practical reasons related to the diversity and complexity of the factual situations, which do not allow the Court to favour one method or formula over another.

21. For similar reasons, the fact that a national legislature has not yet opted for one method or another but, as is pointed out by the referring court and by the German Government in its written observations, has preferred to leave that assessment, in the light of the circumstances of the specific case, to taxable persons and to the tax authorities also cannot lead the Court to consider that it is entitled to assume the role of that legislature.

22. On the contrary, the national courts must ascertain whether, having regard to the situations referred to them, the method(s) of calculation applied either by the taxable person or, as the case may be, by the national tax authorities objectively reflect the part of the input expenditure actually to be attributed, respectively, to the economic activities and the non-economic activities of the taxable person.

23. In the present cases, the referring court must therefore verify whether the application of the method considered appropriate by the tax authorities, which is, according to the information provided by the referring court, the investment formula, satisfies that objective.

24. I am uncertain, however, about the referring court's premise in so far as it takes the view that the two holding companies carry out in part economic activities and in part non-economic activities.

4 — See, to this effect, *Securenta* (C-437/06, EU:C:2008:166, paragraph 33).

5 — Idem (paragraphs 34 to 36).

6 — Ibid. (paragraphs 37 and 38).

25. This goes beyond a mere question of assessment of the facts in the main proceedings, which, of course, falls exclusively within the jurisdiction of the referring court in the context of the cooperation provided for by Article 267 TFEU.

26. As is pointed out by Larentia + Minerva and Marenave, the question must be asked whether the holding companies' involvement in the management of the subsidiaries should, pursuant to the principles identified in *Cibo Participations* (C-16/00, EU:C:2001:495) in particular, lead to the conclusion that such holding companies exercise only an economic activity, and thus to the exclusion of any non-economic activity. According to those parties, it follows that there is consequently a right to full deduction of input VAT in respect of the services provided to those holding companies in connection with the acquisition of shareholdings in their subsidiaries.

27. In its case-law on the VAT status of holding companies, the Court draws a distinction between two cases, depending on whether or not the holding companies involve themselves in the management of their subsidiaries.

28. Holding companies in the first category are those the sole purpose of which is to hold and manage shares in other companies and which do not provide those companies with any services for remuneration and thus do not involve themselves directly or indirectly in the management of other undertakings, other than by exercising their rights as shareholders.

29. Such holding companies do not have the status of a taxable person within the meaning of Article 4 of the Sixth Directive and therefore have no right to deduct tax pursuant to Article 17 of that directive. According to case-law, the mere acquisition and holding of shares in a company is not to be regarded as an economic activity within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property. [7]

30. However, the Court has repeatedly held that '*it is otherwise* where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, without prejudice to the rights held by the holding company as shareholder'. [8] The Court goes on to state that the involvement of a holding company in the management of companies in which it has acquired a shareholding constitutes an economic activity within the meaning of Article 4(2) of the Sixth Directive where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company to its subsidiaries of administrative, financial, commercial and technical services. [9]

31. As follows from the typology of holding companies set out by the referring court, such holding companies are classified as 'management' holding companies.

32. It is common ground in the present cases that the two holding companies in the main proceedings come under that second category and that they are therefore subject to VAT in respect of the supplies which they provide for remuneration to their subsidiaries.

7 — See, inter alia, *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 19), and *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 32).

8 — See, inter alia, *Polysar Investments Netherlands* (C-60/90, EU:C:1991:268, paragraph 14); *Floridienne and Berginvest* (C-142/99, EU:C:2000:623, paragraph 18); *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 20); *SKF* (C-29/08, EU:C:2009:665, paragraph 30); and *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 33) (my italics).

9 — *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 22), and *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 34).

33. The referring court acknowledges, moreover, that those holding companies are entitled to deduct the input VAT allotted to the services which they purchased from third-party undertakings in connection with capital transactions involving their subsidiaries. In the view of the referring court, however, that deduction is only pro rata. The holding companies' input supplies in connection with the raising of capital were intended primarily for a non-economic activity of the holding companies, namely the (non-taxable) acquisition and holding of their respective shares in their subsidiaries.

34. In this regard I would point out, first of all, that the referring court does not state that those supplies were attributed to the mere holding of shares in other subsidiaries in the management of which the holding companies do not involve themselves, an activity which cannot be regarded as economic and which therefore entails the obligation to apportion input VAT between the economic and non-economic activities of those holding companies.

35. Second, I consider that the logic underlying the Court's case-law concerning the dichotomy between holding companies which do or do not involve themselves in the management of their subsidiaries has repercussions for the allocation of the expenditure connected with input capital transactions by holding companies to their output economic activity.

36. In *Cibo Participations*, which concerned a similar situation to those in the main proceedings, the Court ruled that expenses incurred by a holding company involved in the management of a subsidiary in respect of various services which it purchased in connection with the acquisition of a shareholding in that subsidiary form part of the taxable person's general costs and are, *as such*, cost components of its products. Such services therefore do, in principle, have a direct and immediate link with the holding company's business as a whole. [10]

37. As the Court must have known that, by its very nature, such a holding company also managed shareholdings which did not entail an economic activity, the approach taken in that judgment means, first, that expenditure incurred by the holding company in respect of the acquisition of shareholdings in its subsidiaries is connected only with the holding company's economic activity and not, even partially, with its non-economic activity, which consists in managing shareholdings and, second, that the holding company is, in principle, permitted to deduct all the VAT paid on input transactions.

38. This assessment is confirmed by paragraph 34 of the judgment in *Cibo Participations*, in which the Court refers to the system of deduction provided for in the first subparagraph of Article 17(5) of the Sixth Directive, the application of which relates only to the apportionment of VAT on input transactions used both for economic transactions, in respect of which VAT is deductible, and for transactions in respect of which VAT is not deductible, hence VAT on expenditure connected exclusively with economic activities. [11]

39. The expenditure connected with the acquisition of shareholdings in subsidiaries incurred by a holding company which involves itself in their management, within the meaning of the Court's case-law, is therefore attributed to that holding company's economic activity. Consequently, VAT paid on that expenditure will be subject to full deduction pursuant to Article 17(2) of the Sixth Directive unless the input economic transactions are exempt from VAT under the Sixth Directive, in which case the right to deduct will be based on the proportion method under Article 17(5) of that directive. [12] In my view, that is the proper interpretation of *Cibo Participations*.

10 — *Cibo Participations* (C-16/00, EU:C:2001:495, paragraph 33). See also, inter alia, *SKF* (C-29/08, EU:C:2009:665, paragraph 58).

11 — See, to this effect, *Securenta* (C-437/06, EU:C:2008:166, paragraph 33) and my Opinion in *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C-515/07, EU:C:2008:769, point 79). See also the judgment in *Portugal Telecom* (C-496/11, EU:C:2012:557, paragraph 40).

12 — The methods for calculating the proportion fall within the sphere of application of the Member States' national legislation: see, in this regard, *Le Crédit Lyonnais* (C-388/11, EU:C:2013:541, paragraphs 30 and 31).

40. This analysis is perfectly capable of being extended to expenditure connected, not with the acquisition of shareholdings in subsidiaries, but with other capital transactions effected by a management holding company, such as the increase in its capital through the issue of shares for the ultimate purpose of funding the acquisition and operation of sea vessels, as appears to be the situation in Case C-109/14.

41. The Court has already recognised in *Kretztechnik* (C-465/03, EU:C:2005:320) that a share issue does not, per se, fall within the scope of the Sixth Directive but may be carried out by a company in order to increase its capital for the benefit of its economic activity in general, which means that the costs of the supplies acquired by that company in connection with the operation concerned form part of its overheads and are therefore, as such, component parts of the price of its products, as those supplies have a direct and immediate link with the whole economic activity of the taxable person.[13]

42. The fact that in the main proceedings in Case C-109/14 the shares had been issued by a management holding company and not by a company, such as Kretztechnik, that carried on only an economic activity would not, in view of the findings made in *Cibo Participations*, appear necessarily to entail different consequences for the fundament right of full deduction of input VAT.

43. In any event, neither the referring court nor the interested parties in these proceedings have suggested that a distinction should be drawn between the tax treatment of expenditure incurred by a management holding company depending on whether that expenditure is connected with the acquisition of shareholdings or with other capital transactions.

44. In the light of the foregoing, I consider that the first question should be answered to the effect that expenditure connected with capital transactions incurred by a holding company which involves itself directly or indirectly in the management of its subsidiaries has a direct and immediate link with that holding company's economic activity as a whole. Input VAT on that expenditure should not therefore be apportioned between economic and non-economic activities. If the holding company effects transactions which are subject to VAT and transactions which are exempt, the proportion method provided for in Article 17(5) of the Sixth Directive will be used to calculate the right to deduct input VAT.

B – *The second question*

45. By its second question, the referring court asks, in essence, whether the second subparagraph of Article 4(4) of the Sixth Directive, which provides that Member States may treat several persons as a single taxable person, precludes national legislation which, first, limits to legal persons alone the possibility of being integrated into the undertaking of another taxable person (a 'controlling company') and, second, requires that those legal persons be integrated into the undertaking of the controlling company in financial, economic and organisational terms, namely in the sense of a relationship of control and subordination.

46. According to the wording of the second subparagraph of Article 4(4) of the Sixth Directive, the directive permits each Member State to treat several persons as a single taxable person where they are established in the territory of that Member State and, while legally independent, are closely bound to one another by financial, economic and organisational links.[14]

13 — See *Kretztechnik* (C-465/03, EU:C:2005:320, paragraph 36).

14 — It should be noted that this provision was subsequently reproduced with a similar wording in Article 11 of Directive 2006/112/EC.

47. That provision thus established in EU legislation the concept of a VAT group, which, as was stated in the Explanatory Memorandum to the Proposal for the Sixth Directive,[15] is intended, either in the interests of simplifying administration or with a view to combating abuses, to allow Member States not to treat as distinct those taxable persons whose independence is purely a legal technicality.[16]

48. In practice, since the VAT group is regarded as a single taxable person, the entities forming it do not continue to submit VAT declarations separately or to be identified, within and outside their group, as taxable persons.[17]

49. It follows that the VAT group's internal transactions, that is to say, transactions effected for consideration between the constituent members, do not exist, in principle, for VAT purposes. The right to deduct input VAT is therefore determined, not on the basis of the transactions between the members of the group, but solely on the basis of the group's transactions with third parties.[18]

50. In the present context, although the referring court does not express any doubt that the Federal Republic of Germany chose the option available under the second subparagraph of Article 4(4) of the Sixth Directive, a fact confirmed, moreover, by the German Government in its written observations, the referring court is uncertain whether the holding companies and their respective subsidiaries are capable of obtaining the status of VAT group, such that the group is eligible, in respect of transactions effected for remuneration between the subsidiaries and third-party undertakings, for full deduction of input VAT linked to capital transactions by the holding companies.

51. Whilst such full deduction cannot be excluded in the light of my proposed answer to the first question, two points have to be made at the present juncture.

52. First, the factual situations underlying each of the first two questions are mutually exclusive. In other words, either a VAT group exists or it does not exist. A holding company which involves itself in the management of its subsidiaries cannot under any circumstances benefit from a right to deduct input VAT on expenditure connected with capital transactions involving its subsidiaries and at the same time claim to form a VAT group with those subsidiaries within which, as I have already stated, transactions are not subject to VAT.

53. Second, it is evident from the information contained in the orders for reference that the issue of the grant of the status of VAT group was only raised for the first time before the referring court, which is giving the final ruling at the stage of the appeal on a point of law. Neither the tax authorities nor the courts below the referring court have therefore previously been able to take a view on whether that status should be granted to Larentia + Minerva and to Marenave and their respective subsidiaries.

54. These findings might suggest that the interpretation of the Sixth Directive requested in the second question ultimately bears no relation to the actual facts of the main actions or is hypothetical, such that that question (and, moreover, the third question, which is closely linked to it) should be declared inadmissible.[19] Doubts in this regard have also been expressed by Ireland, both in its written observations and at the hearing before the Court.

15 — Proposal for a Sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment (COM(73) 950, 20 June 1973).

16 — See to this effect, inter alia, *Commission* v *Ireland* (C-85/11, EU:C:2013:217, paragraph 47) and *Commission* v *Sweden* (C-480/10, EU:C:2013:263, paragraph 37).

17 — See, to this effect, *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 19) and *Skandia America (USA), filial Sverige* (C-7/13, EU:C:2014:2225, paragraph 29).

18 — See also, to this effect, Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax (COM(2009) 325 final, 2 July 2009, p. 11). It should be stated that transactions effected between a member of the group and a third party are attributable to the group itself: see *Skandia America (USA), filial Sverige* (C-7/13, EU:C:2014:2225, paragraph 29).

19 — See, inter alia, with regard to case-law on the inadmissibility of questions referred for a preliminary ruling which bear no relation to the actual facts of the action or are hypothetical, *Unió of Pagesos of Catalunya* (C-197/10, EU:C:2011:590, paragraph 17 and the case-law cited).

55. Notwithstanding this, I nevertheless consider that it is helpful to give a substantive answer to this question. As was suggested by the referring court and confirmed by the German Government at the hearing, fulfilment of the conditions governing eligibility for the status of VAT group or tax entity is objective and may be established, in German law, by any court or tribunal irrespective of any request made to that effect. Consequently, the question whether the restrictions on eligibility for such a group provided for under German legislation are compatible with the second subparagraph of Article 4(4) of the Sixth Directive has a bearing on the outcome of the disputes in the main proceedings, as the right to full deduction of input VAT would be likely to be recognised if those restrictions could be set aside.

56. Turning to the substance, then, the referring court seeks guidance on two points. First of all, and in essence, it is necessary to ascertain whether the second subparagraph of Article 4(4) of the Sixth Directive precludes a Member State from limiting the formation of VAT groups to entities having legal personality, to the exclusion, therefore, of partnerships, such as the subsidiaries of the two holding companies in the main proceedings, which are operated in the form of limited partnerships. Second, the referring court asks whether a Member State may require the relationship between the members of the VAT group to be a relationship of control and subordination by which the 'subordinate' entities are integrated into the controlling company.

1. The condition relating to the legal personality of the members of the VAT group

57. In German law, under the first sentence of point 2 of Paragraph 2(2) of the Umsatzsteuergesetz (Law on Turnover Tax; UStG), a trade or profession is not exercised independently if, in the light of the overall actual circumstances, a legal person is integrated in financial, economic or organisational terms into the undertaking of the controlling company.

58. Whilst it is clear from the orders for reference that, in German law, partnerships may be the controlling bodies of the tax entity, such partnerships, in particular limited partnerships, having no legal personality, could not be controlled and could not therefore participate in a VAT group as it exists in Germany.

59. In my view, as Ireland and the Commission have rightly pointed out, there is nothing in the Sixth Directive to permit the exclusion of partnerships from participation in a VAT group.

60. This assessment follows already from the wording of the second subparagraph of Article 4(4) of the Sixth Directive, which mentions, in quite generic terms, that 'persons' may be treated as a single taxable person, which, as Advocate General Jääskinen rightfully noted in his Opinion in *Commission* v *Ireland* (C-85/11, EU:C:2012:753, points 30 and 31), contrasts with the legal framework stemming from the Second VAT Directive.[20] The Court concluded that the wording of Article 11 of Directive 2006/112, which reproduced the similar wording of the second subparagraph of Article 4(4) of the Sixth Directive, did not preclude a Member State from providing that non-taxable persons may individually be included in a VAT group.[21] In another case, the Court also held, albeit indirectly, that the second subparagraph of Article 4(4) of the Sixth Directive is directed at 'persons, in particular companies'.[22]

61. It follows from this case-law that the scope of the second subparagraph of Article 4(4) of the Sixth Directive is not limited to a specific form of company or to the entities that are members of a VAT group having legal personality.

20 — 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, p. 16).

21 — *Commission* v *Ireland* (C-85/11, EU:C:2013:217, paragraphs 38 to 41). See also *Commission* v *Netherlands* (C-65/11, EU:C:2013:265, paragraphs 35 to 39); *Commission* v *Finland* (C-74/11, EU:C:2013:266, paragraphs 30 to 34); *Commission* v *United Kingdom* (C-86/11, EU:C:2013:267, paragraphs 33 to 37); and *Commission* v *Denmark* (C-95/11, EU:C:2013:268, paragraphs 34 to 38).

22 — *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 19).

62. Moreover, contrary to the second subparagraph of Article 4(4) of the Sixth Directive, certain provisions of that directive, such as Articles 28a to 28c, refer only to 'legal persons', which also indicates that the EU legislature did not intend to limit the scope of Article 4 to entities having legal personality.

63. I therefore consider that the scope *ratione personae* of the second subparagraph of Article 4(4) of the Sixth Directive extends to all persons.

64. However, that finding does not provide an answer to the first part of the second question referred to the Court by the Bundesfinanzhof.

65. In order to identify that answer, it is first necessary to assess whether the Sixth Directive precludes a Member State from limiting the scope of the second subparagraph of Article 4(4) of that directive when it exercises its option to allow VAT groups to be formed within its territory. In other words, it is necessary to determine whether Member States retain a margin of discretion as regards the 'persons' whom they consider to be eligible for participation in VAT groups within their territory.

66. In the light of the case-law, this question calls for a nuanced response in my view.

67. It is true that the Court has ruled, with regard to the first paragraph of Article 11 of Directive 2006/112, which reproduced the wording of the second subparagraph of Article 4(4) of the Sixth Directive, that, according to its wording, the application of that article is not made subject to conditions other than those set out.[23] In *Commission* v *Sweden* (C-480/10, EU:C:2013:263, paragraph 35) and *Commission* v *Finland* (C-74/11, EU:C:2013:266, paragraph 63), the Court stated that that provision also did not stipulate that the Member States are able to impose other conditions on economic operators in order to form a VAT group, such as carrying out a certain type of activity or being part of a particular sector of activity.

68. It might therefore appear that the scheme provided for by the second subparagraph of Article 4(4) of the Sixth Directive (and now by the first paragraph of Article 11 of Directive 2006/112) does not confer any margin of discretion on the Member States.

69. However, in those same judgments, the Court recognised, not by reference to the wording of the provision in question, but on the basis of its objectives, the possibility for Member States to restrict the application of the scheme provided for under Article 11 of Directive 2006/112 in compliance with EU law.[24] On the basis of that finding, the Court then rejected the allegations that the Kingdom of Sweden and the Republic of Finland had failed to fulfil their obligations, holding that the Commission had failed to show that the restriction of the application of the VAT group scheme to undertakings in the financial and insurance sector in those two Member States, motivated by the goal of preventing tax evasion and avoidance in accordance with the second paragraph of Article 11 of Directive 2006/112, was contrary to EU law.[25]

70. Since, in my view, that case-law can be applied to the Sixth Directive, it therefore appears to confer a margin of discretion on the Member States when they exercise the option provided for in the second subparagraph of Article 4(4) of the Sixth Directive, although that margin of discretion is subject to the pursuit of the objectives of Article 4(4) of that directive in compliance with EU law.

23 — See, inter alia, *Commission* v *Ireland* (C-85/11, EU:C:2013:217, paragraph 36), and *Commission* v *Sweden* (C-480/10, EU:C:2013:263, paragraph 35).

24 — *Commission* v *Sweden* (C-480/10, EU:C:2013:263, paragraph 38), and *Commission* v *Finland* (C-74/11, EU:C:2013:266, paragraph 66).

25 — *Commission* v *Sweden* (C-480/10, EU:C:2013:263, paragraphs 39 and 40), and *Commission* v *Finland* (C-74/11, EU:C:2013:266, paragraphs 67 and 68).

71. In practice, I therefore consider that the restrictions on the scheme provided for in the second subparagraph of Article 4(4) of the Sixth Directive must be necessary and appropriate for the abovementioned objective of preventing abusive practices or conduct or the objectives of preventing tax evasion and avoidance in compliance with EU law, in particular the principle of fiscal neutrality, which is a fundamental principle of the common system of VAT. [26]

72. In this case, in order to be regarded as legitimate, it must be possible to justify the exclusion of partnerships from participation in a VAT group on the basis of the objectives pursued by Article 4(4) of the Sixth Directive, having due regard to the principle of fiscal neutrality.

73. Although it is for the referring court to determine these points, it should be observed that in its requests for a preliminary ruling it has already essentially made clear, first, that it cannot identify a link between the requirement under point 2 of Paragraph 2(2) of the UStG that all members of a VAT group must have legal personality and the pursuit of the objectives of Article 4(4) of the Sixth Directive and, second, that that requirement might infringe the principle of fiscal neutrality in so far as it has regard to a single legal form in order to prevent certain entities from benefiting from participation in a VAT group.

74. I share that point of view.

75. However, the following two additional comments should be made.

76. First, as regards the objectives of preventing tax evasion or avoidance which, as has been highlighted, are now set out in the second paragraph of Article 11 of Directive 2006/112, it must be stated that it was only upon the adoption of Directive 2006/69/EC of 24 July 2006 [27] that the EU legislature introduced a third subparagraph in Article 4(4) of the Sixth Directive, expressly recognising that Member States which have exercised the option of permitting the formation of VAT groups in their territory 'may adopt any measures needed to prevent tax evasion or avoidance through the use of [the second subparagraph of Article 4(4) of the Sixth Directive]'.

77. At least as far as Case C-108/14 is concerned, the relevant tax year is 2005, which is well before the date of adoption of Directive 2006/69 and the date of its entry into force.

78. Nevertheless, I do not think that this means that, prior to the entry into force of Directive 2006/69, the Member States were unable to adopt measures pursuing such objectives in the exercise of the option available to them under the second subparagraph of Article 4(4) of the Sixth Directive.

79. As the Commission and the United Kingdom Government have rightly pointed out in their written observations, the Court has made clear on many occasions that the prevention of tax evasion and avoidance was one of the objectives recognised and encouraged by the Sixth Directive, [28] including in situations where the national tax authorities could not rely on any express powers granted by the EU legislature under specific provisions of that directive. [29]

26 — With regard to the fundamental character of this principle, see, inter alia, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 59); *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 25). With regard to the limits imposed by the principle of neutrality on the application by the Member States of measures pursuing objectives of preventing tax evasion and avoidance, see, inter alia, *Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski* (C-188/09, EU:C:2010:454, paragraph 26 and the case-law cited).

27 — Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC 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).

28 — See, inter alia, *Gemeente Leusden and Holin Groep* (C-487/01 and C-7/02, EU:C:2004:263, paragraph 76); *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 71); *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446); *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 29); and *R.* (C-285/09, EU:C:2010:742, paragraph 36).

29 — See, in particular, *Halifax and Others* (C-255/02, EU:C:2006:121), which concerned tax avoidance and abusive practices, and *Kittel and Recolta Recycling* (C-439/04 and C-440/04, EU:C:2006:446), which concerned tax evasion.

80. However, like the referring court and the Commission, 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.

81. Second, in my view, such a distinction is also contrary to the principle of fiscal neutrality since, as the German Government acknowledged at the hearing, entities which are individually fully liable to VAT cannot participate in a VAT group solely by reason of their specific legal form.

82. It should be noted in this regard that VAT grouping may entail cash flow advantages to its members as the group's internal transactions, which would be subject to VAT in principle, are exempt from that tax. [30] 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. [31]

83. The VAT group mechanism must promote fiscal neutrality whilst reflecting economic reality. In my view, it must not lead to the creation of artificial distinctions according to the legal form by means of which economic operators exercise their activity.

84. I therefore propose that the first part of the second question be answered to the effect that the second subparagraph of Article 4(4) of the Sixth Directive precludes a Member State, in the exercise of the option available under that provision, from making the formation of a VAT group subject to the condition that all the members of that group must have legal personality, unless that condition is justified by the prevention of abusive practices or tax evasion or avoidance, having due regard to the principle of fiscal neutrality, this being a matter which must be determined by the referring court.

2. The need for the members of the VAT group to have a relationship of control and subordination

85. As has been stated, the second subparagraph of Article 4(4) of the Sixth Directive permits treatment as a single taxable person in the case of entities which, while legally independent, are closely bound by financial, economic and organisational links.

86. The first sentence of point 2 of Paragraph 2(2) of the UStG requires the entities to be integrated in financial, economic and organisational terms into the undertaking of the controlling company.

87. The Bundesfinanzhof states that, according to its settled case-law, the integration required by that provision necessitates the existence of a relationship of control and subordination between the controlling company and the controlled company as the 'subordinate person'.

88. According to the referring court, that financial integration exists if the controlling company is financially involved in the controlled company in such a way that it can impose its will by majority vote in the general meeting. It is a characteristic of economic integration that the controlled company appears as a component of the controlling company in the latter's structure. Lastly, the referring court points out that organisational integration requires that the controlling company uses the possibility, associated with financial integration, of controlling the subsidiary in its day-to-day business management, governing the subsidiary company by its management methods and imposing its will on the subsidiary.

30 — See, to this effect, Communication from the Commission, cited above, p. 11, and Opinion of Advocate General Jääskinen in *Commission* v *Ireland* (C-85/11, EU:C:2012:753, point 45).

31 — The Court has already found, in circumstances linked to the scope of VAT exemptions, that the Sixth Directive precludes distinctions based solely on the legal form by means of which taxable persons exercise their activities: see, in this regard, *Gregg* (C-216/97, EU:C:1999:390, paragraph 20); *Kügler* (C-141/00, EU:C:2002:473, paragraph 30); *Linneweber and Akritidis* (C-453/02 and C-462/02, EU:C:2005:92, paragraph 25); and *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571, paragraphs 30 and 31).

89. However, the referring court does not state precisely in what financial, economic and/or organisational terms the economic operators in the main proceedings do not satisfy the integration condition laid down in the first sentence of point 2 of Paragraph 2(2) of the UStG, as interpreted by the Bundesfinanzhof. Neither the observations submitted by Larentia + Minerva nor those submitted by Marenave really cast any light on this question.

90. That being said, it is common ground that the requirements laid down by the first sentence of point 2 of Paragraph 2(2) of the UStG go beyond those stemming from the second subparagraph of Article 4(4) of the Sixth Directive. The existence of 'close' financial, economic and organisational links does not necessarily mean either the integration of a member into the undertaking of another member of the VAT group or a relationship of control and subordination between those members.[32] At the hearing before the Court, the Commission pointed out that of the 16 Member States which had taken the option provided for in the second subparagraph of Article 4(4) of the Sixth Directive, only 4 of them, including the Federal Republic of Germany, required such links of integration and of subordination. Furthermore, as Larentia + Minerva stressed in its written observations, by holding, in particular in *Commission* v *Ireland* (C-85/11, EU:C:2013:217, paragraph 47), that the formation of a VAT group may be necessary in order to combat certain abuses such as, for example, the fact that one undertaking can be split up artificially among several taxable persons so that each might benefit from a special scheme, it seems that the Court implicitly acknowledged that it is possible to have recourse to horizontal VAT groups ('Gleichordnungskonzerne') in accordance with the second subparagraph of Article 4(4) of the Sixth Directive.

91. The fact that in *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 19) the Court alluded indirectly to a relationship of subordination between the members of a VAT group cannot, in my view, be effectively relied on in the present context, as the question which had been referred to it in that case did not in any way relate to this point. In *Commission* v *Ireland* (C-85/11, EU:C:2013:217, paragraph 43) and *Commission* v *Finland* (C-74/11, EU:C:2013:266, paragraph 36) in particular, the Court also rejected on this ground an argument put forward by the Commission which was derived from the same paragraph of the judgment in *Ampliscientifica and Amplifin*.

92. These considerations also lead me to reject the argument, essentially put forward by the Austrian Government, that the existence of a relationship of subordination is inherent in the condition of 'close links' under the second subparagraph of Article 4(4) of the Sixth Directive since, under the first subparagraph of Article 4(4), it is precisely the existence of such a relationship between natural persons and their employer which prevents them from being treated as persons liable to VAT.

93. Such an argument not only ignores the difference in the wording of the first and second subparagraphs of Article 4(4) of the Sixth Directive, as the latter does not use the expression 'relationship of employer and employee' but, more broadly, 'close links'. It also disregards the fact that the Court has recognised that a Member State may provide that non-taxable persons may be members of VAT groups and that the term 'taxable person' is not therefore synonymous with 'persons' within the meaning of the second subparagraph of Article 4(4) of the Sixth Directive.

94. That said, it is clear from the observations submitted by the interested parties that they ultimately disagree on the question whether the requirements of the first sentence of point 2 of Paragraph 2(2) of the UStG, as interpreted by the case-law of the Bundesfinanzhof, constitute additional conditions to those laid down by the second subparagraph of Article 4(4) of the Sixth Directive (an argument essentially supported by Larentia + Minerva, Marenave, Ireland and the Commission), which would

32 — It should be noted that the use of the adverb 'closely' in the second subparagraph of Article 4(4) of the Sixth Directive to describe the links between the entities concerned replaced the adverb 'organically', previously used, at least in certain language versions of the text, in point 2, fourth paragraph, of Annex A to the Second Directive, which interpreted Article 4 of that directive. The clarification introduced by point 2, fourth paragraph, of Annex A to the Second Directive with regard to the definition of 'taxable person' for the purposes of Article 4 of the Second Directive was largely inspired by the German 'Organschaft' regime.

mean that those conditions must be justified having regard to the objectives of preventing abuse or tax evasion or avoidance, or whether they are simply specifications or clarifications of the condition relating to the existence of close financial, economic and organisational links provided for in that article of the Sixth Directive, a view supported by the German, Austrian and United Kingdom Governments.

95. Although at first sight it is not easy to choose between these alternatives, the arguments set out by the first group of interested parties nevertheless seem more consistent with the case-law.

96. In *Commission* v *Ireland* (C-85/11, EU:C:2013:217, paragraph 36) and *Commission* v *Finland* (C-74/11, EU:C:2013:266, paragraph 29) in particular, the Court described as an 'other condition', that is to say, a condition additional to those set out in the first paragraph of Article 11 of Directive 2006/112 (which reproduced the conditions under the second subparagraph of Article 4(4) of the Sixth Directive), a requirement under which the 'persons' referred to in that provision should individually have had the status of a taxable person. In other words, a Member State which transposed the second subparagraph of Article 4(4) of the Sixth Directive by limiting eligibility for VAT groups solely to 'taxable persons' did not clarify the meaning of that provision, but introduced an additional condition for the application of that provision.

97. Consequently, following the Court's logic in those judgments and in the judgment in *Commission* v *Sweden* (C-480/10, EU:C:2013:263), although such an additional condition is not in itself incompatible with the second subparagraph of Article 4(4) of the Sixth Directive, in view of the margin of discretion conferred on the Member States, it must nevertheless be justified by the pursuit of the objectives of preventing abuse and tax evasion or avoidance in compliance with EU law, in particular the principle of fiscal neutrality.

98. It follows that the condition under the first sentence of point 2 of Paragraph 2(2) of the UStG, to the effect that close financial, economic and organisational links can exist only where there is a relationship of control and subordination between the members of the VAT group, may be compatible with the Sixth Directive, on condition that it is necessary and proportionate to the pursuit of the abovementioned objectives, having due regard in particular to the principle of fiscal neutrality.

99. Although it is for the referring court to determine whether those conditions are satisfied, I am nevertheless uncertain whether a national measure which requires such an intensity of links between persons to form a single taxable person does not go beyond what is necessary to attain those objectives. Aside from particular circumstances specific to a certain Member State, which have not been adduced before the Court in these proceedings, however, it is difficult to understand, in general, why the pursuit of the abovementioned objectives would make necessary a relationship of control and subordination between the members of a VAT group in order to satisfy the condition relating to the existence of close financial, economic and organisational links. Whilst the existence of such a relationship of control and subordination between the members of a VAT group is undoubtedly a sufficient condition to attain those objectives and to satisfy the condition laid down in the second subparagraph of Article 4(4) of the Sixth Directive, I doubt whether it is strictly necessary.

100. I therefore suggest that the second part of the second question be answered to the effect that national legislation under which close financial, economic and organisational links within the meaning of the second subparagraph of Article 4(4) of the Sixth Directive can exist only where there is a relationship of control and subordination between the members of the VAT group is liable to be compatible with that article, on condition that it is necessary and proportionate to the pursuit of the objectives of preventing abusive practices and tax evasion or avoidance in compliance with EU law, in particular the principle of fiscal neutrality, this being a matter which must be determined by the referring court.

C – The third question

101. By its third question, the referring court expresses uncertainty as to the direct effect of the second subparagraph of Article 4(4) of the Sixth Directive in the event that it precludes a national measure such as that provided for in the first sentence of point 2 of Paragraph 2(2) of the UStG.

102. If the Court decides to follow the proposals made in this Opinion in response to the second question, it cannot be ruled out that, following the necessary examination by the referring court, that court may conclude that the first sentence of point 2 of Paragraph 2(2) of the UStG is incompatible with the second subparagraph of Article 4(4) of the Sixth Directive. Therefore, in order to provide a helpful answer to the referring court, I think that an answer should be given to the third question which it has referred to the Court.

103. According to settled case-law, wherever provisions of the Sixth Directive or of Directive 2006/112 appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with those directives or in so far as they define rights which individuals are able to assert against the State. [33]

104. It is thus necessary to establish whether the second subparagraph of Article 4(4) of the Sixth Directive may, so far as its subject-matter is concerned, be considered to be unconditional and sufficiently precise as to permit an individual to rely on it before the national courts with a view to opposing the application of national legislation which is incompatible with that article.

105. In this regard, I consider, first and foremost, that an objection to recognition of the direct effect of the second subparagraph of Article 4(4) of the Sixth Directive, as raised by the Austrian Government and Ireland in particular, solely on the ground that that article confines itself to giving the Member States the option to allow the formation of VAT groups in their territory, is not convincing.

106. The Court has already acknowledged on several occasions that the fact that a provision of a directive gives Member States a choice does not necessarily render it impossible to determine with sufficient precision, on the basis of the provisions of that directive alone, the content of the rights thus conferred on individuals. [34]

107. Furthermore, the existence of discretion on the part of the Member States in implementing provisions of the Sixth Directive has not been used by the Court as an argument which in itself eliminates the possibility of recognising the direct effect of some of those provisions. [35]

108. In particular, the Court has ruled that, although the Member States undoubtedly have a discretion as regards laying down the conditions for the application of certain exemptions provided for by the Sixth Directive, that fact does not prevent individuals who are able to show that their tax position actually comes within one of the categories of exemption laid down in that directive from relying on it directly, in particular where, having exercised its powers under that provision, a Member State has adopted national provisions which are not compatible with that directive, in particular with the principle of fiscal neutrality. [36]

33 — See, inter alia, *Becker* (8/81, EU:C:1982:7, paragraph 25); *Kügler* (C-141/00, EU:C:2002:473, paragraph 51); *Linneweber and Akritidis* (C-453/02 and C-462/02, EU:C:2005:92, paragraph 33); and *MDDP* (C-319/12, EU:C:2013:778, paragraph 47).

34 — See *Flughafen Köln/Bonn* (C-226/07, EU:C:2008:429, paragraph 30); *Cobelfret* (C-138/07, EU:C:2009:82, paragraph 61); and *Balkan and Sea Properties and Provadinvest* (C-621/10 and C-129/11, EU:C:2012:248, paragraph 57).

35 — See, inter alia, *Stockholm Lindöpark* (C-150/99, EU:C:2001:34, paragraph 31 and the case-law cited). See also *MDDP* (C-319/12, EU:C:2013:778, paragraph 51 and the case-law cited).

36 — See *Linneweber and Akritidis* (C-453/02 and C-462/02, EU:C:2005:92, paragraphs 34 to 37). See also *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 61).

109. Consequently, the fact that, in the exercise of the option available to it under the second subparagraph of Article 4(4) of the Sixth Directive, the Federal Republic of Germany retains a certain margin of discretion does not necessarily mean that individuals are deprived of the right to rely directly on the provisions of that article before the national courts.

110. On the contrary, in my view, once a Member State has exercised the option granted by the second subparagraph of Article 4(4) of the Sixth Directive, that article confers on all 'persons' the possibility of being treated as a single taxable person and thus identifies clearly the beneficiaries of that provision in an unconditional and sufficiently precise manner.

111. The fact that, where appropriate, that provision may entail a proviso relating to justifications based on the prevention of abusive practices or tax evasion or avoidance does not call this finding into question, since such justifications are not only subject to judicial review,[37] but are also encouraged by the Sixth Directive, and may even be regarded as limits inherent in the scope of the rights conferred on individuals by that directive.[38]

112. On the other hand, the substantive condition under the second subparagraph of Article 4(4) of the Sixth Directive that the financial, economic and organisational links between several persons must be 'close' in order for them to form a single taxable person undoubtedly needs to be specified at national level. If regard is simply had to close financial links, they can thus be dependent on a variable percentage of participation in the capital and/or in voting rights within a company or on particular contractual relationships between economic operators, such as the existence of franchise contracts.[39] However, these criteria are not exclusive. In any event, Member States which have chosen the option provided for in the second subparagraph of Article 4(4) of the Sixth Directive must therefore specify the substantive condition laid down therein even though, unlike the situation of VAT exemption, which can be determined objectively on the basis of the interpretation of the provisions of the Sixth Directive, it is not possible to identify directly, in the actual wording of that article, the precise meaning of the 'close' links mentioned therein.

113. That being the case, I consider that the second subparagraph of Article 4(4) of the Sixth Directive does not have direct effect.

114. If the Court should concur with this proposal, and in so far as the referring court has made a prior finding that the first sentence of point 2 of Paragraph 2(2) of the UStG is incompatible with the second subparagraph of Article 4(4) of the Sixth Directive, it will still be for the referring court to determine whether national law can be interpreted, as far as possible, in a manner consistent with EU law.[40]

115. It should be noted in this regard that the Commission pointed out in its written observations that a German tax court attempted to give such a consistent interpretation, holding that partnerships 'with a capital-based structure', like the limited partnerships in the main proceedings, might come within the scope *ratione personae* of the first sentence of point 2 of Paragraph 2(2) of the UStG.[41]

37 — See, by analogy, with regard to the direct effect of Article 4(5) of the Sixth Directive, *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraph 32). See also, in a different context, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 81).

38 — See, to this effect, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 57 to 59).

39 — In its abovementioned Communication (p. 9), the Commission proposes to infer the existence of close financial links from the holding of at least 50% of the share capital or voting rights of a company or from the existence of franchise contracts. It should be noted that certain Member States acknowledge the existence of such financial links in the case where a company holds at least 10% of the share capital of another company.

40 — See, inter alia, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 108 to 114).

41 — See paragraph 34 of the Commission's written observations, which refer to the judgment of the Finanzgericht München (Finance Court, Munich) of 13 March 2013, reference 3 K 235/10.

116. At least as regards persons capable of participating in a VAT group, such an example from case-law suggests that an interpretation in conformity with EU law is certainly feasible, without, however, leading to a *contra legem* interpretation.

117. As regards the condition relating to the integration of the member company into the controlling company of the VAT group, to which the application of the first sentence of point 2 of Paragraph 2(2) of the UStG is subject, as I have already highlighted, it is clear from the orders for reference that it is mainly by way of judicial decision that that condition has been interpreted in German law as requiring a relationship of control and subordination between the members of the VAT group.

118. Aside from the previously addressed question of legal personality, as has also already been stated, the information provided by the referring court does not make it possible to determine why the economic operators in the main proceedings do not satisfy the condition laid down in the first sentence of point 2 of Paragraph 2(2) of the UStG, as interpreted by the Bundesfinanzhof.

119. In any event, it is for the referring court to determine, in the cases in the main proceedings, whether the integration condition provided for in the first sentence of point 2 of Paragraph 2(2) of the UStG can be interpreted, as far as possible, as permitting undertakings which are bound to one another by close financial, economic and organisational links within the meaning of the second subparagraph of Article 4(4) of the Sixth Directive to benefit from VAT group status, without necessarily having a link of subordination or relationships of control and subordination.

120. Consequently, I propose that the third question be answered to the effect that a taxable person cannot rely directly on the second subparagraph of Article 4(4) of the Sixth Directive and that it is, however, for the referring court, as far as possible, to interpret its national legislation in conformity with the Sixth Directive.

III – **Conclusion**

121. In the light of the foregoing considerations, I propose that the questions referred by the Bundesfinanzhof be answered as follows:

(1) Expenditure connected with capital transactions incurred by a holding company which involves itself directly or indirectly in the management of its subsidiaries has a direct and immediate link with that holding company's economic activity as a whole. Input value added tax on that expenditure should not therefore be apportioned between the economic and non-economic activities of the holding company. If the holding company effects transactions which are subject to value added tax and transactions which are exempt, the proportion method provided for in Article 17(5) 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 will be used to calculate the right to deduct input value added tax.

(2) The second subparagraph of Article 4(4) of Sixth Directive 77/388 precludes a Member State, in the exercise of the option available under that provision, from making the formation of a VAT group subject to the condition that all the members of that group must have legal personality, unless that condition is justified by the prevention of abusive practices or of tax evasion or avoidance, having due regard to EU law, in particular the principle of fiscal neutrality, this being a matter which must be determined by the referring court.

National legislation under which close financial, economic and organisational links, within the meaning of the second subparagraph of Article 4(4) of Sixth Directive 77/388, can exist only where there is a relationship of control and subordination between the members of the VAT group is liable to be compatible with that article, on condition that it is necessary and

proportionate to the pursuit of the objectives of preventing abusive practices and tax evasion or avoidance in compliance with EU law, in particular the principle of fiscal neutrality, this being a matter which must be determined by the referring court.

(3) A taxable person cannot rely directly on the second subparagraph of Article 4(4) of Sixth Directive 77/388. It is, however, for the referring court, as far as possible, to interpret its national legislation in conformity with that provision of the Sixth Directive.