Case C-868/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

27 November 2019

Referring court:

Finanzgericht Berlin-Brandenburg (Germany)

Date of the decision to refer:

21 November 2019

Applicant:

M-GmbH

Defendant:

Finanzamt für Körperschaften

Subject matter of the main proceedings

Directive 2006/112 — Article 11 — Permissibility of a restriction of the scope *ratione personae* of the first paragraph of Article 11 by a rule of national law — Conditions for the justification of such a rule under the second paragraph of Article 11

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Is the first paragraph of Article 11 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax — the VAT Directive — to be interpreted as precluding the rule set out in point 2 of Paragraph 2(2) of the Umsatzsteuergesetz (German Law on turnover tax) — the UStG — in so far as that rule prohibits a partnership (in this case: a

GmbH & Co. KG (a limited partnership in which the general partner is a limited liability company)) the partners of which, apart from the controlling company, are not exclusively persons financially integrated into the controlling company's undertaking pursuant to point 2 of Paragraph 2(2) of the UStG, from being a controlled company within the scope of a tax-group arrangement for turnover-tax purposes?

2. If Question 1 is answered in the affirmative:

(a) Is the second paragraph of Article 11 of the VAT Directive — regard being had to the principles of proportionality and neutrality — to be interpreted as being capable of justifying an exclusion of partnerships of the type mentioned in Question 1 from a tax-group arrangement for turnover-tax purposes because, in the case of partnerships, there is no obligation to comply with a required form for the conclusion and amendment of partnership agreements under national law and there may, in the event of merely verbal agreements, be difficulties in proving the existence of the financial integration of the controlled company in individual cases?

(b) Is application of the second paragraph of Article 11 of the VAT Directive precluded if the national legislature did not have the intention of preventing tax evasion or avoidance already at the time when it adopted the measure?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, specifically Article 11

Provisions of national law cited

Umsatzsteuergesetz, specifically Paragraph 2

Brief summary of the facts and procedure

1 The applicant is the universal successor of PD GmbH & Co. KG. During the relevant period, its partners were A-GmbH as general partner and D-GbR, Mr C, Mr D, Mr E and M-GmbH as limited partners. According to the partnership agreement, each partner had one vote; in divergence therefrom, M-GmbH had six votes. Apart from a few exceptions, all of the company resolutions were passed with a simple majority.

2 The general partner of PD GmbH & Co. KG and M-GmbH had the same managing director during the relevant period. There were also extensive service relationships between PD GmbH & Co. KG and M-GmbH.

3 As PD GmbH & Co. KG had not filed an advance turnover tax return with the defendant for December 2017, the defendant estimated the tax bases by decision of 9 May 2018 and at the same time imposed a penalty for late filing. Following unsuccessful opposition, PD GmbH & Co. KG brought an action against that decision before the referring court.

Principal arguments of the parties in the main proceedings

4 The applicant takes the view that there has been an integrated inter-company relationship, within the meaning of point 2 of Paragraph 2(2) of the UStG, between PD GmbH & Co. KG and M-GmbH since December 2017. This, it argues, has the result that all sales and input tax amounts for December 2017 are to be assigned, not to PD GmbH & Co. KG, but to M-GmbH, and the latter should have filed the advance return in question.

5 Against this, the defendant opines that there was no tax-group arrangement between PD GmbH & Co. KG and M-GmbH in December 2017. There is no financial integration of PD GmbH & Co. KG into M-GmbH. Under national law, this requires partners of the partnership, aside from the controlling company, exclusively to be persons financially integrated into the controlling company's undertaking under point 2 of Paragraph 2(2) of the UStG. Accordingly, no natural persons could be involved in the partnership to be financially integrated. As the limited partners of PD GmbH & Co. KG are, apart from M-GmbH, also natural persons, their financial integration is not possible.

Brief summary of the basis for the request

Assessment of the dispute under national law

6 The dispute raises the question as to whether the conditions are met for a tax-group arrangement within the meaning of point 2 of Paragraph 2(2) of the UStG. In that case, the trader would not be PD GmbH & Co. KG, but the controlling company (*in casu*: M-GmbH), with the result that M-GmbH alone would have been obliged to file a turnover tax return for December 2017.

7 Point 2 of Paragraph 2(2) of the UStG reads as follows: '*The commercial or professional activity is not carried out independently ... if a legal person is financially, economically and organisationally integrated into the controlling company's undertaking based on the overall picture of the actual circumstances (tax-group arrangement). The effects of the tax-group arrangement are limited to internal services between the parts of the undertaking established domestically. These parts of the undertaking are to be treated as one undertaking.*'

8 According to this, only 'legal persons' can be controlled companies. Within the scope of a teleological extension, the Fifth Chamber of the Bundesfinanzhof (Federal Finance Court; 'the BFH') has ruled that partnerships also come into

consideration as controlled companies if their partners, apart from the controlling company, are exclusively persons financially integrated into the controlling company's undertaking pursuant to point 2 of Paragraph 2(2) of the UStG. These cannot be natural persons.

9 As the partners of PD GmbH & Co. KG also included natural persons, the action would have to be dismissed under national law, even though — alongside the undisputed economic and organisational integration of PD GmbH & Co. KG — the remaining conditions for its financial integration were met. It requires in particular that the controlling company is able to enforce its will through majority resolutions within the controlled company. That is the case here, as M-GmbH, *qua* controlling company, had the majority of votes for deliberations of the partners' meeting of PD GmbH & Co. KG (six out of eleven votes) and could therefore enforce its will within PD GmbH & Co. KG.

Assessment of the dispute under EU law

10 The referring court has doubts as to whether the result following under national law is compatible with the requirements of Article 11 of the VAT Directive.

The first question referred

11 According to the case-law of the Court of Justice, the first paragraph of Article 11 of the VAT Directive does not expressly provide for the possibility for Member States to impose other conditions on economic operators in order to form a VAT group; in particular, Member States cannot insist that only entities having legal personality may be members of a VAT group (see judgments of 16 July 2015, C-108/14 and C-109/14, *Larentia + Minerva*, EU:C:2015:496, paragraph 38; of 25 April 2013, C-480/10, *Commission* v *Sweden*, EU:C:2013:263, paragraph 35; and of 9 April 2013, C-85/11, *Commission* v *Ireland*, EU:C:2013:217, paragraph 36). From the grounds for the decision in the *Larentia + Minerva* judgment, it could be inferred that a restriction of the requirements of the first paragraph of Article 11 of the VAT Directive by the Member States when transposing it into national law will be permissible only if the conditions of the second paragraph of Article 11 of the VAT Directive are met or if the Court of Justice has granted the Member States power of specification. However, the Court of Justice did not grant the Member States any such power of specification with regard to the scope *ratione personae*. It might be inferred from this that a restriction of the scope *ratione personae* of the first paragraph of Article 11 of the VAT Directive is possible only in the cases relating to the second paragraph of Article 11 of the VAT Directive.

12 However, the Chambers of the BFH dealing with turnover-tax matters have divergent legal views as to how the requirements laid down by the Court of Justice in the *Larentia + Minerva* judgment are to be implemented.

13 The Eleventh Chamber of the BFH has unrestrictedly considered the requirements laid down by the Court of Justice in the *Larentia + Minerva* judgment to be binding. In accordance with what the Court of Justice held, it interprets Article 11 of the VAT Directive as *'precluding national legislation which reserves the right to form a value added tax group, as provided for in 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, which it is for the referring court to determine'* (judgment of 16 July 2015, C-108/14 and C-109/14, *Larentia + Minerva*, EU:C:2015:496, point 2 of the operative part). It might be inferred from this that the Eleventh Chamber considers any legal form-dependent restriction of the criterion of 'controlled company' in point 2 of Paragraph 2(2) of the UStG to be incompatible with the first paragraph of Article 11 of the VAT Directive, unless the conditions of the second paragraph of Article 11 are met by way of exception.

14 By contrast, the Fifth Chamber of the BFH takes the view that a restriction of the term 'persons' in the first paragraph of Article 11 of the VAT Directive, in the sense set out above in paragraph 7, is required for reasons of legal certainty. This would be affected if partnerships absolutely had to be regarded as controlled companies within the meaning of point 2 of Paragraph 2(2) of the UStG. This is because, in the case of partnerships, there is a difference with respect to legal persons under national law with regard to the legally certain determinability of the voting-right relationships, which are of importance for the assessment of the financial integration required under the first sentence of point 2 of Paragraph 2(2) of the UStG.

15 The referring court has doubts as to the permissibility of such recourse to the EU-law principle of legal certainty for the purpose of restricting the scope *ratione personae* of the first paragraph of Article 11 of the VAT Directive against the background of the *Larentia + Minerva* judgment.

16 On the one hand, it would seem that an examination of the restrictability of the term 'persons' in the first paragraph of Article 11 of the VAT Directive by the Court of Justice has already conclusively taken place, with the result that such a restriction is possible only in the cases contemplated in the second paragraph of Article 11 (see above, paragraph 10). It would therefore appear that the Court of Justice has also already conclusively ruled on whether a restriction is possible only with recourse to the principle of legal certainty.

17 On the other hand, it is impermissible for a Member State to plead provisions, practices or situations obtaining in its domestic legal order to justify a failure to observe obligations arising under EU law (as expressly stated, for example, in the judgment of 12 November 2019, C-261/18, *Commission* v *Ireland*, EU:C:2019:955, paragraph 89). However, that would be the case if — as assumed by the Fifth Chamber of the BFH — national company law were to allow a

restriction of the requirements laid down in the first paragraph of Article 11 of the VAT Directive.

18 Apart from this, it would seem that the breach of the principle of legal certainty assumed by the Fifth Chamber of the BFH does not in any event exist in the case of partnerships.

19 In this respect, it is, on the one hand, necessary to take into consideration the fact that the principle of legal certainty under EU law is not intended to protect the administration when applying legal standards, but to protect the taxable persons subject to the standard. According to established case-law of the Court of Justice, this principle requires that the rights conferred on individuals by EU law must be implemented in a way which is sufficiently precise, clear and foreseeable to enable the persons concerned to know precisely their rights and their obligations, to take steps accordingly and to rely on those rights, if necessary, before the national courts (see judgment of 7 October 2019, C-171/18, *Safeway*, EU:C:2019:839, paragraph 25 and the case-law cited therein). However, the taxable person knows whether the conditions of financial integration in the case of partnerships are met, with the result that there is no legal uncertainty for that person.

20 On the other hand, the assumption that verbal agreements — which are permissible only in the case of partnerships, but not in the case of legal persons — are more legally uncertain than written agreements, and that there is therefore a breach of the principle of legal certainty, appears doubtful, because it would lead to verbal agreements being quite simply irrelevant for turnover-tax purposes. However, it would seem that such a far-reaching conclusion cannot be drawn from the principle of legal certainty under EU law.

Part (a) of the second question referred

21 The Court of Justice has ruled that measures within the meaning of the second paragraph of Article 11 of the VAT Directive may be taken only if they are compliant with EU law and that it is solely with that reservation that it is permissible for Member States to restrict the application of the scheme provided for under the first paragraph of Article 11 of the VAT Directive in order to combat tax evasion or avoidance (see judgment of 25 April 2013, C-480/10, *Commission* v *Sweden*, EU:C:2013:263, paragraph 38). The second question referred relates to the interpretation of that reservation.

22 The requirements set out by the Fifth Chamber of the BFH may be contrary to the principles of proportionality and neutrality under EU law.

23 The principle of proportionality requires that the national measure is appropriate for attaining the objective pursued and does not go further than is necessary for its attainment. It may, in particular, not be used in such a way as to have the effect of undermining the neutrality of VAT, which is a fundamental principle of the

common system of VAT established by the relevant EU legislation (see judgment of 27 September 2007, C-146/05, *Collée*, EU:C:2007:549, paragraph 26 and the case-law cited therein).

24 The principle of VAT neutrality precludes, in particular, economic operators carrying out the same transactions from being treated differently in relation to the collection of VAT (see judgment of 29 November 2018, C-264/17, *Mensing*, EU:C:2018:968, paragraph 32 and the case-law cited therein).

25 Against this background, the referring court has doubts as to whether the exclusion of partnerships whose partners, aside from the controlling company, are not exclusively persons financially integrated into the controlling company's undertaking pursuant to point 2 of Paragraph 2(2) of the UStG from the tax-group arrangement for turnover-tax purposes constitutes a proportionate restriction of the principle of neutrality. This is because, with regard to the performance of transactions, there are no differences for turnover-tax purposes between partnerships whose partners, aside from the controlling company, are exclusively persons financially integrated into the controlling company's undertaking pursuant to point 2 of Paragraph 2(2) of the UStG, on the one hand, and partnerships in respect of which this is not the case, on the other. They are also in direct competition with one another when performing the same transactions.

26 The referring court also has doubts as to whether a Member State's measure, within the meaning of the second paragraph of Article 11 of the VAT Directive, which leads to a general exclusion of partnerships whose partners, aside from the controlling company, are not exclusively persons financially integrated into the controlling company's undertaking pursuant to point 2 of Paragraph 2(2) of the UStG from the tax group arrangement does not go further than is necessary for the purpose of achieving the objective of preventing tax evasion and avoidance. It does not appear to be excluded that more moderate legislative means are available which offer protection from tax evasion and avoidance in an equally appropriate manner. It would, for example, be conceivable for the effects of the tax-group arrangement to be allowed to occur only upon request or following authorisation by the fiscal administration.

27 Finally, the pursued objective (prevention of tax evasion and avoidance) must be weighed up against the restrictions of the principle of neutrality. It is to be taken into consideration in this regard that the German provision provides for the general exclusion of partnerships whose partners, aside from the controlling company, are not exclusively persons financially integrated into the controlling company's undertaking pursuant to point 2 of Paragraph 2(2) of the UStG as controlled companies, irrespective of whether the conditions of the financial integration are disputed or difficult to determine in the individual case. In addition, the use of the second paragraph of Article 11 of the VAT Directive is ultimately based solely on the assumption that verbal agreements are more legally uncertain than written agreements and that there is therefore a threat of tax evasion or avoidance. However, this assumption is for its part doubtful (see above,

paragraph 19). In addition, unlike, for example, in the case of intra-Community deliveries or export deliveries, there is in the case of the tax-group arrangement no cross-border issue with which there might be particular difficulties in establishing facts. This is because the effects of the tax-group arrangement are limited to internal services between the parts of the undertaking established domestically (second sentence of point 2 of Paragraph 2(2) of the UStG). This corresponds to the requirement under EU law set out in the first paragraph of Article 11 of the VAT Directive.

Part (b) of the second question referred

28 It is also doubtful whether the measures required by the second paragraph of Article 11 of the VAT Directive have to have been adopted by the legislature with the clear intention of being appropriate and necessary for preventing tax evasion and avoidance, or whether it is sufficient if the measure — irrespective of the purpose pursued by the legislature — is objectively appropriate and necessary for preventing tax evasion and avoidance.

29 The wording of the second paragraph of Article 11 of the VAT Directive *('adopt any measures needed to …')* indicates that the prevention of tax evasion and avoidance must be an intended consequence of the legislative measure. This is confirmed by the English and French versions of the second paragraph of Article 11.

30 However, when it introduced the legal form restriction for controlled companies, as provided for in the first sentence of point 2 of Paragraph 2(2) of the UStG, the [German] legislature was not pursuing the purpose of preventing tax evasion and avoidance. As can be seen from the legislative documentation, it was instead based on the assumption that, due to their structure under civil law, partnerships are not suitable for integration into a controlling company. There was also no focus on such a purpose in later amendments of the UStG.

31 In addition, subsequent supplementing of the stated objectives is not compatible with the wording of the second paragraph of Article 11 of the VAT Directive. This is also supported by the fact that the first paragraph of Article 11 of the VAT Directive provides for consultation with the advisory committee on VAT before the introduction of a Member State's tax group regulation. This consultation requirement would be undermined if the national legislature could subsequently plead the objective of preventing tax evasion and avoidance.