**Case C-141/20**

**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:**

23 March 2020

**Referring court:**

Bundesfinanzhof (Germany)

**Date of the decision to refer:**

11 December 2019

**Defendant and appellant in the appeal on a point of law:**

Finanzamt Kiel

**Applicant and respondent in the appeal on a point of law:**

Norddeutsche Gesellschaft für Diakonie mbH

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**Subject matter of the main proceedings**

Turnover tax — Directive 77/388 — Power of a Member State to derogate from the legal consequence provided for in the second subparagraph of Article 4(4) of Directive 77/388 — Possibility for an individual to invoke the lack of conformity of the national legal consequence with EU law — Standard to be applied when assessing the necessity of the national derogation — Power of the Member States to base such a derogation on Article 4(1) or the first subparagraph of Article 4(4) of Directive 77/388

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

**Questions referred**

1. Is the second subparagraph of Article 4(4) in conjunction with Article 21(1)(a) and Article 21(3) of Sixth Council Directive 77/388/EEC of

17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC) 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 Directive 77/388/EEC be invoked in this regard?

3. Must a strict or lenient standard be applied in the assessment to be carried out in accordance with paragraph 46 of the *Larentia + Minerva* judgment of the Court of Justice of 16 July 2015, C-108/14 and C-109/14 (EU:C:2015:496, paragraph 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 Umsatzsteuergesetz (Law on turnover tax) 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 Directive 77/388/EEC to be interpreted as permitting a Member State to regard a person as not being independent within the meaning of Article 4(1) of Directive 77/388/EEC 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 own will, which diverges from that of the controlling company?

**Provisions of EU law cited**

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, in particular Annex A, item 2

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, in particular Articles 14 and 21

**Provisions of national law cited**

Umsatzsteuergesetz (Law on turnover tax, 'UStG'), in particular Paragraph 2

## Brief summary of the facts and procedure

1 The parties are in dispute as to whether a tax-group arrangement for turnover-tax purposes existed between A as the controlling company and the applicant as the controlled company in 2005 (year at issue).

2 The applicant is a Gesellschaft mit beschränkter Haftung (limited liability company). Its shareholders are A (51%) and C e. V. (49%). A is a public-law body. C e. V. is a registered association. The applicant's sole manager in the year at issue was E, who, at the same time, was also the sole manager of A and executive board member of C e. V.

3 In the course of an external audit of the applicant, the defendant came to the conclusion that a tax-group arrangement did not exist between the applicant and A in the year at issue, as the applicant was not financially integrated into A's undertaking. Although, with 51%, A held a majority shareholding in the applicant'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 not able to impose decisions on the applicant.

4 The Finanzgericht (Finance Court) upheld the action subsequently brought. The appeal on a point of law brought before the referring court by the defendant is directed against that decision.

## Brief summary of the basis for the reference

### *Assessment on the basis of national law*

5 The appeal on a point of law would be well founded under national law, since financial integration in the form of a majority of the voting rights, as required for a tax-group arrangement under, inter alia, the first sentence of point 2 of Paragraph 2(2) UStG, does not exist.

### *The questions referred*

*Questions referred in relation to the second subparagraph of Article 4(4) of Directive 77/388*

6 In point 2 of the operative part of the *Larentia + Minerva* judgment (EU:C:2015:496), the Court of Justice ruled, inter alia, that the second subparagraph of Article 4(4) of Directive 77/388 must be interpreted as precluding national legislation which reserves the right to form a value added tax group, as provided for in those provisions, solely to entities linked to the controlling company of that group in a relationship of subordination, except where that requirement constitutes a measure which is 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.

7 The referring court takes the view that are doubts as to whether a Member State can derogate from the legal consequence prescribed in the second subparagraph of Article 4(4) of Directive 77/388 and, if it can, as to the conditions under which it can do so. This gives rise to the **first question referred**.

8 Based on the Court of Justice's statements in paragraphs 41 and 42 of the *Larentia + Minerva* judgment (EU:C:2015:496), a derogating designation of a taxable person other than the VAT group, in derogation from the second subparagraph of Article 4(4) of Directive 77/388, could have been permissible in the year at issue in order to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance.

9 The *Skandia America (USA)* judgment of 17 September 2014, C-7/13 (EU:C:2014:2225), according to which the VAT group is liable for the VAT if such a group exists, and paragraph 20 of the *Ampliscientifica and Amplifin* judgment of 22 May 2008, C-162/07 (EU:C:2008:301), according to which the second subparagraph of Article 4(4) of Directive 77/388 necessarily requires the national implementing legislation to provide that the taxable person is a single taxable person, could militate against that possibility.

10 In addition, Article 21(1)(a) of Directive 77/388 could also militate against the view that Member States have the power to designate, instead of the taxable person designated under EU law, a different person liable to pay tax. Such power cannot be inferred from that provision. Article 21(3) of Directive 77/388 merely allows Member States to provide that other persons are to be held jointly and severally liable.

11 It is also not clear how regarding a member of the VAT group instead of the VAT group itself as the taxable person could serve to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance. It is therefore doubtful whether that justifying circumstance allows for a derogation in the first place.

12 If, based on the Court of Justice's answer to the first question referred, it is not permissible under EU law for a Member State to designate a member of the VAT group instead of the VAT group itself as a taxable person, the referring court takes the view that it is also doubtful whether an individual may invoke the lack of conformity of the national legal consequence with EU law. This gives rise to the **second question referred**.

13 An argument against the existence of such a right is the fact that the Court of Justice ruled, in point 3 of the operative part of the *Larentia + Minerva* judgment (EU:C:2015:496), that Article 4(4) of Directive 77/388 may not be considered to have direct effect allowing taxable persons to claim the benefit thereof against their Member State in the event that that State's legislation is not compatible with that provision and cannot be interpreted in a way compatible with it.

14 However, paragraph 20 of the *Ampliscientifica and Amplifin* judgment (EU:C:2008:301) could lead to a different conclusion (see above, paragraph 9).

15 In addition, individuals could potentially invoke Article 21(1)(a) of Directive 77/388, since the designation of a different taxable person results in the designation of a different person liable to pay tax.

16 Furthermore, in the context of the assessment of whether the national requirement of financial integration is necessary within the meaning of paragraphs 45 and 46 of the *Larentia + Minerva* judgment (EU:C:2015:496), there are also doubts from an EU-law perspective as to the strictness of the standard to be applied when assessing the necessity of the national derogation. This forms the subject matter of the **third question referred**.

17 Under national law, the controlling company can enforce its rights in connection with the obligation to pay tax on behalf of the controlled company, namely by bringing an action against that company. Therefore, considered from a narrow perspective, the national rule might not be necessary.

18 The referring court recognises that, in paragraph 46 of its *Larentia + Minerva* judgment (EU:C:2015:496), the Court of Justice imposed the task of carrying out the required assessment on the national courts. However, the referring court will only be able to carry out the assessment incumbent on it once it has been decided what standard is to be applied in the assessment of necessity.

19 In the *Commission v Sweden* judgment of 25 April 2013, C-480/10 (EU:C:2013:263), the Court of Justice held that the Commission had failed to show convincingly that, in the light of the need to combat tax evasion and avoidance, that measure taken by the Kingdom of Sweden was not well founded. This could militate in favour of a very broad understanding of the Member States' power of derogation.

20 In other respects, however, in the context of the principle of proportionality when reviewing measures of the EU or the Member States in established case-law, the Court of Justice has proceeded on the basis of whether a measure goes beyond what is (strictly) necessary in order to achieve the objective pursued (see, for example, the judgments *Di Maura* of 23 November 2017, C-246/16, EU:C:2017:887, paragraph 25; *Avon Cosmetics* of 14 December 2017, C-305/16, EU:C:2017:970, paragraph 44; *Menci* of 20 March 2018, C-524/15, EU:C:2018:197, paragraph 46 et seq. and 52; *EN.SA.* of 8 May 2019, C-712/17, EU:C:2019:374, paragraph 33; *A-PACK CZ* of 8 May 2019, C-127/18, EU:C:2019:377, paragraphs 26 and 27). This could militate in favour of somewhat stricter, or even very strict, requirements on necessity.

21 However, consideration may have to be given to the fact that the second subparagraph of Article 4(4) of Directive 77/388 is an exception to the principle of Article 4(1) of Directive 77/388. Counter-exceptions which, by way of derogation from the exception, restore the general rule must be interpreted broadly

rather than narrowly, including in the case of Article 4 of Directive 77/388 (see judgments *Isle of Wight Council and Others* of 16 September 2008, C-288/07, EU:C:2008:505, paragraph 60; *SALIX Grundstücks-Vermietungsgesellschaft* of 4 June 2009, C-102/08, EU:C:2009:345, paragraphs 67 and 68), which, in turn, militates in favour of a more lenient assessment of necessity.

22 Furthermore, clarification is required as to what extent the principle of legal certainty or the purpose of administrative simplification may be taken into account in the assessment. The Court of Justice did not refer to them in paragraph 46 of its judgment in *Larentia + Minerva* (EU:C:2015:496); in addition, the tax-group arrangement under national law does not serve the purpose of administrative simplification, but rather the purpose of avoiding unnecessary administrative work in the economy.

23 The referring court is also inclined to take the view that the principle of legal certainty and the purpose of the tax-group arrangement are essentially unable to justify the imposition of substantive requirements on integration. If, for example, financial integration did not require a majority of voting rights, but rather a majority of shares were sufficient, this characteristic could be ascertained with at least the same degree of legal certainty as in the case of a majority of voting rights. Administrative simplification or the avoidance of unnecessary administrative work in the economy would occur in the same way.

*Question referred in relation to Article 4(1) and the first subparagraph of Article 4(4) of Directive 77/388*

24 The referring court considers it necessary to refer a further question on Article 4(1) and the first subparagraph of Article 4(4) of Directive 77/388, since the national approach for establishing a tax-group arrangement is conceptually, systematically and historically based on the characteristic of independence and could therefore also be justified as a permissible interpretation or classification by virtue of Article 4(1) or the first subparagraph of Article 4(4) of Directive 77/388. This gives rise to the **fourth question referred**, which is asked entirely independently of the first to third questions referred.

25 The German tax-group arrangement was originally based on the assumption that the controlled company had ‘no will of its own’. The referring court takes the view that clear parallels can be drawn between the original justification based on the lack of independence in cases where an entity does not have a ‘will of its own’ and the considerations on which the Court of Justice based its assessment of independence in the *Gmina Wrocław* judgment of 29 September 2015, C-276/14 (EU:C:2015:635, paragraph 30 et seq.), and *Saudacor* judgment of 29 October 2015, C-174/14 (EU:C:2015:733, paragraphs 60, 63 and 67). In those cases, the Court of Justice based its considerations on an existing relationship of subordination (‘employer-employee relationship’) (see *Gmina Wrocław* judgment, EU:C:2015:635, paragraphs 33, 34 and 36) and on an organisational link (*Saudacor* judgment, EU:C:2015:733, paragraph 67).

26 The assessment of whether a natural person is independent within the meaning of Article 4(1) and the first subparagraph of Article 4(4) of Directive 77/388 also takes account of 'subordination' (see judgments *Heerma* of 27 January 2000, C-23/98, EU:C:2000:46, paragraph 18, *van der Steen* of 18 October 2007, C-355/06, EU:C:2007:615, paragraph 18 et seq., and *IO* of 13 June 2019, C-420/18, EU:C:2019:490, paragraphs 32, 38 and 39).

27 Taking account of the *Gmina Wrocław* judgment (EU:C:2015:635, paragraph 35), the referring court takes the view that it cannot be ruled out that, although the justification under EU law for the (very strict) subordination criteria imposed by Germany for the existence of a tax-group arrangement cannot be found in the second subparagraph of Article 4(4) of Directive 77/388, it can be found in Article 4(1) and the first subparagraph of Article 4(4) of that directive. It is possible that Article 4(1) or the first subparagraph of Article 4(4) of the directive allows Germany to regard the controlled company as not being independent within the meaning of Article 4(1) of the Directive due to its subordination to the controlling company — as provided for in point 2 of Paragraph 2(2) UStG.

28 In this respect, it is doubtful whether the Member States may determine the cases in which it can typically be assumed that a person has 'no will of his own' and is therefore not independent within the meaning of Article 4(1) of Directive 77/388. This is the approach taken in the first sentence of point 2 of Paragraph 2(2) of the current version of the German UStG.

29 The Court of Justice has acknowledged the legitimacy of the objective consisting in the laying down by a legislature of general rules which can be easily applied by economic operators and are easily verified by the competent national authorities, even though those rules are necessarily approximate in nature (see judgments *Sopora* of 24 February 2015, C-512/13, EU:C:2015:108, paragraphs 35 and 36, and *RPO* of 7 March 2017, C-390/15, EU:C:2017:174, paragraphs 57, 58 and 60). Since the determination of the taxable person constitutes a rule liable to entail financial consequences, those concerned must know precisely the extent of the obligations imposed on them before concluding a transaction (see judgments *Halifax and Others* of 21 February 2006, C-255/02, EU:C:2006:121, paragraph 72, and *Teleos and Others* of 27 September 2007, C-409/04, EU:C:2007:548, paragraph 48).

30 Germany's classification of a lack of independence could therefore be permissible under EU law. The reason for this is that if the German courts were to carry out the assessment — required under Article 4(1) of Directive 77/388 — of whether a legal person has no will of its own and is therefore not independent in the overall context of the situation, without basing that assessment on statutorily defined criteria, this could be capable of leaving the persons concerned in uncertainty over their tax obligations.

31 The referring court recognises that the characteristic of independence in Article 4(1) of Directive 77/388 is a concept of EU law, which raises the question of whether the national legislature has a possible power of classification.

32 A systematic interpretation could militate in favour of this, since the first subparagraph of Article 4(4) of Directive 77/388 also refers to a relationship of subordination (‘relationship of employer and employee’), whereby such a relationship indicates a lack of independence. This could express a general legal concept.

33 A historical interpretation could also militate in favour of this: it could be inferred from item 2 of Annex A of Directive 67/228 that the tax-group arrangement was a case of a lack of independence. Annex A to Directive 67/228 appears to have served, inter alia, to legitimise Germany’s tax-group-arrangement scheme under EU law. This could also still be of significance today.

34 Finally, the second subparagraph of Article 4(4) of Directive 77/388 does not militate against such an interpretation; in particular, the provision does not lose its purpose: there are significant differences between the joint taxation of the members of a VAT group as provided for in that provision and the German tax-group arrangement, in terms of both the criteria and the legal consequences.