

***Finanzamt T v S*: CJEU resolves uncertainty over internal transactions in VAT groups**

Draft

Introduction

*Finanzamt T v S (Finanzamt T II)*¹ is the final case in a series of cases on group taxation in value added tax (VAT). The substantive issue in this case concerns the treatment of intra-group supplies and the specific questions referred to the Court of Justice of the European Union (CJEU) by the domestic court in *Finanzamt T II* were as follows:

“(1) Does the bringing together of several persons into a single taxable person, as provided for in the second subparagraph of Article 4(4) of [the Sixth Directive], have the effect of removing [supplies] made for consideration between those persons from the scope of [VAT] as defined in Article 2(1) of that directive?

(2) Do [supplies] made for consideration between those persons fall within the scope of [VAT] in any event in the case where the recipient of the [supply] is not (or is only partly) entitled to deduct input tax, as there is otherwise a risk of tax losses?”²

The case was brought to the CJEU by the German Federal Fiscal Court (*Bundesfinanzhof*, BFH), but the issue is relevant to the wider VAT system of the European Union. In accordance with EU rules on VAT grouping (for the provision currently in force, see Article 11 para.2 of Council Directive 2006/112/EC on the common system of value added tax [2006] OJ L347/1 (VAT Directive)), group regimes have been implemented in 21 of the 27 EU Member States according to a recent inventory and, in 19 of these, domestic legal practice considers intra-group supplies to be outside the scope of VAT.³ In addition to the substantive question of the taxability of intra-group supplies, which commentators have stressed is crucial to the continued existence of VAT grouping as a legal construct,⁴ the decision has also given rise to other relevant issues. One question that arose in this case was the significance of statements of the VAT Committee; and the case is also noteworthy from an additional (procedural) perspective, as the BFH has twice referred it to the CJEU.⁵

***Finanzamt T I, Norddeutsche Gesellschaft für Diakonie* and the (repeated) reference by the domestic court**

The series of cases under consideration commenced with two parallel submissions by the BFH in the cases *Finanzamt T v S (Finanzamt T I)*⁶ and *Finanzamt Kiel v Norddeutsche Gesellschaft für Diakonie*

¹ For the reference of the domestic court, see BFH, 26 January 2023, V R 20/22, BFHE 280, 68. For the CJEU’s decision, see *Finanzamt T v S (Finanzamt T II)* (C-184/23) EU:C:2024:599; [2024] S.T.C. 1391.

² *Finanzamt T II* (C-184/23) EU:C:2024:599 at [26]. For the original reference, see BFH, V R 20/22 at [I.].

³ For an overview of VAT grouping regimes in EU Member States, see Eduard Forster and Andreas Striegl, “‘Abschaffung’ der umsatzsteuerlichen Organschaft? – Überblick zur Organschaft in der EU sowie Ausblick auf die EuGH-Vorlage des BFH zur Nichtsteuerbarkeit von Innenumsätzen” (2024) 12(12) *Mehrwertsteuerrecht* 465, 467.

⁴ See, e.g., Forster and Striegl, “‘Abschaffung’ der umsatzsteuerlichen Organschaft?” (2024) *Mehrwertsteuerrecht* 465; Roland Ismer and Daniela Endres-Reich, “Erneute EuGH-Vorlage zur Frage der Steuerbarkeit von Innenleistungen bei Organschaft – Erste Einordnung 1” (2023) 11(8) *Mehrwertsteuerrecht* 310, 310–311.

⁵ See Jochen Tillmanns and Alexander Tsyganov, “Nichtsteuerbarkeit der Innenumsätze einer Organschaft – Anmerkung” (2025) 17(1) *Zeitschrift für das Recht der Nonprofit Organisationen* 20, 23.

⁶ For the reference of the domestic court, see BFH, 7 May 2020, V R 40/19, BFHE 270, 166. For the CJEU’s decision, see *Finanzamt T v S (Finanzamt T I)* (C-269/20) EU:C:2022:944.

(*Norddeutsche Gesellschaft für Diakonie*),⁷ which were concerned primarily (at the time of the submissions) with the question of whether Article 4 para.4 subpara.2 of the 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 [1977] OJ L145/1 (Sixth Directive) precludes the (German) domestic practice of designating not the VAT group itself but rather its controlling company as the single taxable person in that group.⁸ In the aforementioned cases, the CJEU ruled that EU law does not prevent a Member State from designating such a controlling company as the sole taxable person of the group, provided that said controlling company can impose its will on the other group members and that this “does not entail a risk of tax losses”.⁹ The CJEU’s ruling thus provided clarification on the initial question raised by the BFH;¹⁰ nevertheless, the CJEU’s statements in *Norddeutsche Gesellschaft für Diakonie*, in particular, raised new questions which ultimately proved to be more substantial than those solved. The problem stemmed mainly from the CJEU’s response to a further inquiry (the fourth question referred for preliminary ruling) in *Norddeutsche Gesellschaft für Diakonie*, wherein the BFH had asked:

“Are Article 4(1) and the first subparagraph of Article 4(4) of [the Sixth Directive] to be interpreted as permitting a Member State to regard a person as not being independent within the meaning of Article 4(1) of [that Directive] if that person is integrated into the undertaking of another undertaking (controlling company) in financial, economic and organisational terms in such a way that the controlling company is able to impose its will on the person and thus prevent the person from forming his [or her] own will, which diverges from that of the controlling company?”¹¹

The CJEU’s response included the following statements, which have, apparently inadvertently, given rise to questions regarding the fundamental principles of the VAT group:

“[A] supply of services is taxable only if there exists between the service supplier and the recipient a legal relationship in which there is a reciprocal performance...

78 To establish whether such a legal relationship exists between an entity forming part of a VAT group and the other members of that group, including that group’s controlling company, so that the supplies made by that entity may be liable to VAT, it is necessary to determine whether that entity carries out an independent economic activity...

79 In the present case...[i]t follows that those entities must be regarded as carrying out independent economic activities, with the result that they cannot be classified, by categorisation, as ‘non-independent entities’ for the purposes of Article 4(1) and the first subparagraph of Article 4(4) of the Sixth Directive simply because they belong to a VAT group.

80...[A]lthough it follows from the second subparagraph of Article 4(4) of the Sixth Directive that the entities which can constitute a VAT group must have close financial, economic and organisational links, that provision does not, however, provide that the existence of such links

⁷ For the reference of the domestic court, see BFH, 11 December 2019, XI R 16/18, BFHE 268, 240. For the CJEU’s decision, see *Finanzamt Kiel v Norddeutsche Gesellschaft für Diakonie (Norddeutsche Gesellschaft für Diakonie)* (C-141/20) EU:C:2022:943.

⁸ BFH, XI R 16/18 at [I.]; BFH, V R 40/19 at [II.]; see also *Finanzamt T I* (C-269/20) EU:C:2022:944 at [34]; *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [42].

⁹ *Finanzamt T I* (C-269/20) EU:C:2022:944 at [53]; *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [60].

¹⁰ Thomas Küffner, “Nationale Regelung, die den Organträger der Mehrwertsteuergruppe zum einzigen Steuerpflichtigen bestimmt – Leistungen innerhalb der Mehrwertsteuergruppe – Unentgeltlich erbrachte Dienstleistungen – Begriff ‘unternehmensfremde Zwecke’ – Anmerkung” (2023) 72(1) *Umsatzsteuer-Rundschau*, 41.

¹¹ *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [34]. For the original reference, see BFH, XI R 16/18 at [I.].

would involve the exercise of a non-independent economic activity by an entity of the group other than the controlling company. Thus, it does not follow from that provision that that entity would cease to carry out independent economic activities, for the purposes of the first subparagraph of Article 4(4) of that directive, solely because it belongs to the VAT group.

81...[T]he second subparagraph of Article 4(4) of the Sixth Directive, read in conjunction with the first subparagraph of Article 4(1) of that directive, must be interpreted as precluding a Member State from classifying, by categorisation, given entities as non-independent, where those entities are integrated, in financial, economic and organisational terms, into the controlling company of a VAT group.”¹²

Commentators saw this part of the ruling as raising the question of whether the non-taxation of intra-group supplies—arguably the key feature of the VAT group—could now be called into question.¹³ Indeed, the quoted reasoning of the CJEU could be interpreted to mean that the CJEU considers intra-group supplies to be taxable in principle; and this view was already foreshadowed in the Opinions of Advocate General Medina in *Finanzamt T I* and *Norddeutsche Gesellschaft für Diakonie*, in which the Advocate General appears to assume that intra-group supplies should be taxable.¹⁴ Confirmation of this presumption by the CJEU would have fundamentally undermined the VAT group as a legal instrument, as it would have limited the practical benefits of VAT grouping to purely procedural aspects.¹⁵ Under this premise, the only advantage of the treatment as “a single taxable person” under the EU VAT rules (see Article 11 subpara.1 of the VAT Directive;¹⁶ Article 4 para.4 subpara.2 of the Sixth Directive¹⁷) would have been a simplification of administration and compliance by relieving the individual group members of the obligation to file tax returns separately, but the VAT group would have lost its substantive legal effect.¹⁸ Advocate General Medina indeed operated under the notion that the original objective of the VAT group was (only) to facilitate administrative simplification.¹⁹ However, this view has been met with considerable resistance; reactions in the German literature to *Norddeutsche Gesellschaft für Diakonie*, for example, included those that labelled the assumption that intra-group supplies could be taxable and that the VAT group has a procedural effect only as “simply wrong”.²⁰

In light of the fundamental questions raised in *Finanzamt T I* and *Norddeutsche Gesellschaft für Diakonie*, and in order to eliminate the resulting legal uncertainty, the BFH referred the case *Finanzamt*

¹² *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [77]–[81].

¹³ See Forster and Striegl, “‘Abschaffung’ der umsatzsteuerlichen Organschaft?” (2024) 12(12) *Mehrwertsteuerrecht* 465; Roland Ismer and Daniela Endres-Reich, “Organträger kann Steuerschuldner sein – Anforderungen an Stimmrechtsmehrheit des Organträgers sowie Unselbständigkeit der Organgesellschaften unionsrechtswidrig – Norddeutsche Gesellschaft für Diakonie – Erste Einordnung 1” (2022) 10(23) *Mehrwertsteuerrecht* 887.

¹⁴ See Opinion of Advocate General Medina in *Finanzamt T v S* (Opinion of Advocate General Medina in *Finanzamt T I*) (C-269/20) EU:C:2022:60 at [AG36]–[AG37]; Opinion of Advocate General Medina in *Finanzamt Kiel v Norddeutsche Gesellschaft für Diakonie* (Opinion of Advocate General Medina in *Norddeutsche Gesellschaft für Diakonie*) (C-141/20) EU:C:2022:11 at [AG64]–[AG89]. This view is particularly evident from the practical example given by the Advocate General; see Jan Brinkmann and Tanja Walter-Yadegardjam, “Der Anfang vom Ende der umsatzsteuerlichen Organschaft oder viel Lärm um Nichts?” (2023) 61(3) *Deutsches Steuerrecht* 65, 70. Cf. also BFH, V R 20/22 at [II.3.a)].

¹⁵ Ismer and Endres-Reich, “Organträger kann Steuerschuldner sein” (2022) 10(23) *Mehrwertsteuerrecht* 887.

¹⁶ Council Directive 2006/112/EC [2006] OJ L347/1.

¹⁷ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

¹⁸ See Forster and Striegl, “‘Abschaffung’ der umsatzsteuerlichen Organschaft?” (2024) 12(12) *Mehrwertsteuerrecht* 465, 469; Christian Wüst, “Deutsche Organschaftsregelung hat Bestand” (2023) 72(1) *UmsatzsteuerRundschau* 1, 3.

¹⁹ See Opinion of Advocate General Medina in *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:11 at [AG64]. Cf. also Opinion of Advocate General Medina in *Finanzamt T I* (C-269/20) EU:C:2022:60 at [AG37].

²⁰ Ismer and Endres-Reich, “Organträger kann Steuerschuldner sein” (2022) 10(23) *Mehrwertsteuerrecht* 887, 887–888.

TI back to the CJEU.²¹ The submission, which concerns a case that took place in 2005, refers to Article 4 para.4 of the Sixth Directive,²² but the considerations of the BFH and the CJEU are transferable to Article 11 of the VAT Directive,²³ which has since replaced the previous provision. As will be discussed later, the CJEU also cited recent statements by the European Commission and the VAT Committee on the current provision in its decision to form its view.

Preservation of the VAT group in *Finanzamt T II*

In *Finanzamt T II*, the CJEU first clarified that its statements in *Norddeutsche Gesellschaft für Diakonie* did not concern the taxation of internal transactions within a VAT group under Article 4 para.4 subpara.2 of the Sixth Directive.²⁴ Rather, the relevant passages of this judgment (see the quote above) referred to the corresponding question posed by the BFH, which sought to clarify whether certain German requirements for VAT groups could also be based on Article 4 para.4 subpara.1 of the Sixth Directive as an alternative legal basis.²⁵ The issue at stake in *Finanzamt T II*, namely whether internal supplies within a VAT group are taxable, was therefore not pre-empted from the perspective of the CJEU.²⁶

In order to answer the first question referred to it by the BFH in *Finanzamt T II* (whether considering a group of persons as a single taxable person will result in supplies between group members being outside of the scope of VAT; see the full quote above)²⁷, the CJEU analysed the provision of Article 4 para.4 of the Sixth Directive.²⁸ The court pointed out that the wording of Article 4 para.4 subpara.2 of the Sixth Directive refers to “a single taxable person”,²⁹ which argues against the assumption that the individual group entities can continue to be taxable persons.³⁰ The CJEU further emphasised that the assumption that intra-group supplies are taxable would have been inconsistent with the established case law of the court, and clarified that treatment as a single taxable person “precludes members of the VAT group...from continuing to be identified, *within* and outside their group, as individual taxable persons” (emphasis added).³¹ The CJEU underlined this point by making reference to the guidelines of the VAT Committee,³² highlighting that the VAT Committee had stipulated that the treatment of a VAT group as a single taxable person precludes the group members from continuing to operate as individual taxable persons for VAT purposes both inside and outside of the group.³³ The CJEU also referred to the European Commission’s statements on Article 11 of the VAT Directive,³⁴ according to which “the VAT group’s internal transactions for consideration do not exist for VAT purposes”³⁵ and are, in fact, deemed ““out of scope”³⁶ of VAT.

²¹ For the reasons for resubmitting *Finanzamt T I* (C-269/20) EU:C:2022:60 (and not *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:11), see Ismer and Endres-Reich, “Erneute EuGH-Vorlage zur Frage der Steuerbarkeit von Innenleistungen bei Organschaft” (2023) 11(8) *Mehrwertsteuerrecht* 310, 311.

²² Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

²³ Council Directive 2006/112/EC [2006] OJ L347/1.

²⁴ *Finanzamt T II* (C-184/23) EU:C:2024:599 at [32]–[35]; Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

²⁵ *Finanzamt T II* (C-184/23) EU:C:2024:599 at [33]–[34]. See also Opinion of Advocate General Rantos in *Finanzamt T v S* (Opinion of Advocate General Rantos in *Finanzamt T II*) (C-184/23) EU:C:2024:416 at [65]–[76]; Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

²⁶ *Finanzamt T II* (C-184/23) EU:C:2024:599 at [35].

²⁷ *Finanzamt T II* (C-184/23) EU:C:2024:599 at [26]. For the original reference, see BFH, V R 20/22 at [I.].

²⁸ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

²⁹ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

³⁰ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [37]–[40].

³¹ *Finanzamt T II* (C-184/23) EU:C:2024:599 at [38]–[39].

³² See VAT Committee, Guidelines resulting from the 119th meeting of 22 November 2021, Document B, taxud.c.1(2022)2315070-1034.

³³ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [41].

³⁴ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [42]; Council Directive 2006/112/EC [2006] OJ L347/1.

³⁵ 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, p.10. See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [42].

³⁶ 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, p.10.

With regard to the second question referred to it by the BFH in *Finanzamt T II* (whether the taxation of intra-group supplies should fall within the scope of VAT, in light of a potential risk of tax losses, in the case that the recipient of the supply cannot, or can only partly, claim input VAT deductions; see the full quote above), the CJEU also clarified its previous statements.³⁷ In *Norddeutsche Gesellschaft für Diakonie*, the CJEU maintained that the controlling company, and not the group itself, can be designated as a single taxable person only if “that designation does not entail a risk of tax losses”,³⁸ and in *Finanzamt T II*, the CJEU contrasted this risk of tax losses with risks of tax losses which do not follow from “the application of conditions specific to the VAT group regime which are also specific to the law of a Member State”,³⁹ but which instead result from “the application of the common VAT system laid down by the Sixth Directive”.⁴⁰

In light of these considerations, the CJEU ruled:

“Article 2(1) and the second subparagraph of Article 4(4) of the [Sixth Directive]...must be interpreted as meaning that services provided for consideration between persons belonging to the same group – formed by persons who, while legally independent, are closely bound to one another by financial, economic and organisational links – designated as a single taxable person by a Member State, are not subject to...[VAT] even where the VAT due or paid by the recipient of those services cannot be subject to an input deduction.”⁴¹

Further arguments against the taxation of intra-group transactions

The CJEU’s judgment in *Finanzamt T II* on the question of whether intra-group supplies should be subject to VAT is persuasive.⁴² The literal interpretation of the relevant provisions and the CJEU’s reliance on the concept of a “single taxable person” is logical; yet further historical, teleological and systematic arguments can be advanced to argue against the taxation of intra-group transactions.⁴³

One argument that can be put forward in this context pertains to the historical objective guiding the implementation of rules on VAT grouping in EU law, which was to establish the implementation of existing Member State legislation on group taxation, with the German group regime (*Organschaft*) being of particular importance.⁴⁴ The *Organschaft* originally emerged as a measure by which to prevent the cascading effect of cumulative tax charges for independent group companies in a system without input VAT deduction.⁴⁵ This was achieved by treating intra-group transactions as being outside the scope of VAT, which was therefore the fundamental element of the *Organschaft*.⁴⁶ In the current system, where input VAT deductions are recognised, the effect of the non-taxability of intra-group supplies is limited⁴⁷ and, in principle, this non-taxation only leads to a procedural simplification, as VAT does not then have

³⁷ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [44]–[46].

³⁸ *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [60].

³⁹ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [46].

⁴⁰ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [46]; Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁴¹ *Finanzamt T II* (C-184/23) EU:C:2024:599 at [50].

⁴² See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [27]–[47].

⁴³ See, e.g., Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [AG50]–[AG93]; Bertrand Monfort, “Plädoyer für die Nichtsteuerbarkeit der Innenumsätze innerhalb der Organschaft – Zugleich eine Anmerkung zum BFH-Vorlagebeschluss V R 20/22 v. 26.1.2023, UR 2023, 325” (2023) 72(9) *UmsatzsteuerRundschau* 355.

⁴⁴ See Ad van Doesum, et al, *Fundamentals of EU VAT Law*, 3rd edn (Alphen aan den Rijn: Wolters Kluwer, 2025), pp.103–104. See also European Commission, Proposition d’une deuxième directive du conseil en matière d’harmonisation des législations des états membres relatives aux taxes sur le chiffre d’affaires concernant la structure et les modalités d’application du système commun de taxe sur la valeur ajoutée, IV/COM(65) 144 (final), pp.7–8.

⁴⁵ See BFH, V R 20/22 at [II.4.b)cc)]. See also Sebastian Pfeiffer, “VAT grouping – EU law and Austrian implementation” (2020) 10 *Studi Tributari Europei* 135, 136.

⁴⁶ See Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [AG84].

⁴⁷ See BFH, V R 20/22 at [II.4.b)cc)]. See also, e.g., Alena Kirchinger, “Die umsatzsteuerliche Organschaft lebt weiter” (2023) *Umsatzsteuer-Berater* 19, 20.

to be paid and subsequently reclaimed. However, for certain businesses, the relevance of the non-taxability of intra-group supplies goes beyond procedural aspects.⁴⁸ This is true, for example, in the banking and insurance sector, or for hospitals and care facilities, which primarily carry out exempt transactions (see Articles 132 and 135 of the VAT Directive;⁴⁹ Article 13 of the Sixth Directive⁵⁰), thus preventing them from claiming input VAT deductions (see Article 168 of the VAT Directive;⁵¹ Article 17 of the Sixth Directive⁵²).⁵³ For these businesses, the original rationale of the *Organschaft* remains applicable.

Closely related to the historical rationale is a complementary teleological argument. The VAT grouping rules are intended to create a level playing field by introducing a system that is neutral as regards different business structures, irrespective of whether part of a business is outsourced to a discrete taxpayer or is carried out by an internal department of a business;⁵⁴ and the VAT group still serves this purpose today in cases where input VAT is not deductible.⁵⁵ Hence, the principle of organisational neutrality argues for an interpretation of the VAT grouping provisions under which intra-group supplies are outside the scope of VAT.⁵⁶

A further argument is of a systematic nature. The inclusion of the provision on the VAT grouping regime within the section on taxable persons in the EU VAT rules (see Title III of the VAT Directive;⁵⁷ Title IV of the Sixth Directive⁵⁸) is consistent with the conclusion that the grouping regime does not only serve procedural purposes, but that intra-group supplies are not taxable.⁵⁹ If the VAT grouping rules were intended to be purely procedural, it would have been more consistent to include them in the section on procedural aspects (see Title XI of the VAT Directive;⁶⁰ Titles XII and XIII of the Sixth Directive⁶¹).⁶²

Clarification (or correction) of *Finanzamt T I* and *Norddeutsche Gesellschaft für Diakonie*

Given the apparent clarity of this reasoning, the question arises as to why *Finanzamt T I* and *Norddeutsche Gesellschaft für Diakonie* prompted such fundamental questions about the VAT group. One issue was the (controversial)⁶³ view of Advocate General Medina; but it was particularly significant

⁴⁸ See Pfeiffer, “VAT grouping” (2020) 10 *Studi Tributari Europei* 135, 136–137; van Doesum, et al, *Fundamentals of EU VAT Law* (2025), pp.104–105. Cf. also BFH, V R 20/22 at [II.4.d)aa)(2)].

⁴⁹ Council Directive 2006/112/EC [2006] OJ L347/1.

⁵⁰ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁵¹ Council Directive 2006/112/EC [2006] OJ L347/1.

⁵² Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁵³ See Kirchinger, “Die umsatzsteuerliche Organschaft lebt weiter” (2023) *Umsatzsteuer-Berater* 19, 20; Pfeiffer, “VAT grouping” (2020) 10 *Studi Tributari Europei* 135, 136–137. Cf. also BFH, V R 20/22 at [II.4.d)aa)(2)].

⁵⁴ Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [AG81]–[AG87].

⁵⁵ Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [AG86]. See also Pfeiffer, “VAT grouping” (2020) 10 *Studi Tributari Europei* 135, 136.

⁵⁶ Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [AG81]–[AG87]. See also van Doesum, et al, *Fundamentals of EU VAT Law* (2025), pp.103–104.

⁵⁷ Council Directive 2006/112/EC [2006] OJ L347/1.

⁵⁸ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁵⁹ See Ismer and Endres-Reich, “Erneute EuGH-Vorlage zur Frage der Steuerbarkeit von Innenleistungen bei Organschaft” (2023) 11(8) *Mehrwertsteuerrecht* 310, 311–312. Cf. also Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [AG50]–[AG57].

⁶⁰ Council Directive 2006/112/EC [2006] OJ L347/1.

⁶¹ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁶² See Kirchinger, “Die umsatzsteuerliche Organschaft lebt weiter” (2023) *UmsatzsteuerBerater* 19, 21; Monfort, “Plädoyer für die Nichtsteuerbarkeit der Innenumsätze innerhalb der Organschaft” (2023) 72(9) *UmsatzsteuerRundschau* 355, 359.

⁶³ For criticism on Advocate General Medina’s view, see Ismer and Endres-Reich, “Organträger kann Steuerschuldner sein” (2022) 10(23) *Mehrwertsteuerrecht* 887, 887–888; Oelmaier, “Erneute EuGH-Vorlage zur Frage der Steuerbarkeit von Innenleistungen bei Organschaft – Erste Einordnung 2” (2023) 11(8) *Mehrwertsteuerrecht* 312; for a more favourable response, see Ralph E. Korf, “Mehrwertsteuergruppe ist eigenständiger Steuerpflichtiger – Erste Einordnung” (2022) 10(4) *Mehrwertsteuerrecht* 160, 160–161. For speculation as to whether the Advocate General did in fact intend to deem intra-group supplies to be taxable, see

that the CJEU and the BFH appear to have been talking past each other.⁶⁴ In order to understand this dynamic, it is fundamental to recognise that the context of the fourth question posed by the BFH in *Norddeutsche Gesellschaft für Diakonie* (whether the group companies could be deemed not to be independent) is that Section 2 para.2 No.2 of the German VAT Act (*Umsatzsteuergesetz*, UStG 2005) implements the VAT grouping regime by considering the individual group companies not to be independent.⁶⁵ The BFH, hence, was concerned with whether the German requirements for the *Organschaft* could be based on “Article 4(1) and the *first subparagraph* of Article 4(4) of [the Sixth Directive]” (emphasis added), as an alternative legal basis, rather than on relying on Article 4 para.4 subpara.2 of the Sixth Directive.⁶⁶ Some confusion arose due to the fact that the CJEU then ruled, in *Norddeutsche Gesellschaft für Diakonie*, that “the *second subparagraph* of Article 4(4) of the Sixth Directive, read in conjunction with the first subparagraph of Article 4(1) [sic] of that directive, must be interpreted as precluding a Member State from classifying, by categorisation, given entities as non-independent” (emphasis added).⁶⁷ Commentators in Germany therefore thought that the CJEU might have misunderstood the question and failed to answer the specific question referred;⁶⁸ and the CJEU’s statements were also perplexing because Article 4 para.1 subpara.1 of the Sixth Directive,⁶⁹ which was cited by the CJEU, does not exist.⁷⁰ It could appear, *prima facie*, as if a general statement had been made by the CJEU in *Norddeutsche Gesellschaft für Diakonie* about the taxation of intra-group supplies. In light of Advocate General Medina’s position in favour of the taxation of these transactions,⁷¹ in particular, certain statements made by the CJEU imply the potential existence of a legal relationship that constitutes a taxable supply, even between “an entity forming part of a VAT group and the other members of that group...so that the supplies made by that entity may be liable to VAT”.⁷²

On the other hand, the role of the CJEU under Article 19 para.3 lit.b of the Treaty on European Union (TEU) and Article 267 subpara.1 of the Treaty on the Functioning of the European Union (TFEU) is to interpret EU law; and EU VAT law (see Article 11 of the VAT Directive;⁷³ Article 4 para.4 of the Sixth Directive⁷⁴) does not suggest utilising the specific German implementation technique of treating the controlled companies as not being independent. For the CJEU, membership of a VAT group under the EU grouping regime is not a question of a lack of independence (under Article 4 para.4 subpara.1 of the Sixth Directive),⁷⁵ but rather a separate issue of assessment in the context of determining taxable persons.⁷⁶ From the outset, this argued against drawing general conclusions on the taxation of intra-group transactions under the EU VAT grouping regime pursuant to Article 4 para.4 subpara.2 of the

Küffner, “Nationale Regelung, die den Organträger der Mehrwertsteuergruppe zum einzigen Steuerpflichtigen bestimmt” (2023) 72(1) *UmsatzsteuerRundschau* 41, 42.

⁶⁴ See Bernd Heuermann, “Erneute EuGH-Vorlage zur Frage der Steuerbarkeit von Innenleistungen bei Organschaft – Anmerkung” (2023) 61(12) *Deutsches Steuerrecht* 638.

⁶⁵ Brinkmann and Walter-Yadegardjam, “Der Anfang vom Ende der umsatzsteuerlichen Organschaft oder viel Lärm um Nichts?” (2023) *Deutsches Steuerrecht* 65, 69–70.

⁶⁶ *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [34]; Sixth Council Directive 77/388/EEC [1977] OJ L145/1. For an analysis of the question referred, see Ismer and Endres-Reich, “Organträger kann Steuerschuldner sein” (2022) 10(23) *Mehrwertsteuerrecht* 887.

⁶⁷ *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [81].

⁶⁸ See Ismer and Endres-Reich, “Organträger kann Steuerschuldner sein” (2022) 10(23) *Mehrwertsteuerrecht* 887, 887–888.

⁶⁹ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁷⁰ Wüst, “Deutsche Organschaftsregelung hat Bestand” (2023) *UmsatzsteuerRundschau* 1, 3.

⁷¹ See again Opinion of Advocate General Medina in *Finanzamt T I* (C-269/20) EU:C:2022:60 at [36]–[37]; Opinion of Advocate General Medina in *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:11 at [AG64]–[AG89].

⁷² *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [78]. See Matthias Luther, Hans-Hinrich von Cölln and Marie-Theres Rathmann “Umsatzsteuerliche Organschaft: Sind Innenumsätze steuerbar?” (2023) 11(3) *Mehrwertsteuerrecht* 76, 80.

⁷³ Council Directive 2006/112/EC [2006] OJ L347/1.

⁷⁴ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁷⁵ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁷⁶ Kirchinger, “Die umsatzsteuerliche Organschaft lebt weiter” (2023) *UmsatzsteuerBerater* 19, 20. See also Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [50]–[57].

Sixth Directive⁷⁷ from the CJEU's ruling in *Norddeutsche Gesellschaft für Diakonie*.⁷⁸ Furthermore, there were additional indications that the CJEU did not intend to tax intra-group supplies, especially since, in its statements that were unrelated to the fourth question in *Norddeutsche Gesellschaft für Diakonie*, the CJEU had expressly pointed out that members of the group are not to be treated as individual taxable persons and that supplies provided to group members must be considered as supplies to the group as a single taxable person.⁷⁹

In *Finanzamt T II*, the CJEU sought to resolve the ambiguities described above by explicitly revisiting the fourth question of *Norddeutsche Gesellschaft für Diakonie*, presenting it now correctly as a question of Article 4 para.1 and Article 4 para.4 subpara.1 of the Sixth Directive⁸⁰ (albeit without acknowledging the previous inaccuracies), and providing an unambiguous answer clarifying that intra-group supplies are not taxable.⁸¹ Overall, the confusion surrounding the taxability of intra-group supplies appears to be somewhat unnecessary and might have been avoided by careful formulation on the part of the court. This would have been particularly relevant in light of the Opinion of Advocate General Medina,⁸² which was not explicitly taken up by the CJEU on this key point,⁸³ but which, to some extent, provoked the misunderstanding. In any event, the decision in *Finanzamt T II* fortunately eliminates the uncertainty in question and, ultimately, the CJEU reached the correct conclusion in this matter.

Guidelines of the VAT Committee and repeated submissions

In addition to the issues of substantive law, the decision in *Finanzamt T II* is also noteworthy in a methodological light, considering the CJEU's use of the guidelines of the VAT Committee (see Article 398 of the VAT Directive;⁸⁴ see also Article 29 of the Sixth Directive⁸⁵) to reach a decision on the question referred to it.⁸⁶ In fact, these guidelines have considerable practical implications, as they are referred to by the CJEU (but also by Member States)⁸⁷ when interpreting the VAT Directive.⁸⁸ One effect of this development is that the guidelines (as soft law instruments) enable more flexible coordination between the Member States than amendments of statutory law and CJEU case law.⁸⁹ However, due to their non-binding nature, statements of the VAT Committee do not definitively ensure the uniform application of EU VAT law in the Member States.⁹⁰ Furthermore, the monopoly of

⁷⁷ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁷⁸ See Opinion of Advocate General Rantos in *Finanzamt T II* (C-184/23) EU:C:2024:416 at [AG65]–[AG76].

⁷⁹ See *Finanzamt T I* (C-269/20) EU:C:2022:944 at [39]–[41]; *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:943 at [46]–[47]. See also Brinkmann and Walter-Yadegardjam, “Der Anfang vom Ende der umsatzsteuerlichen Organschaft oder viel Lärm um Nichts?” (2023) 61(3) *Deutsches Steuerrecht* 65, 70–71; Wüst, “Deutsche Organschaftsregelung hat Bestand” (2023) 72(1) *UmsatzsteuerRundschau* 1, 2–3.

⁸⁰ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁸¹ *Finanzamt T II* (C-184/23) EU:C:2024:599 at [32]–[35].

⁸² See Opinion of Advocate General Medina in *Finanzamt T I* (C-269/20) EU:C:2022:60 at [AG36]–[AG37]; Opinion of Advocate General Medina in *Norddeutsche Gesellschaft für Diakonie* (C-141/20) EU:C:2022:11 at [AG64]–[AG89].

⁸³ See Forster and Striegl, “‘Abschaffung’ der umsatzsteuerlichen Organschaft?” (2024) 12(12) *Mehrwertsteuerrecht* 465, 469, 471. See also Küffner, “Nationale Regelung, die den Organträger der Mehrwertsteuergruppe zum einzigen Steuerpflichtigen bestimmt” (2023) 72(1) *UmsatzsteuerRundschau* 41.

⁸⁴ Council Directive 2006/112/EC [2006] OJ L347/1.

⁸⁵ Sixth Council Directive 77/388/EEC [1977] OJ L145/1.

⁸⁶ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [41]. For comments, see Roland Ismer and Daniela Endres-Reich “Keine Steuerbarkeit von Innenleistungen bei Organschaft – S/FA T II – Erste Einordnung 1” (2024) 12(15) *Mehrwertsteuerrecht* 601, 602.

⁸⁷ See Stefanie Geringer, “A Change in the Law or A Guideline from the EU VAT Committee? Evaluating Soft Law Instruments for Clarifying EU VAT Law Through the Lens of Legitimacy” (2024) 52(3) *Intertax* 239, 248 fn.115.

⁸⁸ See, e.g., *Finančné riaditeľstvo Slovenskej republiky v Weindel Logistik Service* (C-621/19) EU:C:2020:814 at [47]–[48]; *Finanzamt Graz-Stadt v SK Telecom* (C-593/19) EU:C:2021:281 at [48]–[49]; Council Directive 2006/112/EC [2006] OJ L347/1.

⁸⁹ Geringer, “A Change in the Law or A Guideline from the EU VAT Committee?” (2024) 52(3) *Intertax* 239, 251.

⁹⁰ Geringer, “A Change in the Law or A Guideline from the EU VAT Committee?” (2024) 52(3) *Intertax* 239, 248.

interpretation remains with the CJEU,⁹¹ which should not, therefore, adopt the VAT Committee's views without careful consideration. In *Finanzamt T II*, the CJEU recognised that the guidelines do not have a binding effect but nevertheless constitute an aid to interpretation;⁹² and the statements of the VAT Committee (and the European Commission for that matter) appear to have only confirmed the CJEU's own reasoning.⁹³

From a procedural point of view, it is remarkable that the BFH has referred the case in question repeatedly to the CJEU for preliminary ruling. In principle, a judgment of the CJEU is legally binding in accordance with Article 91 of the Rules of Procedure of the CJEU,⁹⁴ and domestic courts cannot deviate from the CJEU's preliminary ruling in their decision in the main proceedings.⁹⁵ However, this does not prevent domestic courts from referring a matter to the CJEU again in order to obtain further clarification regarding questions of EU law.⁹⁶ Such a course of action is permitted in instances where national courts encounter challenges in understanding or applying the judgment, where a fresh question of law is referred to the CJEU, or when novel considerations that could result in the CJEU providing a different response to a question posed are presented.⁹⁷ The CJEU's statements imply that it recognised the issue of the taxation of intra-group transactions as a fresh legal issue, since it said that it had not yet resolved this question in the *Norddeutsche Gesellschaft für Diakonie* decision.⁹⁸

However, it follows from the above considerations that, from the perspective of the domestic court, it was perhaps (also) the difficulty of the interpretation of the CJEU's reasoning that led to the resubmission.⁹⁹ Either way, it was appropriate for the question to be reconsidered and clarified in light of the fundamental uncertainty surrounding the VAT group regime.

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⁹¹ See Bertrand Monfort, "EuGH bestätigt Abzug der Einfuhrumsatzsteuer nur beim Verfügungsberechtigten – Anmerkung" (2021) 70(2) *Umsatzsteuer-Rundschau* 79, 81.

⁹² See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [41].

⁹³ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [41]–[42].

⁹⁴ Rules of Procedure of the Court of Justice [2012] OJ L265/1.

⁹⁵ *Wünsche v Bundesrepublik Deutschland (Wünsche)* (C-69/85) EU:C:1986:104 at [13].

⁹⁶ *Wünsche* (C-69/85) EU:C:1986:104 at [15]. See also *Consorzio Italian Management and Catania Multiservizi v Rete Ferroviaria Italiana* (C-561/19) EU:C:2021:799 at [38].

⁹⁷ *Wünsche* (C-69/85) EU:C:1986:104 at [15]. On the issue of when courts are not obliged to refer questions to the CJEU (*acte clair* and *acte éclairé*), see *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (C-283/81) EU:C:1982:335 at [13]–[21] (citing Article 177 of the Treaty establishing the European Economic Community).

⁹⁸ See *Finanzamt T II* (C-184/23) EU:C:2024:599 at [32].

⁹⁹ See BFH, V R 20/22 at [II.3.].

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