Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 30 June 2016[1]

Case C-340/15

Christine Nigl,
Gisela Nigl sen.,
Gisela Nigl jun.,
Josef Nigl,
Martin Nigl
v
Finanzamt Waldviertel

(Request for a preliminary ruling from the Bundesfinanzgericht (Federal Finance Court, Austria))

(Reference for a preliminary ruling — Taxation — Value added tax — Sixth Directive — Article 4(1) and (4) and Article 25 — Directive 2006/112/EC — Articles 9 to 11 and 296 — Concept of taxable person — Economic activity conducted independently — Civil-law partnerships supplying goods under a joint trading name and through a trading company — Refusal to regard as taxable persons — Common flat-rate scheme for farmers — Exclusion from flat-rate scheme)

Introduction

1. In the present case the Bundesfinanzgericht (Federal Finance Court, Austria) has referred to the Court of Justice for a preliminary ruling a number of questions concerning the status of traders as separate taxable persons in the context of the application to them of the common flat-rate scheme for farmers laid down in provisions on value added tax ('VAT'). The Court of Justice will have an occasion to recall and clarify its case-law on the correct understanding of the concept of economic activity conducted independently, the interpretation of the provisions on 'VAT groups' and also the abuse of rights.

1 — Original language: Polish.

Legal framework

EU law

2. The facts in the main proceedings relate to a period when both 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[2] and Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[3] were in force. However, since the wording of the two directives relevant to this case is essentially identical, I will cite only the provisions of Directive 2006/112.

3. Under the first subparagraph of Article 9(1) of Directive 2006/112:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.'

4. Under Article 10 of that directive:

'The condition in Article 9(1) that the economic activity be conducted "independently" shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.'

5. Article 11 of that directive provides:

'After consulting the advisory committee on value added tax …, each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.'

6. Finally, under Article 296(1) and (2) Directive 2006/112:

'1. Where the application to farmers of the normal VAT arrangements, or the special scheme provided for in Chapter 1, is likely to give rise to difficulties, Member States may apply to farmers, in accordance with this Chapter, a flat-rate scheme designed to offset the VAT charged on purchases of goods and services made by the flat-rate farmers.

2. Each Member State may exclude from the flat-rate scheme certain categories of farmers, as well as farmers for whom application of the normal VAT arrangements, or of the simplified procedures provided for in Article 281, is not likely to give rise to administrative difficulties. …'

Austrian law

7. Under Paragraph 1175(1) of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), a civil-law partnership is formed by two or more persons who, by agreement, have decided jointly to carry out activity aimed at attaining a jointly determined objective. Such agreement is not subject to any requirements as regards form.

2 — OJ 1977 L 145, p. 1 (hereinafter 'the Sixth Directive').

3 — OJ 2006 L 347, p.1.

8. Directive 2006/112 was transposed into Austrian law by the VAT Law of 1994 (Umsatzsteuergesetz 1994; 'the UStG'). Under Paragraph 2(1) of that law, any person who independently carries out a commercial or professional activity is a taxable person for the purposes of VAT. Subparagraph 2 of that paragraph makes it clear that an activity is not to be regarded as independent where it is carried out by natural persons subject to the orders of an undertaking or by a legal person financially, economically or organisationally subject to the will of an (other) undertaking in such a way that it cannot exercise its own will.

9. The common flat-rate scheme for farmers laid down in Directive 2006/112 was incorporated in Paragraph 22 of the UStG. It applies to farmers who are not subject to the obligation to keep accounts. Under Paragraph 125(1) of the Austrian Tax Code (Bundesabgabenordnung), that obligation is subject to the turnover and value of the undertaking concerned.

Facts, procedure and questions referred

10. The Nigl family has for a long time carried out activity relating to grape growing and wine production. With the development of production and an expansion of the area under cultivation, this activity has encompassed an increasing number of new family members. At present they form three civil-law partnerships, each of which grows wine on its own land. Wine is also produced separately from harvests from land belonging to each partnership and although it is sold under the joint 'Nigl' name it bears designations which indicate a vintage belonging to a specific civil-law partnership. In addition, in 2001 the family members formed a limited company, Weingut Nigl GmbH. That company engages primarily in the sale of wine in the name and on behalf of the three civil-law partnerships. It also produces wine in its own name made from fruit acquired from the three civil-law partnerships. The equipment necessary for cultivation and production is essentially owned by the individual civil-law partnerships, with the exception of some immovable property and equipment, such as the bottling plant which is owned jointly.

11. All four undertakings (that is to say the three civil-law partnerships and the limited company) were, from the time they were formed, registered as separate taxable persons for the purposes of VAT and the civil-law partnerships were covered by the flat-rate scheme for farmers. Inspections by the tax authorities confirmed that status. However, in 2012 those authorities found, as a result of a subsequent inspection, that all three civil-law partnerships should be regarded as one undertaking, and therefore as a single taxable person for the purposes of VAT, starting from 2005. Only the limited company retained the status of a separate person. For that reason the tax authority, which is the defendant in main proceedings, issued in relation to the applicants in the main proceedings tax a number of tax correction decisions for 2005 to 2012 and also a decision restricting the validity of their tax identification numbers as taxable persons for the purposes of VAT.

12. Under Austrian law, the finding that the three trading companies are a single undertaking also means that they are excluded from taxation under the flat-rate scheme for farmers.

13. As grounds for those decisions, the tax authorities cite the far-reaching economic and organisational integration of the three civil-law partnerships. They point out in particular that all the partnerships interact with third parties under the name 'Weingut Nigl', that is to say also the trade name of their products, that they use joint buildings and installations, and that the vinification process essential to the wine production is in fact carried out by one person, Martin Nigl, who is a recognised specialist in that field.

14. The applicants in the main proceedings challenged the abovementioned decisions before the national court. They put forward the following arguments, inter alia: the individual civil-law partnerships were formed separately at different times and it is not possible to conclude that a single civil-law partnership was formed by implication, contrary to the express will of its purported

members; the joint use of buildings and equipment is a common practice, particularly in agriculture, and it cannot therefore be presumed that individual undertakings are not independent; and the sale of the final product, that is to say the wine, under a joint trading name is likewise not a decisive factor in this case, particularly since that wine also bears the designation of each of the civil-law partnerships.

15. In those circumstances, the Bundesfinanzgericht decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do three associations of persons constitute three independent traders (taxable persons) where those associations consist of different members of one family, conduct themselves outwardly as such independently in relation to their suppliers and to public authorities, possess their own production facilities, with the exception of two business assets, but market under a common trade mark the greater part of their products through a limited company whose shares are held by the members of the associations of persons and other members of the family?

(2) If the three associations of persons are not to be regarded as three independent traders (taxable persons), is any of the following to be regarded as an independent trader (taxable person):

(a) the marketing company, or

(b) an association of persons consisting of the members of the three associations of persons, which does not conduct itself as such on the market in relation either to suppliers or to customers, or

(c) an association of persons consisting of the three associations of persons and the limited company, which does not conduct itself as such on the market in relation either to suppliers or to customers?

(3) If the three associations of persons are not to be regarded as three independent traders (taxable persons), is the refusal of the status of a trader (taxable person)

(a) retrospective,

(b) only for the future, or

(c) not permissible at all

if the associations of persons were at first, after investigations by the tax authorities, recognised by the Tax Office as independent traders (taxable persons)?

(4) If the three associations of persons are to be regarded as three independent traders (taxable persons), are they, as wine growers and therefore farmers, flat-rate farmers if each of those associations of persons which cooperate in practice is in itself covered by the flat-rate scheme for farmers, but the limited company, an association of persons formed of the members of the three associations of persons or an association of persons formed of the limited company and the members of the three associations of persons is, under national law, not covered by the flat-rate scheme on account of the size of the business or its legal form?

(5) If the flat-rate scheme for farmers is in principle excluded for the three associations of persons, is that exclusion

(a) retrospective,

(b) only for the future, or

(c) not effective at all?'

16. The request for a preliminary ruling was received by the Court on 7 July 2015. Written observations were submitted by the applicant in the main proceedings, the Austrian Government and the European Commission. The same parties were represented at the hearing of 13 April 2016.

Analysis

17. The national court does not specifically indicate the provisions of EU law for which it is seeking an interpretation in its request. However, it must be concluded from the wording of the questions referred and the information contained in the order of the national court that the first, second and third questions concern the first subparagraph of Article 9(1) and Article 11 Directive 2006/112, and the fourth and fifth questions also concern the interpretation of the provisions on the common flat-rate scheme for farmers, and in particular Article 296(1) and (2) of that directive. I propose that the legal analysis in this case also be divided thus.

First, second and third questions referred — interpretation of the first subparagraph of Article 9(1) and Article 11 of Directive 2006/112

First question referred

18. By its first question the national court essentially seeks to ascertain whether the first subparagraph of Article 9(1) and Article 11 of Directive 2006/112 must be interpreted as allowing or requiring a Member State to refuse the status of separate taxable persons to persons who, in carrying on a taxable activity, are economically or organisationally bound to one another to such an extent that it is possible to regard them as a single undertaking. In replying to the question thus worded, it is necessary, in my view, to separate the interpretation of the first subparagraph of Article 9(1) and Article 11 of that directive.

– Interpretation of the first subparagraph of Article 9(1) of Directive 2006/112

19. In the present case it is common ground that the activity carried out by the applicants in the main proceedings constitutes economic activity within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112. Therefore, the question remains whether it is an activity which they carry out independently within the meaning of the first subparagraph of Article 9(1) or, more precisely, whether each of the civil-law partnerships formed by the applicants carries out that activity independently, thus acquiring the status of taxable person.

20. According to the settled case-law of the Court of Justice, the independent nature of an activity within the meaning of the first subparagraph of Article 9(1) of Directive 2006/112 must be viewed in the light of Article 10 of that directive. That provision indicates unequivocally that the term 'independently' is intended to exclude from VAT activities conducted by persons bound to an employer by a contract of employment or by any other legal ties. This means that an activity is not carried out independently only where the person carrying it out is subordinate to another person in such a way that he does not carry out that activity in his own name and on his own behalf, does not direct that activity in person, and does not bear the economic risk associated with it.[4]

4 — See inter alia the judgments in *Heerma* (C-23/98, EU:C:2000:46, paragraph 18), and *Gmina Wrocław* (C-276/14, EU:C:2015:635, paragraphs 33 and 34 and the case-law cited).

21. The very fact that there is cooperation, even close cooperation, between several persons in the form of civil-law partnerships in the conduct of an activity does not, in my view, indicate that they are subordinate to another person. Therefore, persons cooperating with one another necessarily carry on activity on their behalf, in their own name and under their own direction and bear the economic risk associated with carrying out that activity since there is no other, overarching entity on whose behalf and in whose name that activity could be carried out. It should be added that, according to the information contained in the national court's order, in the main proceedings the limited company formed by the applicants does not appear to fulfil such function.

22. In that situation it cannot be held that the first subparagraph of Article 9(1) of Directive 2006/112 constituted a basis for refusing the persons concerns the status of taxable persons on account of the non-independent nature of the activity which they carry out.

– Interpretation of Article 11 of Directive 2006/112

23. Article 11 of Directive 2006/112 permits the Member States to regard as a single taxable person persons who are legally independent but closely bound to one another by financial, economic and organisational links (such a taxable person is defined as a 'VAT group'). Both actual or potential separate taxable persons and persons not having the status of a taxable person can be regarded as a single taxable person. [5]

24. That provision has a two-fold purpose. Firstly, it can allow administration to be simplified for both the tax authorities and the persons concerned. [6] Secondly, it can be used to combat abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special tax scheme. [7]

25. However, for that provision to be applied in national law two conditions must be satisfied.

26. First, that provision must be expressly transposed into domestic law. It is not unconditional and consequently cannot be applied directly. [8] That is so even where the effects thereof are intended to be beneficial for taxable persons and thus *a fortiori*, as the Commission correctly noted in its observations, where they are applied to their detriment, as in the present case.

27. Secondly, for a Member State to avail itself of the option provided for in Article 11 of Directive 2006/112, there must be prior consultation of the VAT Committee. [9]

28. Against this background, uncertainty arises in the present case as to whether there exists in Austrian law a legal basis for regarding the civil-law partnerships formed by the applicants in the main proceedings as a VAT group for the purposes of Article 11 of Directive 2006/112. As the Commission stated at the hearing, the provision on which the Republic of Austria consulted the VAT Committee in that context is the second subparagraph of Paragraph 2(2) of the UStG. That provision restricts the option of regarding persons as a single taxable person to legal persons financially, economically or organisationally subordinate to an undertaking in such a way that they cannot exercise their own will.

5 — See inter alia judgment in *Commission* v *Ireland* (C-85/11, EU:C:2013:217).

6 — Judgment in *Commission* v *Ireland* (C-85/11, EU:C:2013:217, paragraph 48).

7 — See inter alia judgment in *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 40).

8 — *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraphs 50 and 51).

9 — See, to that effect, in relation to the second subparagraph of Article 4(4) of the Sixth Directive, judgment in *Ampliscientifica and Amplifin* (C-162/07, EU:C:2008:301, paragraph 23).

29. The undertakings formed by the applicants in the main proceedings which the Austrian tax authorities refused to regard as separate taxable persons in the decisions challenged in those proceedings do not have legal personality and are not subordinate to any other undertaking. Therefore, the Austrian Government claims that there is an option to apply the second subparagraph of Paragraph 2(2) to them.

30. That is a matter of interpretation of national law over which the national courts alone have jurisdiction I would merely like to point out that, in my view, the assessment of that matter is unaffected by the possible incompatibility between that provision of Austrian law and Article 11 of Directive 2006/112 in the light of the Court's judgment in *Larentia + Minerva and Marenave Schiffahrt*,[10] which the Commission appears to suggest in its observations. In that judgment the Court in fact ruled that the restriction on forming a VAT group contained in German law, similar to that contained in the Austrian provision under consideration in the present case, is contrary to the second subparagraph of Article 4(4) of the Sixth Directive, since the latter does not make application thereof subject to requirements other than a close tie between the persons concerned.[11] At the same time, however, the Court ruled out the possibility of taxable persons relying directly on that provision of the directive, even where the national provision transposing it introduces a restriction which is incompatible with it.[12] Therefore, *a fortiori* tax authorities cannot rely directly on Article 11 of Directive 2006/112 in order to apply it to the detriment of a taxable person.

31. In the light of the foregoing, I consider that any incompatibility between the second subparagraph of Paragraph 2(2) of the UStG and Article 11 of Directive 2006/112 can have no bearing on the assessment of the possibility of applying the former provision to civil-law partnerships formed by the applicants in the main proceedings.

– Answer to the first question referred

32. In the light of the above, I propose that the Court's answer to the first question should be that the first subparagraph of Article 9(1) of Directive 2006/112 must be interpreted as not forming a basis for refusing the status of taxable person to a person bound by organisational, economic or financial ties to another person where the those links are legal ties as referred to in Article 10 of that directive. Article 11 of that directive must be interpreted as meaning that for it to be applied there must exist in national law an express legal basis adopted after prior consultation with the VAT Committee. It is for the national courts to determine whether such a basis exists in national law and whether it applies in a specific case.

Second question referred

33. By its second question, the national court essentially seeks to ascertain which of the parties to the main proceedings should be regarded as a single taxable person, if such a possibility exists from a legal point of view.

34. As is clear from the answer which I propose be given to the first question, such possibility would arise from Article 11 Directive 2006/112, if the national court holds that the second subparagraph of Paragraph 2(2) of the UStG, which transposes it, applies in the circumstances of the main proceedings. However, a finding that the persons concerned should belong to a VAT group is a finding of fact which is entirely a matter for the national tax authorities and courts. I do not believe that EU law can provide any guidance in this regard.

10 — Judgment in C-108/14 and C-109/14, EU:C:2015:496.

11 — Judgment in *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 2 of the operative part).

12 — Judgment in *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 3 of the operative part).

35. I therefore propose that the Court's answer to the second question be that it is entirely for the tax authorities and courts of the Member States to establish which persons in a particular set of circumstances can be regarded as a single taxable person.

Third question referred

36. By its third question, the national court essentially seeks to ascertain whether the tax authorities can, when applying the provisions of national law transposing Article 11 Directive 2006/112, regard as members of a VAT group taxable persons who were previously regarded as separate taxable persons, and if so, whether they can do so retrospectively or only for the future.

37. In replying the question thus worded, I must point out at the outset that, in my view, neither Article 11 of Directive 2006/112, nor the general principles of tax law indicate that the provision is to apply only to persons who have never carried out a taxable activity before and thus had the status of a taxable person for the purposes of VAT. Such a restrictive interpretation of that provision would preclude its objectives from being attained. On the one hand, it would prevent taxable persons already carrying out taxable activity as separate taxable persons from forming a VAT group. On the other, it would also prevent the tax authorities from reacting accordingly to taxable persons' changing situation and applying the provisions on VAT groups to them, either to simplify tax assessments or combat abuses.

38. Nor, in my view, do the principles of tax law, including in particular the principle of legal certainty, preclude persons previously regarded as separate taxable persons from being regarded as members of a VAT group. In so far as that principle requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authorities, not to be open to challenge indefinitely,[13] clear and predictable rules which allow the tax authorities to verify earlier tax decisions do not breach that principle.[14]

39. As regards whether previously separate taxable persons can be regarded as members of a VAT group retrospectively or only for the future, it is, in my view, necessary to distinguish between two situations.

40. As I have noted in point 24 of this Opinion, application of the provisions on VAT groups can be aimed inter alia at combating abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special tax scheme. In that case regarding taxable persons as members of a VAT and the associated consequences for their taxation will be aimed at correcting the previously existing irregularity and restoring the situation which would have existed had the abuse not taken place. That can also cover correction, retrospectively, of earlier decisions.[15] Consequently, in my view it must be concluded that the tax authorities have the right retrospectively to regard as a VAT group persons who were previously regarded by those authorities as separate taxable persons, where that action is aimed at combating abuse consisting, for example, in the artificial splitting-up of one undertaking.

41. However, where no abuse on the part of the taxable persons is found the principles of legal certainty and protection of legitimate interests preclude, in my view, the retrospective application of the provisions on VAT groups to persons who previously had the status of separate taxable persons. That is so in particular in a situation, as in the main proceedings, where that status of separate taxable persons was confirmed as a result of an inspection carried out by the tax authorities.

13 — See judgment in *Fatorie* (C-424/12, EU:C:2014:50, paragraph 46). See also, to that effect, judgment in *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 72).

14 — Judgment in *Fatorie* (C-424/12, EU:C:2014:50, paragraphs 47 and 48).

15 — See, to that effect, judgment in *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 94 and 95).

42. In this regard it is worth adding further that, according to the case-law of the Court, for an abuse of law to be found in tax cases two conditions must be satisfied. First, the taxable person's transactions must, notwithstanding formal application of the conditions laid down by the relevant provisions, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage, which means that they cannot have some explanation other than the mere attainment of tax advantages.[16] The assessment of whether those conditions have been satisfied and the general finding as to whether there has been an abuse of law in a specific case naturally falls within the jurisdiction of the national courts.

43. In the light of the above, I propose that the Court's answer to the third question be that Article 11 of Directive 2006/112 must be interpreted as meaning that in the application thereof the tax authorities may regard as a single taxable person persons who earlier carried out a taxable activity as separate taxable persons. Those persons can be regarded as a single taxable person retrospectively where they have abused rights arising from their status as separate taxable persons.

Fourth and fifth questions referred — common flat-rate scheme for farmers

44. The fourth and fifth questions concern the application to the applicants in the main proceedings of the common flat-rate scheme for farmers referred to in Article 295 et seq. of Directive 2006/112. The fourth question specifically concerns applying or disapplying that scheme, depending on whether the applicants in the main proceedings are regarded as separate taxable persons or members of a VAT group. The fifth question, however, concerns the time from which it is possible to disapply that flat-rate scheme.

Fourth question referred

45. By its fourth question the national court essentially seeks to ascertain whether it is possible to disapply the flat-rate scheme to the applicants in the main proceedings who were treated as separate taxable persons (more precisely as three civil-law partnerships which are separate taxable persons) on account of their close economic ties, even though from a formal point of view they meet the criteria for the application of that scheme laid down in national law.

46. I must point out from the outset that the question thus worded would appear to go beyond the scope of the dispute in the main proceedings. As is clear from the order for reference, that dispute concerns a decision of the tax authorities to regard the applicants as members of a VAT group, to correct their tax assessments accordingly, and to restrict the validity of their identification numbers for the purposes of VAT. Naturally, as is clear from the order for reference and the observations of the parties, against that background the question arises as to the application of the flat-rate scheme — the applicants treated as separate taxable persons would have a right to benefit from it, but as a VAT group they would not as they would cease to meet the criteria for the application of the flat-rate scheme. However, non-application of that scheme would precisely follow from the applicants being regarded as members of a VAT group. The main proceedings do not concern the disapplication of the flat-rate scheme irrespective of the status of the applicants as taxable persons or on any basis other than them being regarded as members of a VAT group. In my view, the Court's answer to the fourth question must consequently relate only to whether the disapplication of the flat-rate system can be made subject on the applicants being regarded as members of a VAT ground since otherwise it would be hypothetical in nature.

16 — See, to that effect, judgments in *Halifax and Others* (C-255/02, EU:C:2006:121, paragraphs 74 and 75), and *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 36).

47. It must next be recalled that under Article 296(1) of Directive 2006/112 Member States *may* apply a flat-rate scheme to farmers *where* the application to them of the normal VAT arrangements or one of the simplified procedures 'is likely to give rise to difficulties'. Under Article 296(2) of that directive, Member States *may exclude* from the flat-rate scheme certain farmers or certain categories of farmers, for whom application of the normal VAT arrangements, or of the simplified procedures, is not likely to give rise to difficulties. Finally, under Article 296(3) of that directive every flat-rate farmer covered by that scheme may opt instead for taxation under normal arrangements or the simplified procedures.

48. That configuration of the flat-rate scheme in the provisions of the directive appears to indicate that it is exceptional in nature. That nature is also confirmed in the case-law of the Court, according to which the flat-rate scheme must be applied only to the extent necessary to achieve its objective,[17] that is to say, as it must be construed, to the extent to which application of the normal arrangements or simplified procedure are likely to give rise to difficulties.

49. At the same time, however, the factual nature of the flat-rate scheme, and the exclusions therefrom provided for in Article 296(2) of Directive 2006/112, indicate the broad discretion granted to the Member States in implementing that scheme. In particular, as the Commission correctly pointed out in its observations, it would not appear that the Member States are required to examine on a case-by-case basis, in relation to each farmer individually, whether or not the application to him of the normal arrangements or simplified procedure is likely to give rise to difficulties and whether therefore the flat-rate system should be applied. The Member States can generally lay down the criteria to be met to benefit from the flat-rate scheme and apply that scheme automatically to farmers who meet those criteria.

50. In Austrian law the right to benefit from the flat-rate scheme is connected with an exemption from the obligation to keep accounts, which in turn depends on the size of the holding measured by turnover and value. That criterion would appear to be entirely rational since the obligation to keep accounts is precisely one of the administrative difficulties associated with VAT under the normal arrangements and the simplified procedure.

51. It would also appear entirely rational to disapply the flat-rate scheme where, because several farmers are regarded as a single taxable person for the purposes of VAT, they lose their right to exception from the obligation to keep accounts since their holding, as a single entity, exceeds the specified size.

52. I therefore propose that the answer to the fourth question be that Article 296(1) and (2) of Directive 2006/112 must be interpreted as not precluding national legislation under which the flat-rate scheme referred to in that provision is disapplied only where a farmer ceases to meet the criteria for the application of that scheme based on the size of the holding, for example as a result of several economically linked farmers being regarded as a single taxable person.

Fifth question referred

53. By its fifth question, the national court seeks to establish whether the disapplication of the flat-rate scheme for farmers may relate to farmers to whom that scheme was applied in the past and, if so, whether it can be done retrospectively or only for the future.

54. Since in this case we are considering disapplication of the flat-rate scheme as a result of several farmers being regarded as members of a VAT group, the answer to the fifth question must be similar to the answer to the third question.

17 — Judgments in *Harbs* (C-321/02, EU:C:2004:447, paragraph 27), and *Commission* v *Portugal* (C-524/10, EU:C:2012:129, paragraph 49).

55. Firstly, I can therefore see no obstacles to disapplying the flat-rate scheme to farmers to whom it was applied in the past. Such a prohibition would prevent Member States from reacting to a changing situation and would also run counter to the exceptional nature of that scheme and the requirement that it be applied only to the extent necessary.

56. Secondly, I consider that if it is found that application of the flat-rate system entailed an abuse of the right, for example if the agricultural holding was artificially split up solely for the purpose of meeting the criteria which make it possible to benefit from that scheme, disapplication thereof can be retroactive. Otherwise, however, the principles of legal certainty and protection of legitimate expectations preclude, in my view, disapplication of the flat-rate system retrospectively. In that case the tax authorities, if they claim that the farmer's changed situation no longer justifies his benefitting from that scheme, can disapply it, but only for the future.

57. In the light of the foregoing, I propose that the Court's answer to the fifth question be that Article 296(1) and (2) of Directive 2006/112 must be interpreted as not precluding disapplication of the flat-rate scheme referred to in that provision to a farmer to whom that scheme was applied earlier. Such disapplication can be retrospective where application of the flat-rate system entailed abuse of the right.

Conclusion

58. In the light of all the foregoing considerations, I propose that the Court give the following answer to the questions referred for a preliminary ruling by the Bundesfinanzgericht (Federal Finance Court, Austria):

(1) The first subparagraph of Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not forming a basis for refusing the status of taxable person to a person bound by organisational, economic or financial ties to another person where those links are legal ties as referred to in Article 10 of that directive. Article 11 of that directive must be interpreted as meaning that for it to be applied there must exist in national law an express legal basis adopted after prior consultation with the VAT Committee. It is for the national courts to determine whether such a basis exists in national law and whether it applies in a specific case.

(2) It is entirely for the tax authorities and courts of the Member States to establish which persons in a particular set of circumstances can be regarded as a single taxable person.

(3) Article 11 of Directive 2006/112 must be interpreted as meaning that in the application thereof the tax authorities may regard as a single taxable person persons who earlier carried out a taxable activity as separate taxable persons. Those persons can be regarded as a single taxable person retrospectively where they have abused rights arising from their status as separate taxable persons.

(4) Article 296(1) and (2) of Directive 2006/112 must be interpreted as not precluding national legislation under which the flat-rate scheme referred to in that provision is disapplied only where a farmer ceases to meet the criteria for the application of that scheme based on the size of the holding, for example as a result of several economically linked farmers being regarded as a single taxable person.

(5) Article 296(1) and (2) of Directive 2006/112 must be interpreted as not precluding disapplication of the flat-rate scheme referred to in that provision to a farmer to whom that scheme was applied earlier. Such disapplication can be retrospective where application of the flat-rate system entailed abuse of the right.