Question 1

1. The despatch of goods from the German factory for customers in Austria and Poland would initially be treated as an intra-community supply of goods. The goods would be exempt with credit in Germany. Input tax relating to the supply would be reclaimable in Germany, so the supplier is VAT neutural, which is in line with the principles of the VAT directive. VAT is a tax on consumption, and there was no consumption in Germany, so the VAT is effectively washed out of the system.
In Poland or Austria, the goods would be subject to acquisition tax, at the rate applicable in their respective states. This would put them on par with businesses who acquire goods domestically, and this therefore averts distortion of competition.

As for the change in process, title of goods passes when the right to dispose of them passes from the supplier to the customer. One must query the motive for the customers for wanting to change the process in this way. Where the customer now wants to pick up the goods using their own lorries, one might question the ultimate destination of the goods. In the case of Teleos, the goods never actually left the UK, and false documentation had been provided to verify that they had.
While Teleos was successfully in defending their right to reclaim input tax, this was because they had taken reasonable precautions and had acted in good faith. Handel must also ensure that they have covered their bases.

2. Downloading of software for B2C transactions comes under the new rules as at the 1st of January 2015, the final phase of the VAT package. Telecommunications, Broadcasting, and electronically supplied services are now supplied where the customer belongs, rather than the supplier. In the annexes to the VAT directive, the download of software is specifically included in this treatment.
Supplies to businesses are covered by the article 44 general rule, where the customer belongs. The new rules for B2C in the VAT package now bring both types of transactions into line. However, for B2BC the customer will reverse charge themselves VAT, and the transaction from the suppliers' point of view will be outside the scope of VAT. For the B2C transaction, the supplier will still account for the VAT, however it will be due in the member state of the customer. To alleviate the subsequent necessity for suppliers to then register in all member states in which they make supplies, a simplification process has been introduced under which the supplier may register in one member state only. This is called MOSS - Mini one stop shop. The member state of registration will distribute the VAT payments to the respective member states where applicable. The supplier still has the option to register in all member states in which it makes sales if it wishes. This can have advantages such as the ability to reclaim input VAT without making a separate claim.

3. The internal charges will be treated differently for those branches which are separately registered, and the single branch which is part of a VAT group.
Those which are separately registered will be treated as under CJEU ruling in FCE Bank. In this case a UK bank charged costs to its' Italian branch. Initially the branch Reverse charged itself VAT on the costs. Then when it decided that this shouldn't be the case, it applied for a refund. The Italian VAT authorities decided that it was their right to charge VAT on a Fixed Establishment within its' territory. The CJEU ruled that where a branch is not independent of its' company, charges imputed to it from its' own company are not taxable transactions. Therefore they were entitled to the refunds, they should not have been Reverse charging the VAT on the costs.
Therefore those branches which are charged for use of the groups' accountancy software will not have VAT included with these charges. They will be outside the scope of VAT.

The branch which is part of a VAT group is a different story. This situation came to light in the Skandia case, where a US parent was making charges to its' Swedish branch. The Swedish tax authorities wanted the branch to account for VAT. The case went to the CJEU, with the company relying on the FCE Bank case to justify the exclusion of VAT from the charges. The Advocate General stated that the branch should not have been allowed to form a part of the VAT group. The CJEU however, took a different line of reasoning. It ruled that the branch, due to its' being a part of the VAT group, created a special situation where the VAT group was a separate entity for the purposes of VAT. By being part of the VAT group, it no longer came under the FCE bank ruling. The branch therefore needed to account for VAT via the reverse charge mechanism, and charge itself Swedish VAT.
Therefore the charge to the Swedish branch must in light of this ruling also account for VAT via a reverse charge.

4. The advertising services are contracted between Australia and the Channel Islands, both outside the EU for VAT purposes so on initial inspection would be outside the scope of VAT. However, the use & enjoyment provisions in article 59A mean that the advertising services may be chargeable in the EU, according to whether each member state has implemented such a provision.
A similar situation came to light in the case of Paul Newey t/a Ocean Finance. Initially all transactions were taking place in the UK, and the trader was incurring irrecoverable VAT on advertising costs, because he was making exempt supplies. He re-routed the advertising services via Jersey, set up an office in Jersey, and purchased advertising services from a Jersey supplier. The UK tax authorities did not agree that this was permissible and sought to redefine the transactions, on the basis of abuse of rights, to restore the situation to what would have prevailed had the 'abusive transactions not taken place. The CJEU ruled that all of the transactions were commercially realistic and served their correct purposes. There was no abuse in this case. The CJEU did mention however the use and enjoyment provisions in article 59A, and the company needs to be aware that this may be invoked.

5. Under article 135, insurance related transactions are exempt, and therefore this affects input tax reclaims on purchases. Those purchases directly linked to exempt outputs will not be reclaimable, while those falling under general overheads will be reclaimable under the partial exemption ration. Those linked directly to taxable supplies will be reclaimable. Where a third party repairer charges VAT to an insurance company, the VAT may be a cost to the insurance company. By bringing the repair work in-house, the company looks to be seeking to avoid this non-recoverable cost. The charges would be outside the scope of VAT, being between VAT grouped members.
The company needs to consider whether the member state has implemented article 18 for deemed supplies on supplies produced in-house. If so they may be liable for this VAT anyway.

6. If the advertising services were made directly to Britten, this may come under the Skandia ruling as they are part of a VAT group and therefore a separate entity for VAT purposes.

Question 2

1. Architectural services in Portugal, for a Dutch client.

According to article 47 of the PVD, the supply of services relating to immoveable property, specifically mentioning the services of architects, is where the property is located. Therefore the place of supply is Portugal. Making supplies in Portugal may therefore require registration by the UK Company, in that member state, and to account for output VAT there, as well as to reclaim any related input tax. The location of the client is not relevant to the VAT treatment, because article 47 overrides the article 44 basic rule.

2. Design services to an educational establishment to an existing building in Bonn. This may also come under the article 47 treatment, as connected with immoveable property. However, it also needs to be considered whether the supplies are made to a body governed by public law. This would then be treated the same as to a non-taxable person, and UK output tax would apply, which would be likely irreclaimable by the customer if they are making exempt supplies.

3. Bathroom units for hotels, potentially in the Maldives. These will come under article 47 as taxable where the immoveable property is located. If this is outside the EU, and to a business, then it may be outside the scope of EU VAT.

4. A B2C supply to a German individual related to building a new house. This would come under article 45, the basic rule, within the EU, and therefore be subject to UK output VAT, which would not be reclaimable by the customer, as the final consumer needs to bear the burden of the VAT cost.

5. Services to a wholly owned subsidiary in Austria, is within the EU, and so would be subject to article 44, outside the scope of VAT for the UK supplier, and the subsidiary needs to Reverse charge itself VAT at the rate applicable in its' jurisdiction. They can then reclaim this on their VAT return according to their partial exemption ratio based on the percentage of taxable supplies made. The supplier will need to make a recapitulative statement/ EC sales list, to list the details, being the cost, VAT registration and country of the customer. No details of this sale will be required on the normal VAT return.

6. Raising finance for its subsidiary, selling shares, is exempt under article 135. However, there is the possibility of reclaiming some of the input tax incurred in the costs of listing, in wake of the decision in AB SKF, which appeared to offer hope after BLP group had failed in its' quest to reclaim input tax in similar circumstances. The CJEU ruled in AB SKF that there were 2 possibilities of reclaiming input tax on costs of the sale of shares - firstly, if the sales represented a Transfer of Going concern - unlikely in these circumstances. Secondly, if the costs of the sale were not cost components of the shares, ie. not built in to the share price. This is likely to provide an avenue for reclaim as costs tend not to be built in the way they are for manufactured items.
The costs could then be considered as general overheads of the business and reclaimable according to the partial exemption ratio of the business. There is unlikely to be a supply for VAT purposes as the purchasers of the shares are unlikely to be involved in the management of the company, they will be merely non-management holding companies, treated the same as private investors.
Were they to be involved in the management of the subsidiaries, the EU based buyers may be able to recuperate some input tax on the costs of the purchase as general overheads, according to their partial exemption ratio, as in the case of Larentia and Minerva.

In all of these situations, the company needs to consider whether it has created a fixed establishment in the member state, which would potentially change the place of supply. This would only be brought about, should the standard procedure produce an irrational result or if there is a conflict between member states.

The possibility of forming a VAT group, if the option is given by the member state - in this case - the UK does give this option, may have some benefits. These would be mainly administrative. The VAT group provision is not intended to give straight tax advantages, it is intended to relieve the administrative burden, where input tax would normally be reclaimable at the same rate. The cases of FCE bank and Skandia need to be considered, in order to weigh up the potential benefits vs costs. Forming a VAT group would allow only one VAT return to be made for the group, and transactions between group members are outside of the scope of VAT. Part exemption ratios need to be considered also, for each company and the group as a whole. The CJEU considered in EC vs Ireland and others, who may form a VAT group. The EC considered that non-taxable persons could not join a VAT group, on the basis that this opened up the option for a VAT group made up of all non-taxable person. The ECJ rejected the case on the basis that non-taxable persons are not making VATable transactions.

Question 3

1. Missing Trader intra community Fraud (MTIC) has led to multi-billion euro losses to European governments, and continues to grow.
The destination system of VAT is designed to alleviate distortion of competition, and is crucial to the VAT system. However, this can create problems with fraud. Input tax reclaims effectively can create a blank cheque for companies to receive funds from governments. Missing trader fraud can take many forms. For example, a business may charge output tax on a transaction, and then disappear before paying it over to the tax authorities. A trader in one country may sell goods to an unsuspecting customer, who then sells the goods to a customer in another state. The first supplier charges output tax and disappears. The customer in the 2nd state reclaims the input tax on the acquisition, and supplies back to the first supplier. The same goods are supplied around in a circle, and this is referred to as carousel fraud. Traders often use long chains of transactions, some of the traders may be genuine, others will be involved in the fraud.

2. Due to the large volumes of money which are lost every year to MTIC, governments are doing all they can in order to recouperate or avoid losses. In these days of austerity, governments can ill afford to lose such large amounts of funds to their treasuries.
Unfortunately, because it is much easier to find and charge an innocent party, they often end up being the target of tax authorities in their quest to win back some tax revenue. The following cases highlight this activity in the courts in EU member states:

Teleos - the UK trader was selling goods to Spain and France. The customer was responsible for delivery of the goods and provided evidence that they had reached their destination. The documentation proved to be fraudulent, the goods had never left the UK. The UK tax authorities therefore tried to treat these supplies as domestic and the case went before the CJEU. It was ruled that the supplier had acted in good faith. The tax authorities should be chasing the fraudulent trader and not the innocent supplier. Therefore Teleos did not have to account for the output tax on the supplies.

Twoh - Similar to the above case, but the supplier had not proof that the goods had left the state. They wanted the tax authorities to use the applicable mutual assistance resources to communicate with the other member state to substantiate that the goods had arrived. It was ruled that it was the suppliers' responsibility, not the tax authorities, and therefore they were denied their input claim. The supplier therefore bore the loss and not the member state.

Eyedial - it was found that the trader at least 'should have known' that they were involved in a fraudulent supply chain. They attempted to only be involved in the non-fraudulent parts of the chain, but they should not have gotten involved at all. It was ruled because they should have known, that they were denied their input tax reclaim, again bearing the loss rather than the member state.

Optigen/ Bond - CPU's were sold to traders who subsequently went missing. It was ruled that the suppliers acted in good faith, and were able to substantiate their input tax reclaim. The only way that they could be denied was if 1. They knew or should have known about the fraud, or 2. No supplies were made. This time the member state bore the loss unless they could locate and prosecute the fraudulent trader.

Kittel v Belgium. The Belgian law voided transactions which were involved in fraud, and therefore tried to deny the input tax on the basis that there was therefore no supply. The CJEU ruled that the existence of fraud did not mean that no economic activity had taken place. They were entitled to reclaim their input VAT and the Belgian state bore the loss of VAT revenue. So we can see that member

states are limited to the extent to which they can limit VAT losses through the innocent parties involved. There is a reasonable level of responsibility on suppliers to ensure that they are not involved in a dirty chain of supply, but if they have done this and acted in good faith then they are protected by European law against having to pay.
There is alot of case law in this area, and alot of opinion around the idea that member states should be concentrating their efforts on chasing the fraudulent traders rather than the innocent ones.

There are measures in discussion currently on how to combat this tax evasion, such as real time VAT, where the VAT is taken electronically at the time of supply. It is the implementation and the detail of how to introduce ideas like this which produces the difficulty. Extending the MOSS scheme to B2B supplies, where the supplier is responsible for accounting for the VAT, is promising but is a long way off, and still not immune to fraud where the supplier is fraudulent, or collusion between suppliers and customers exists.

Member states do use many measures currently which are designed to prevent these types of fraud, such as verification via the VIES system, and using recapitulation statements to match of supplies with acquisitions, but these are clearly not enough, given the current scale of successfully fraudulent VAT crime in the EU.

Some member states have a system whereby traders can anonymously advise the tax authorities if they suspect fraudulent activity. This may help, but may be largely ineffective, the company has nothing to gain, and may find it easier to just avoid the situation altogether, rather than casting further light on their own transactions and dealings.

Question 4

Dear Sir/Madam,

Thank you for your query regarding the determination of an individual's place of belonging for EU VAT purposes. I trust that the below will be of some use to yourself and the Institute.

Where a non-taxable person belongs for EU VAT purposes, is of paramount importance for establishing the VAT treatment.

For supplies of services, article 45 is the basic rule for B2C services, which states that the place of supply is where the supplier is located. The issue is, however, where the basic rule does not apply.

Recently, for example, the final phase of the VAT package has been introduced, whereby from 1st January 2015, supplies of B2C services relating to Telecommunications, Broadcasting, and electronically supplied services are to be taxed where the customer belongs. Given the rate at which services of this nature have expanded over recent years, this is a very significant change.
There is a responsibility now on the supplier, to establish where the private customer belongs.
This has not been an easy implementation, and given that this treatment is likely to expand to other areas, it is one which needs immediate attention.
There are basic rules which can be used by the supplier, such as place of residence, billing address, IP address or SIM card registration which can be used. There has been some confusion over what is permissible and this will need to be clarified before the expansion of this treatment to other areas of services.

Another area where it is important to establish the location of the customer is long term car hire. Article 56 subsumes the basic rule in article 45, and changes the place of supply to where the customer belongs. As there will be a contract between the supplier and customer, this may be easier to substantiate, than for example the formerly mentioned electronic supplies over the internet.

If an individual belongs outside of the EU, it will still be chargeable under article 45 to EU VAT if the supplier is within the EU. However, under article 59C of the VAT directive, certain transactions are outside of the scope of VAT to a non-EU customer. These for example include services of an advisory nature, which was considered in the case of Maatschaap for vetinary services.

Question 6

The recent case considering 'Special Investment Funds', or SIFs, was that of JP Morgan. The court considered whether these should be treated as exempt in the same way as 'Open-ended Investment Funds'. The principle of 'Fiscal Neutrality' involved whether the customer would view these funds as being identical or similar, and serving the same purpose in their eyes. It was ruled that the two funds did in fact serve the same purpose in the eyes of the customer, and to treat the two transactions different for VAT purposes would be contrary to this principle of Fiscal Neutrality which is central to the VAT directive.
The funds in question involve where large quantities of small 'less rich' investors can group together to make investments. These are generally exempt, as opposed to where a larger, 'richer' person/ company may make similar investments which are VATable.

Other cases which involved this principle, included Rank Group in the UK. Different types of gambling were being treated differently for VAT purposes, and the UK asked for clarification from the CJEU. The CJEU responded that this was contrary to the principle of Fiscal Neutrality, and the transactions which were the same in the eyes of the customer must be treated the same for VAT purposes.

Also in Germany, in the Linneweber case - The tax authorities were treating licensed gambling as exempt under article 135, but unlicensed gambling was being charged to VAT. It was ruled that both unlicensed and licensed gambling must be treated the same under the principle of Fiscal neutrality. Being unlicensed did not stop the transactions being economic activity. There needed to be another remedy in law for the unlicensed transactions, treating different for VAT purposes was impermissible.

In 'Isle of Wight' this principle was also established where the local council was ruled to have to charge VAT on local off street parking where it was in competition, or potentially in competition with commercial enterprises.

So the decision in JP Morgan is in line with the principles already established in earlier cases, and should be of no surprise.