

**Case C-519/22**

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

**Date lodged:**

4 August 2022

**Referring court:**

Fővárosi Törvényszék (Hungary)

**Date of the decision to refer:**

31 May 2022

**Applicant:**

MAX7 Design Kft.

**Defendant:**

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Division of the National Tax and Customs Authority, Hungary)

---

**Subject matter of the main proceedings**

Action for judicial review in a tax matter

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

Value added tax – Obligation to lodge a tax guarantee – Legal consequences of failing to lodge a tax guarantee – Time limit and method for taking measures to remove the reason for the imposition of the requirement to lodge a tax guarantee

Legal basis: Article 267 TFEU

**Questions referred for a preliminary ruling**

1) In the light of Article 273 [of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax] and the principle of proportionality under Article 52(1) [of the Charter of Fundamental Rights of

the European Union], is legislation of a Member State under which a company's tax identification number or VAT identification number may be cancelled for failure to comply with the requirement to lodge a tax guarantee imposed on that company compatible with the freedom to conduct a business enshrined in Article 16 of the Charter, even in the case where the members of the company are not directly aware that the requirement to lodge that guarantee has been imposed on the company or that the reason why the requirement to lodge a tax guarantee was imposed on the company is that one of its executive officers is or was a member or executive of another legal person with an outstanding tax debt?

2) In the light of principle of necessity under Article 273 of Directive [2006/112] and the principle of proportionality under Article 52(1) of the Charter, is legislation of a Member State under which a company's tax identification number or VAT identification number may be cancelled for failure to comply with the requirement to lodge a tax guarantee imposed on that company compatible with the freedom to conduct a business enshrined in Article 16 of the Charter and the right to an effective remedy under Article 47 of the Charter, even in the case where the minimum notice period for properly convening a meeting of that company's decision-making body, in accordance with the general provisions of the legislation of that Member State, does not allow that body to dismiss the executive officer affected by the impediment giving rise to the requirement to lodge that guarantee, and thus to remove that impediment within a timeframe such as to cause the obligation to lodge the guarantee to be extinguished, thereby obviating the need to cancel the tax identification number, before the tax authority's decision imposing the requirement to lodge that guarantee becomes final?

3) Is legislation of a Member State which provides in mandatory terms, and without leaving any discretion to law-enforcement bodies, that:

- a) the removal by the company, as a taxable person, of the impediment giving rise to the imposition of the requirement to lodge a tax guarantee once the decision imposing that requirement has become final has no effect on the obligation to lodge a tax guarantee or, therefore, on the cancellability of the tax identification number, even if that impediment was removed after the decision imposing the requirement to lodge a guarantee became final but within the prescribed time limit for lodging that guarantee; and that,
- b) if the tax guarantee has not been lodged, the company, as a taxable person, cannot remedy the legal consequences of the cancellation of its tax identification number once the prescribed time limit for lodging that guarantee has expired, even if it removed the impediment giving rise to the imposition of the requirement to lodge a guarantee after the decision imposing that requirement became final but within the prescribed time limit for lodging that guarantee,

compatible with the freedom to conduct a business enshrined in Article 16 of the Charter, subject to the necessary limitation thereof provided for in Article 273 of [...] Directive [2006/112], and proportionate in accordance with Article 52(1) of the Charter and with the right to effective judicial protection under Article 47 of the Charter?

### **Provisions of European Union law relied on**

- Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), first paragraph of Article 273
- Charter of Fundamental Rights of the European Union ('the Charter'), Articles 16, 47 and 52(1)
- Judgment of the Court of Justice (Ninth Chamber) of 26 October 2017, *BB construct* (C-534/16, EU:C:2017:820) ('the judgment in *BB construct*')

### **Provisions of national law relied on**

- Az adózás rendjéről szóló 2017. évi CL. törvény (Law CL of 2017 on General Taxation Procedure; 'the Law on General Taxation Procedure'), Articles 19, 24, 26, 28 and 246

According to the provisions of the Law on General Taxation Procedure relied on, the requirement to lodge a tax guarantee after the tax identification number has been issued falls to be imposed if an executive officer of the taxable person has previously held the same position in another taxable person which, in the five years prior to the date on which the application for the issue of a tax identification number was filed, was dissolved, without successor, with a tax debt in excess of HUF 1 million (approximately EUR 2 500). An appeal against the decision imposing the requirement to lodge a tax guarantee may be brought within eight days of that decision having been notified. Any such appeal is not to have the effect of suspending the requirement to lodge the aforementioned guarantee.

The tax guarantee may be lodged by making a lump-sum payment or by filing a receipt for the provision of a bank guarantee. The time limit for lodging the guarantee is thirty days from notification of the decision imposing the requirement to lodge a tax guarantee. In the event of failure to meet that deadline, no application to reset [that time limit] is to be allowed.

A tax guarantee must be lodged even if, once the decision imposing the requirement to lodge such a guarantee has become final, there is a change in the person of the aforementioned executive officer as a result of which the reason for the imposition of that requirement ceases to exist.

If the taxable person fails to lodge the tax guarantee within the prescribed time limit, the tax authority is to order the cancellation of its tax identification number.

In the context of the rules governing the tax registration procedure, the Law on General Taxation Procedure provides that the tax authority must refuse to issue a tax identification number if an executive officer of the taxable person holds the same position in another taxable person which, at the time when the application for the issue of a tax identification number is filed, has a tax debt in excess of HUF five million (approximately EUR 12 500). In that event, the tax authority must give the taxable person notice to make good the impediment to the issue of a tax identification number within forty five days of receipt of that notice. If the taxable person does not comply with that notice, the tax authority must order the cancellation of the tax identification number.

– A Polgári Törvénykönyvről szóló 2013. évi V. törvény (Law V of 2013 on the Civil Code; ‘the Civil Code’), Articles 3:17 and 3:190

According to the provisions of the Civil Code which have been relied on, invitations sent to members of the company to attend the general company meeting must include the agenda for the meeting. At least fifteen days must elapse between the sending of the invitation and the holding of the general meeting.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 By decision of 19 December 2019, the Nemzeti Adó- és Vámhivatal Észak-budapesti Adó- és Vámigazgatósága (Budapest-North Tax and Customs Office, which is part of the National Tax and Customs Administration, Hungary; ‘the first-tier tax authority’) imposed on the company MAX7 Design Kft., the applicant in the main proceedings (‘the applicant’), an obligation to lodge a tax guarantee in the amount of HUF 1 930 979 (approximately EUR 4 900). The reason for the requirement to lodge that guarantee was that, between 14 February and 2 June 2017, one of the applicant’s executive officers had been an executive officer of another company in liquidation which, at the time of its dissolution, had had a tax debt of the same amount as the guarantee required.
- 2 The first-tier tax authority sent the applicant and the executive officer in question the decision imposing the requirement to lodge the aforementioned guarantee. In both cases, it was the executive officer in question who took receipt of that decision. The date of receipt was 21 December 2019. The tax guarantee should have been lodged within thirty days of receipt, that is to say by 20 January 2020 at the latest. Any appeal against that decision should have been brought within eight days of its notification. Neither the applicant nor the executive officer in question having brought such an appeal, the decision became final on 31 December 2019.
- 3 On 7 January 2020, the members of the applicant dismissed the executive officer in question and appointed another in his place. As the reason for imposing the

requirement to lodge a tax guarantee had thereby been removed, the applicant did not lodge that guarantee.

- 4 The first-tier tax authority ordered the cancellation of the applicant's tax identification number and VAT identification number, on the ground that the applicant had not lodged the tax guarantee within the period indicated. The applicant brought an administrative appeal against that decision. The defendant in the main proceedings, the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Division of the National Tax and Customs Authority; 'the defendant'), upheld that decision.
- 5 The applicant brought an action against the second-tier decision before the Fővárosi Törvényszék (Budapest High Court), the referring court. In the course of examining the application, the referring court has submitted a request for a preliminary ruling to the Court of Justice.

#### **The essential arguments of the parties in the main proceedings**

- 6 The applicant submits that Article 273 of Directive 2006/112 and Articles 16, 47 and 52(1) of the Charter preclude the national legislation on which the decisions of the first- and second-tier tax authorities are based. In particular, under that legislation, if a company under an obligation to lodge a tax guarantee does not do so, it cannot be exempted from the legal consequences flowing from that omission even if it removes the reason for the imposition of that requirement after the decision imposing it has become final but within the prescribed time limit for lodging the guarantee.
- 7 According to the applicant, the national legislation applicable in the present case disproportionately limits its freedom to conduct a business.
- 8 First, the members of the applicant were not directly informed that the requirement to lodge a tax guarantee had been imposed: only the executive officer in question was aware of this. Consequently, by the time the members were able to take action to remove the reason for the imposition of that requirement, the decision imposing it had already become final. Neither were the members able, despite exercising the utmost diligence, to ascertain in advance whether, in the case of the applicant's executive officers, there were circumstances present which warranted the imposition of a tax guarantee, because there is no register of such circumstances and the tax authorities cannot be asked for a certificate in this regard.
- 9 What is more, given the time limit available for appealing the decision imposing the requirement to lodge a tax guarantee, the members had only eight days to remove the reason for its imposition. That was not nearly enough time, however, since the decision to dismiss the aforementioned executive officer had to be taken by a general meeting of the applicant, but the Civil Code provides that a notice period of at least fifteen days must be given in order for such a general meeting to

be properly convened. The applicant goes on to say that there would have been no point in its appealing the decision imposing the requirement to lodge a guarantee, since such an appeal does not have the effect of suspending enforcement of that decision.

- 10 The applicant notes that, although, in dismissing the aforementioned executive officer, it removed the reason for the imposition of the requirement to lodge a tax guarantee, it was still under an obligation to lodge that guarantee. As a result of its failure to lodge that guarantee within the prescribed period, it became unable to trade, because its tax identification number had been cancelled, and therefore had to be dissolved. All of which, moreover, amounts to a disproportionately serious legal consequence for the applicant's innocent members, who had no real opportunity to take timely action to remove the reason for the imposition of the requirement to lodge a tax guarantee.
- 11 According to the applicant, the cancellation of its tax identification number also affects its participation in the system of value added tax, since, as a result of that cancellation, it is unable either to account for or to deduct VAT. The applicant relies, in relation to Directive 2006/112, on the judgments of the Court of Justice in Cases C-146/05, C-385/09 and C-534/16, and, in relation to the right to effective judicial protection, the judgments of the European Court of Human Rights in Cases 30696/09 and 17153/11.
- 12 The defendant considers that the sources of EU law and case-law relied on by the applicant are relevant only in the context of the European Union's common system of value added tax and in relation to the principle of VAT neutrality, and cannot therefore be applied in this case, even by analogy. The defendant further notes that the decision of the first-tier tax authority called upon the applicant not to remove the reason for the imposition of the requirement to lodge a tax guarantee, but to lodge that guarantee. Since the applicant chose not to take up the option available to it of appealing that decision, the subject matter of the main proceedings is no longer that decision but the legality of the decision ordering the cancellation of the tax identification number.

#### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 13 According to the referring court, the conditions that must be met in order for there to be a need for interpretation of the provisions of EU law mentioned in the questions referred for a preliminary ruling are present in this case.
- 14 First, the provisions of EU law relied on are relevant to the main proceedings. Second, the Court of Justice has not yet interpreted those provisions. Although the judgment in *BB construct* concerned an examination of Article 273 of Directive 2006/112, that examination was carried out not in relation to Hungarian law but in relation to Slovak law. What is more, that examination did not cover the issue of the type of proceedings in which the requirement to lodge a tax guarantee is imposed and the guarantee is lodged, but only the issue of the amount of that



guarantee. Third, the answer to be given to the questions referred for a preliminary ruling is not so obvious as to leave no room for reasonable doubt.

- 15 The first two questions referred seek to ascertain whether the fact that, under the applicable national legislation, the tax authority may adopt a decision on the requirement to lodge a tax guarantee and the legal consequences thereof such that the members of the company in question have no real opportunity to remove the reason for the imposition of that requirement within the prescribed time limit, constitutes a lawful and proportionate limitation of the freedom to conduct a business. While the first question concerns the company members' awareness [of the imposition of that requirement], the second relates to the real opportunities available to those members to take action.
- 16 As regards the second question referred, the defendant is unquestionably correct in saying that the first-tier tax authority called upon the applicant not to remove the reason for the imposition of the tax guarantee but to lodge that guarantee. Nonetheless, if the taxable person has the opportunity to remove the reason for the imposition of the guarantee, it is important, from the point of view of the freedom to conduct a business, to examine how the national legislation safeguards that opportunity. However, whereas the Law on General Taxation Procedure provides for an opportunity to remove the reason for the imposition of the tax guarantee within a period of eight days, the Civil Code states that at least fifteen days must elapse between the convening of the general meeting and the adoption of decisions by that meeting. According to the referring court, that legislation disproportionately limits the freedom to conduct a business, since, in practice, the company can avoid having its tax identification number cancelled and being dissolved without a successor only by lodging a guarantee.
- 17 The referring court also wishes to ascertain whether that national legislation is compatible with the principle of equal treatment, given that, although the requirement to impose a tax guarantee may be imposed in the event of tax debts in excess of HUF 1 million, the Law on General Taxation Procedure makes it possible, in the context of the tax registration procedure, for the tax authority to refuse to issue a tax identification number if an executive officer of the taxable person is also an executive officer of another company which has a tax debt in excess HUF 5 million. Now, whereas the company has only eight days to remove the reason for the imposition of the requirement to lodge a tax guarantee, an impediment to tax registration can be removed within a period of forty five days, in circumstances much more serious than those described above. In both cases, the failure to adopt measures has as its legal consequence the cancellation of the tax identification number by the tax authority.
- 18 The third question referred concerns two specific features of the national legislation and case-law relating to tax guarantees. First, even if the reason for the imposition of the requirement to lodge a tax guarantee is removed once the decision imposing that requirement has become final, this does not extinguish as such the obligation to lodge that guarantee. Second, if the tax identification

number is cancelled for failure to lodge the aforementioned guarantee, the taxable person cannot make good that consequence either by removing the reason for the imposition of that guarantee or by lodging it afterwards.

- 19 The referring court considers that, in the light of Article 273 of Directive 2006/112, Articles 16 and 52(1) of the Charter and paragraphs 36 to 42 of the judgment in *BB construct*, there is a greater public interest in the removal of the reason for the imposition of the guarantee than in the lodging of that guarantee. Consequently, the national legislation should first and foremost make it possible to remove the reason for the imposition of the guarantee, rather than attempt to ensure through force that the guarantee is lodged in any circumstances, even if the reason for its imposition has already been removed.
- 20 The parties in the main proceedings are also in dispute as to the nature of the time limit for lodging the tax guarantee. National case-law has interpreted that time limit as being preclusive, inasmuch as it rules out the possibility for a taxable person which has had its tax identification number cancelled to make good the failure to lodge that guarantee retrospectively. In the present case, this means that, even though the applicant has removed the reason for the imposition of the guarantee, it will have permanently lost the opportunity to remedy the cancellation of its tax identification number because it failed to lodge the guarantee within the prescribed time limit.
- 21 According to the referring court, this imposes an unjustified and disproportionate limit on the freedom to conduct a business, because the taxable person can avoid having its tax identification number cancelled only if it lodges a tax guarantee, an obligation which restricts the company's freedom to use the resources it has at its disposal. What is more, the legislation in force also infringes the right to effective judicial protection, since the time limit for appealing the decision imposing the requirement to lodge a tax guarantee is only eight days and any appeal does not have suspensory effect. If legal action is taken against the cancellation of a tax identification number, the court has no discretion, which is to say that it cannot take into account the fact that, at the time when the cancellation decision was adopted, the reason for the imposition of the requirement to lodge a tax guarantee no longer existed. Neither can the court, by annulling or amending the cancellation decision, exempt the taxable person from cancellation of the tax identification number and from the loss of legal personality which this triggers. In this particular case, the Commercial Register has already prohibited the applicant from carrying on trading and has ordered that compulsory winding-up proceedings be opened against it. In the main proceedings, the only recourse available to the applicant was through the courts, given that, at the same time as it brought the present action, it also made an application for immediate judicial protection and the referring court granted that application.