

Case C-1/21**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 January 2021

Referring court:

Administrativen sad Veliko Tarnovo (Bulgaria)

Date of the decision to refer:

18 November 2020

Applicant:

MC

Defendant:

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ – Veliko Tarnovo pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

Subject matter of the main proceedings

The subject matter of the proceedings is an action brought by MC, from Veliko Tarnovo, challenging the legality of a tax assessment notice issued by the Teritorialna direktsia na Natsionalna agentsia za prihodite (Regional Directorate of the National Revenue Agency; ‘the NAP’) in Veliko Tarnovo, corrected by way of a notice of correction of a tax assessment notice. In the part contested by the action before the referring court, the corrected tax assessment notice was confirmed by decision of the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ – Veliko Tarnovo (Director of the ‘Appeals and Tax and Social Security Practice’ Directorate of Veliko Tarnovo). The corrected tax assessment notice established that the applicant owed the State a debt in the total amount of 45 008.25 leva (BGN) for the December 2014 tax period, of which 12 837.50 leva (BGN) is accrued interest. That amount is part of the unpaid tax debts of another taxable entity, namely the company ZZ AD, of which the applicant was an executive director during the period for which the aforementioned amount is owed. After opening the main proceedings, the

referring court finds that an interpretation of provisions of EU law is required for the correct resolution of the dispute. It therefore submits a request for a preliminary ruling to the Court of Justice of the European Union under the third paragraph of Article 267 TFEU.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Article 9 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests

Article 273 of Directive 2006/112/EC

Compatibility of Article 19(2) of the Danachno-osiguritelien protsesualen kodeks (Code of Tax and Social Security Procedure; 'the DOPK') with EU law. That provision makes it possible to hold liable for pecuniary loss a manager or member of the management body of an undertaking whose acts carried out in bad faith have led to a reduction in the assets of that undertaking, as a result of which the latter owes outstanding taxes and/or statutory social security contributions. That liability is personal liability, but for the debt of a third party. Thus, the debtor is liable up to the amount of the reduction which he or she caused in the assets of the undertaking that he or she manages. Protective measures and enforcement are directed first against the assets of the debtor for whose tax or social security debt the liability is incurred. The liability of the manager [or member of the management body] who acted in bad faith ceases when the debt in respect of which that liability was established has been extinguished.

The compatibility of that national provision with, in particular, the principle of proportionality.

The compatibility [with EU law] of the liability of the manager [or member of the management body] who acted in bad faith for the interest on the outstanding receivables governed by public law, including in cases where the late payment which led to the charging of interest on the debt is attributable not to the conduct of the manager [or member of the management body] who acted in bad faith but to the conduct of another person or to the manifestation of objective circumstances.

Questions referred for a preliminary ruling

1. Is Article 9 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, read in conjunction with Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added

- tax, to be interpreted as meaning that it does not preclude, in the harmonised field of value added tax, a national legal instrument such as that provided for in Article 19(2) of the DOPK, the application of which has the effect of triggering *post factum* the joint and several liability of a non-taxable natural person who is not liable for payment of VAT but whose conduct in bad faith led to non-payment of VAT by the taxable legal person which is liable for that payment?
2. Do the interpretation of those provisions and the application of the principle of proportionality preclude the national legal instrument provided for in Article 19(2) of the DOPK also in respect of interest on VAT not paid in due time by the taxable person liable for that payment?
 3. Is the national legal instrument provided for in Article 19(2) of the DOPK contrary to the principle of proportionality in a case where the late payment of VAT, which led to interest being charged on the VAT debt, is attributable not to the conduct of the non-taxable natural person, but to the conduct of another person or to the manifestation of objective circumstances?

EU legislation and case-law relied on

Article 9 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests ('the Convention').

Recital 44, Article 9(1) and Articles 206 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive').

The referring court states that it has not been able to identify any case-law of the Court of Justice providing the answer to the questions referred, which is required for the correct resolution of the dispute. In the field of the harmonised system of value added tax, the Court of Justice has repeatedly clarified the application of the principle of proportionality, without, however, ruling on its application in the context of circumstances identical or similar to those in the main proceedings. The referring court considers that the interpretation of Article 205 of the directive in the case-law of the Court of Justice is not relevant, since, on the one hand, the joint and several liability provided for by the national legal mechanism lies outside the scope of that provision and, on the other hand, the joint and several liability provided for therein relates to a person who has the status of taxable person within the meaning of the directive.

Provisions of national law relied on

Danachno-osiguriteln protsesualen kodeks (Code of Tax and Social Security Procedure, 'the DOPK'):

Article 14. Debtors are natural and legal persons who:

1. are obliged to pay taxes or statutory social security contributions;

Article 19(2). A manager or member of a management body who, in bad faith, makes payments in kind or in cash from the assets of a legal entity which is a debtor pursuant to Article 14(1) and (2) constituting a hidden distribution of profits or dividends, or transfers assets of the debtor free of charge or at prices significantly lower than market prices, with the result that the assets of the debtor are reduced and therefore taxes or statutory social security contributions have not been paid, shall be liable for the debt up to the amount of the payments made or, respectively, of the reduction in the assets.

Article 20. In the cases provided for in Article 19, protective measures and enforcement shall be directed first against the assets of the debtor for whose tax or social security debt the liability is incurred.

Article 21(3). The liability of third parties shall cease when the debt for which that liability was established by a final act is extinguished. In this case, amounts paid shall be reimbursed in accordance with the procedure set out in Chapter 16, Section 1.

Zakon za danak varhu dobavenata stoynost (Law on value added tax)

Article 3(1). ‘Taxable person’ shall mean any person who, independently, carries out an economic activity, whatever the purpose or results of that activity.

Article 89(1). Where there is a result for the period, in the form of tax to be paid, the registered person shall be obliged to pay the tax to the State budget by paying it into the account of the competent Teritorialna direktsia na Natsionalnata agentsia za prihodite (Regional Directorate of the National Revenue Agency) within the time limit for filing the VAT return for that tax period.

Zakon za lihvite varhu danatsi, taksi i drugi podobni darzhavni vzemania (Law on interest charged on taxes, fees and other similar receivables governed by public law)

Article 1(1). Taxes, fees, profit deductions, contributions to the budget and other similar receivables governed by public law that have not been paid within the time limits for voluntary payment, have not been withheld or have been withheld but have not been paid on time shall be collected together with statutory interest.

The referring court observes that the case-law from the cassation instance on the existence of an obligation to pay interest under Article 19(2) of the DOPK is contradictory. There are judgments finding that the interest must be included in the scope of the liability of a manager who acted in bad. However, there are also judgments finding that only the principal amount of the receivable is covered by the liability under Article 19(2).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant was the executive director of the company ZZ AD, in respect of which a tax assessment notice was issued for an amount of 3 799 590.92 leva (BGN). That amount also includes interest on the unpaid VAT in the amount of 691 911.94 leva (BGN). There is no doubt that the company is the taxable person under both national tax law and EU law and must pay the VAT and the interest thereon if it has funds available when the debt becomes due.
- 2 With regard to the recovery of the amounts owed, enforcement proceedings for the recovery of receivables governed by public law were initiated. Requests for voluntary payment were sent to the debtor on several occasions, but such payment was never made.
- 3 It was established that the company also has other debts, which are secured by pledges on movable property, attachment of immovable property and two special pledges on the whole company as a set of rights and obligations. The company's accounts were also attached, but the amounts received are not enough to cover the debts. Therefore, the company's debt to the State, which includes the abovementioned interest on VAT not paid in due time, was classified as difficult to enforce by the enforcement officer.
- 4 In view of the applicant's possible personal liability for those third-party debts, that revenue authority referred the matter to the competent Regional Directorate of the NRA. The claims against the applicant are based on the fact that he increased his remuneration several times (from 3 000 to 20 000 leva [BGN]) without being able to produce valid documentary evidence for that increase. The manner in which the increased remuneration was paid does not comply with statutory requirements and established practice. The amounts were transferred to the lawyer acting on behalf of the company, who in turn transferred them to the applicant's wife's account, to which the applicant also has access. In order to determine the amount owed by the applicant, the court has appointed an accountant to provide an expert opinion.

Principal arguments of the parties to the main proceedings

- 5 The applicant disputes the claim and submits that the existence of all the conditions for engaging his liability under Article 19(2) of the DOPK has not been properly established. His main argument is that there is no causal link between the remuneration received by him in his capacity as the executive body of the taxable person and the lack of funds to settle the claims governed by public law, including the interest of VAT for December 2014.
- 6 The defendant argues, in essence, that, as the executive body of the taxable person (a person that is also liable for payment of VAT), the applicant has acted in bad faith because he received, during the relevant tax period, remuneration the amount of which has not been shown to have been duly determined. It submits that the

amounts were transferred to an account of the lawyer with whom the company had concluded a contract for legal advice, and the lawyer had transferred them to the applicant's wife's account, to which the applicant also has access. According to the defendant, the applicant's actions to be regarded as a manifestation of conduct in bad faith are his instructions to the taxable person's chief accountant. The latter carried out the accounting transactions for paying the increased remuneration to the applicant, for which there was no basis.

Brief summary of the grounds for the request

- 7 The referring court takes the view that, in order to resolve the dispute correctly, it is necessary for the Court of Justice to provide it with an answer regarding the subjective and objective limits of liability for the effective payment of VAT which are permissible pursuant to the relevant provisions of EU law and the principle of proportionality in cases where the financial interests of the Union have been harmed, in particular where that harm consists in the fact that interest on VAT not paid in due time by a taxable person could not be collected because of the conduct of a non-taxable natural person.
- 8 For the purposes of the reference and in view of the need to obtain interpretative guidance, the referring court provisionally assumes that the applicant's conduct gives rise to the applicability of the legal instrument provided for by national law, namely Article 19(2) of the DOPK. For the purposes of the reference, it further assumes that the applicant in the case ordered – or at least had knowledge of – the transfer by a third party of a sum from the company's assets to a natural person associated with him and, in so doing, he acted in bad faith under national law. Due to the reduction in the company's assets by the amount of that sum, the interest due on VAT, accrued as of December 2014, was not paid.
- 9 However, the question that arises for the referring court is whether EU law allows a third non-taxable natural person to be held liable for unpaid VAT and/or unpaid interest on that tax on the basis of the legal instrument created by the national provision of Article 19(2) of the DOPK.
- 10 In the first place, the referring court considers it appropriate to point out that – even if this does not expressly follow from the national case-law – liability for unpaid tax under Article 19(2) of the DOPK is joint and several in nature, since, although it arises after the taxable person's liability has arisen, it continues to exist until the tax debt has been extinguished. Its compulsory enforcement is subsidiary, as follows from Article 20 of the DOPK. Nevertheless, the incurrance of liability under Article 19(2) of the DOPK does not exempt the original debtor, which, under the national legal instrument, is a taxable legal person. On the contrary, based on arguments arising from the national provision of Article 21(3) of the DOPK, the extinction of the tax debt also leads to the cessation of the liability of the jointly and severally liable debtor.

- 11 On the other hand, that liability is in no way connected with or attributable to fraudulent or abusive acts by the taxable legal person itself in the context of its independent economic activity.
- 12 The national legal instrument is in fact directed against the conduct in bad faith of a natural person who does not have the status of taxable person under either national law or the VAT Directive. His or her legal relationship with the taxable person consists in the fact that the natural person constitutes a management body or part of a management body of the taxable person and performs operational and managerial functions.
- 13 Indeed, Article 9 of the Convention empowers Member States, in order to protect the financial interests of the European Union, to adopt internal legal provisions which go beyond the minimum obligations and standards deriving from the provisions of the Convention.
- 14 On the one hand, when Member States adopt, in the field of the protection of the European Union's financial interests, national legal instruments creating obligations and liabilities for legal entities, those instruments must comply with the principle of proportionality.
- 15 On the other hand, the referring court states that, when creating legal instruments to protect the European Union's financial interests in the field of value added tax, the national legislature must take into account, in addition to that principle of EU law, the harmonised legal subject matter in the field of value added tax.
- 16 It could be argued that a natural person who is not a taxable person within the meaning of the directive cannot be held jointly and severally liable for VAT not paid by a taxable person, as Member States do not have the power to adopt such national legal instruments. However, the contrary view can also be argued, namely that the conduct in bad faith of a natural person who is not a taxable person but is associated with a taxable legal person empowers Member States to hold the first-mentioned person jointly and severally liable for the payment of VAT not paid by the second-mentioned person.
- 17 However, the referring court takes the view that, even if it were assumed that Member States are entitled to engage the liability of a natural person who is not liable for VAT, this does not lead to the categorical and unequivocal conclusion that that person is also liable for the interest on the VAT not paid in due time. At first glance, it follows from Article 273 of the VAT Directive, read in conjunction with recital 44 thereof, that the measures and the legal instruments which the Member States may introduce to protect their financial interests and, accordingly, the financial interests of the European Union in the field of VAT are confined to the possibility of holding a person who has acted in bad faith liable only for the unpaid VAT itself, but not also for the interest accrued on account of the late payment thereof. That conclusion would be in line with a purely grammatical and strict interpretation of the wording of Article 273 of the VAT Directive, read in

conjunction with recital 44 thereof. It could also be argued that the bad faith of the non-taxable third party constitutes a sufficient reason for him to be liable also (or only) for the interest related to the VAT not paid in due time. In both cases, it is necessary for the referring court to assess whether, in such circumstances, the principle of proportionality and its impact should be taken into account.

- 18 Finally, it is necessary for the referring court to assess whether the application of the national legal instrument triggering the joint and several liability of a non-taxable third party for interest on VAT not paid in due time would infringe the principle of proportionality under EU law where the failure to settle the VAT debt in due time and, therefore, the reason for the charging of interest on that debt is attributable not to the conduct in bad faith of the third-party non-taxable natural person, but to the conduct of another person or the manifestation of objective circumstances.
- 19 Consequently, it would be useful for the referring court if it could obtain an answer – together with interpretative guidance – to the question of whether the legal instrument provided for in the national provision of Article 19(2) of the DOPK is permissible in the harmonised field of value added tax where the application of that instrument entails the engagement *post factum* of the joint and several liability of a natural person who is not a taxable person within the meaning of the VAT Directive and is not the original person liable to pay VAT, but who is connected to that taxable person, and the late payment or non-payment of VAT results from his conduct in bad faith.
- 20 Furthermore, it would be useful for the referring court if it could obtain an answer – together with interpretative guidance – to the question of whether, based on an interpretation of Article 9 of the Convention and Article 273 of the VAT Directive, taking into account the principle of proportionality, the legal instrument provided for by the national provision of Article 19(2) of the DOPK is applicable and permissible as regards interest on VAT not paid in due time.
- 21 Finally, it would be useful for the referring court if it could obtain an answer – together with interpretative guidance – to the question of whether the national provision of Article 19(2) of the DOPK, when applied only in respect of interest on VAT, is contrary to the principle of proportionality under EU law where the late payment of VAT, which led to the charging of the interest in question, is attributable not to the conduct of the non-taxable natural person, but to the conduct of another person or the manifestation of objective circumstances.