Case C-723/23 [Amilla] [i]

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:

28 November 2023

Referring court:

Juzgado de lo Mercantil n.º 3 de Gijón (Spain)

Date of the decision to refer:

13 October 2023

Applicant:

Agencia Estatal de la Administración Tributaria

Defendants:

VT

UP

Subject matter of the main proceedings

Insolvency proceedings – Application by the insolvent debtor (a defendant in this case) to be granted a discharge of an unsatisfied liability – Objection of one of the creditors (the applicant in this case) to such a discharge being granted – Basis of the objection: declaration of the debtor as a person affected by the determination of culpability in respect of the insolvency of a third party

Subject matter and legal basis of the request

Request for a preliminary ruling on validity/interpretation – Article 267 TFEU – Compatibility of national provisions with Directive (EU) 2019/1023 – Recital 79 and Articles 20 and 23 of Directive 2019/1023 – Concept and scope of dishonest

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

action or bad faith on the part of the debtor – Principle of full discharge of debt – Second-chance procedure: subjective exceptions versus objective exceptions

Question referred for a preliminary ruling

(1) Must Article 23(1) of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 of the European Parliament and of the Council relating to certain aspects of company law (Directive on restructuring and insolvency) be interpreted as precluding a national provision such as Article 487(1)(4) of the Recast Text of the Insolvency Law, following the wording given to it by Law 16/2022 of 5 September, where it includes, in the concept of dishonest action or bad faith on the part of the debtor actions relating to creditors of third parties, other than those which make up the list of creditors for his or her own personal insolvency?

(2) Is Article 487(1)(4) of the Recast Text of the Insolvency Law, following the wording given to it by Law 16/2022 of 5 September, consistent with Article 20 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 of the European Parliament and of the Council relating to certain aspects of company law (Directive on restructuring and insolvency), given that it provides for an exception within the second-chance procedure which prevents it culminating in a full discharge of debts?

(3) Is Article 487(1)(4) of the Recast Text of the Insolvency Law, following the wording given to it by Law 16/2022 of 5 September, consistent with Article 20(2) and recital 79 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 of the European Parliament and of the Council relating to certain aspects of company law (Directive on restructuring and insolvency), given that the national provision does not provide for the debtor's individual situation, setting out an exception which is objective in nature, without any possibility of the Spanish courts being able to assess the subjective circumstances of a debtor accessing the second-chance procedure?

Provisions of European Union law relied on

Recital 79 and Articles 20 and 23 of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring

frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

Provisions of national law relied on

Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal, en su versión modificada por la Ley 16/2022, de 5 de septiembre, de reforma del texto refundido de la Ley Concursal, para la transposición de la Directiva (UE) 2019/1023, de 20 de junio de 2019 (Royal Legislative Decree 1/2020 of 5 May, approving the recast text of the Insolvency Law, as amended by Law 16/2022 of 5 September, reforming the recast text of the Insolvency Law for the purposes of the transposition of Directive (EU) 2019/1023 of 20 June 2019; 'the TRLC')

In particular:

Article 486 of the TRLC

Article 487(1)(4) of the TRLC

Succinct presentation of the facts and procedure in the main proceedings

1 In the present proceedings, the Agencia Estatal de la Administración Tributaria (National Tax Administration Agency, Spain: 'the AEAT'), in its capacity as creditor, objects, by means of an ancillary claim brought in the insolvency proceedings concerning the debtor VT, to the application for a discharge of the unsatisfied liability made by that debtor, who is a natural person. The AEAT bases its objection on the fact that the situation provided for in Article 487(1)(4) of the TRLC, following the wording given to it by Law 16/2022 of 5 September, applies to VT. According to Article 487(1)(4) of the TRLC, a debtor who is a natural person will not be able to obtain a discharge of the unsatisfied liability where, in the ten years prior to the application for a discharge, he or she has been declared a person affected by the decision determining the culpability or otherwise of the insolvency of a third party and where that insolvency was in turn determined to be culpable. However, where the debtor, on the date of submitting the application for a discharge, has fulfilled in full his or her responsibilities [in relation to the earlier insolvency], he or she may have recourse to a discharge of the unsatisfied liability.

2 The facts necessary for consideration of the legal dispute in this case may be summarised as follows:

3 With regard to insolvency proceedings numbers [1] and [2], relating, respectively, to the commercial companies BLANCO Y NARANJA, S. L., and MALVA Y NARANJA, S. L., in judgments of the Juzgado de lo Mercantil número 3 de

Oviedo (Oviedo Commercial Court No 3, Spain), sitting in Gijón – given on 23 November 2020 and 20 April 2021, respectively – the insolvencies of both companies were determined to be CULPABLE.

4 VT and his wife UP were directors of those two companies with authority to represent the companies acting alone. For that reason, in both judgments, as well as determining the insolvencies of those companies to be CULPABLE, VT and UP were identified as **persons affected by the determination of culpability** in respect of those insolvencies. And, as a consequence of the foregoing, both judgments imposed a number of punitive measures on VT and UP: (i) disqualification from administering third-party assets and from representing or administering any [legal] person, for a variable period of time; (ii) loss of any entitlement they had as insolvency creditors or to the insolvency estate; (iii) an order, with joint and several liability on the part of VT and UP, to make up the asset shortfall – EUR 280 468.64 in the case of the company BLANCO Y NARANJA, S. L., and EUR 62 035.91 in the case of the company MALVA Y NARANJA, S. L.; and (iv) payment of the procedural costs occasioned.

5 Both judgments at first instance were the subject of appeals to the Audiencia Provincial de Asturias (Provincial Court, Asturias, Spain). Those appeals were decided by means of judgments given by Section One of the Provincial Court, on 8 March 2022 and 1 March 2022, respectively. In both judgments, (i) the determination of CULPABILITY in respect of the insolvencies of both companies is upheld; (ii) VT and UP continue to be identified as persons affected by the determination of culpability in respect of those insolvencies; and (iii) the disqualification of VT and UP is upheld, as well as its duration, the loss of entitlements and the orders, with joint and several liability, requiring those affected individuals to make up the asset shortfall (the first of the two judgments reduces the amount of the shortfall to be made up from EUR 280 468.64 to EUR 169 085.24; the second judgment, however, leaves the amount to be paid unchanged). In both judgments, the appellants are ordered to pay the costs occasioned at that second instance.

6 For his part, VT, having difficulty in paying his debts and in his capacity as an entrepreneur, attempted to reach an out-of-court payment agreement with his own creditors, to that end submitting the relevant application to the Gijón Chamber of Commerce.

7 That out-of-court payment agreement could not be reached and, in view of that fact, VT's insolvency mediator submitted an application to Oviedo Commercial Court No 3, sitting in Gijón, for VT to be declared insolvent.

8 On 21 January 2020, by means of an order of that court, the consequent personal insolvency of VT was declared.

9 By an order of the same court of 8 February 2021, VT's insolvency was determined to be **INADVERTENT**.

10 VT applied for a discharge of the unsatisfied liability by means of a document registered at that court on 2 February 2023.

11 The representative of the AEAT expressly objected to that application for a discharge – pursuant to Article 487(1)(4) of the TRLC and on the grounds set out in that provision. The insolvency administrators, however, expressed their approval of the insolvent's application. As a result of the AEAT's objection, the relevant ancillary insolvency proceedings were initiated.

The essential arguments of the parties in the main proceedings

12 The **AEAT** maintains that the insolvent debtor (VT) is affected by the exception provided for in Article 487(1)(4) of the TRLC, following the reform introduced by Law 16/2022 of 5 September, for the purposes of the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, having been declared a person affected by a decision determining the insolvency of a third party to be culpable, without that debtor having fulfilled in full his responsibilities.

13 For his part, the **insolvent debtor, VT**, maintains that he is a good-faith debtor with regard to 'his own creditors', having been declared a person affected by the determination relating to the insolvency of the legal persons of which he was a director with authority to represent the companies acting alone, on account of his status as a surety for those companies. He further maintains that the bad faith of a director in respect of the creditors of a third party does not limit the debtor's access to the benefit of a discharge of his or her liability in respect of his or her own creditors. He also asserts that the national legislation has established a bar to discharge based on a situation of objective liability which is not subject to moderation, contrary to the system set out in Directive 2019/1023 of a bar based on subjective liability, that is, a system which takes into account the subjective circumstances of the debtor, making it possible to determine whether a debtor was dishonest. That is not possible with the current national provision in the form in which it has been transposed. The insolvent debtor also asserts that the current Spanish provision is more restrictive that the previous version contained in the TRLC. The previous version of Article 487 did not contain the limitation now provided for in paragraph 1, point 4. Consequently, the new provision has become a punitive provision, which, in his opinion, makes it inapplicable to debtors who applied for a declaration of insolvency prior to its entry into force, since, he maintains, it is contrary to the Spanish Constitution to apply, retroactively, a punitive provision to factual situations which existed prior to its entry into force.

14 The **insolvency administrators**, for their part, maintain that there is no basis for believing that the debtor has acted dishonestly or in bad faith, according to the national legislation, with regard to the creditors at the time of going into debt, during the insolvency proceedings or during payment of the debt. All of the debt capable of being discharged is debt originating from the two companies of which

the debtor and his wife, UP, were shareholders, directors with authority to represent the companies acting alone and sureties, and, therefore, they could hardly have been dishonest at the time of incurring the debt, nor during the insolvency proceedings and payment of the debt. Because VT applied for his own [personal] insolvency, they have already been deprived of all of their assets, which had to be liquidated in order to pay loans, and, therefore, the subjective circumstances for accessing a discharge apply to the debtor. Moreover, the insolvency administrators maintain that paragraph 3, point 6, of the First Transitional Provision of Law 16/2022, which establishes the application of that law to applications for a discharge of debt submitted after its entry into force (which took place on 26 September 2022), is unconstitutional, since it violates Article 9(3) of the Spanish Constitution, containing the principle of non-retroactivity with regard to punitive provisions that are unfavourable to, or restrictive of, individual rights and the principle of legal certainty.

15 With regard to the appropriateness of requesting a preliminary ruling from the Court of Justice on account of the possible incompatibility of Article 487(1)(4) of the TRLC with Directive (EU) 2019/1023 (a matter on which the referring court questioned the parties), the **AEAT** is opposed, maintaining, in essence that there is no violation of Directive 2019/1023, as the list included in Article 23(4) of that directive is not exhaustive and because that directive is not applicable to natural persons who are not entrepreneurs. The **insolvent debtor** maintains that the national legislation does violate Article 20, Article 23(1) and recital 79 of that directive. For their part, the **insolvency administrators** have expressed their agreement with the preliminary ruling being requested, given that the provision at issue – Article 487(1)(4) of the TRLC, following the reform introduced by Law 16/2022 of 5 September – is in direct conflict with the content of Article 23 of Directive 2019/1023.

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

16 Article 23 of Directive 2019/1023 allows Member States to maintain or introduce provisions denying or restricting access to the discharge of debt where the entrepreneur acted dishonestly or in bad faith towards ‘creditors’. In the present case, the exceptions provided for in the national legislation, among them that stated in Article 487(1)(4) of the TRLC, set out the situations in which the national legislature considers the debtor to have acted dishonestly or in bad faith, raising the question of the validity of that provision in accordance with the EU directive, especially where the personal insolvency of the debtor has been determined to be INADVERTENT, since the EU provision appears to refer to the debtor’s dishonest character or bad faith in relation to his or her creditors, not the creditors of a third party, even if the debtor has had to be accountable to those creditors, on account of his or her status as company director with authority to represent the company acting alone and as surety for the company.

17 Consequently, the referring court is uncertain whether the term ‘creditors’ appearing in Article 23(1) of Directive 2019/1023 refers exclusively to the creditors of the debtor involved in proceedings for a discharge of an unsatisfied liability or whether the creditors of a third party are also included in the EU legislation’s concept of ‘creditors’ for the purposes of a discharge of the liability of the debtor as a natural person.

18 In the case under examination, the determination of culpability in respect of the insolvencies of two third parties, the companies BLANCO Y NARANJA, S. L., and MALVA Y NARANJA, S. L. (of which the insolvent, along with his wife, UP, was a director with authority to represent the company acting alone), raises the question of whether the creditors referred to in Article 23(1) of Directive 2019/1023 are, exclusively, the creditors of the debtor in his personal insolvency or whether the creditors of a third party must also be included in that concept.

19 Accordingly, the first question which should be put to the Court of Justice is whether it is possible to extend to the creditors of a third party the limitation on, or exception to, access to a discharge of a debtor’s unsatisfied liability in respect of his or her own creditors and whether that is compatible with the generic concept of ‘creditors’ referred to in Article 23(1) of Directive 2019/1023. To put it another way: does the scope of the concept of ‘acted dishonestly or in bad faith’ appearing in Article 23 of that directive include the debtor’s actions in respect of creditors other than those which make up the list of creditors for his own personal insolvency?

20 This question is, therefore, referred for a preliminary ruling so that the Court of Justice of the European Union can provide a reasoned response, interpreting the abovementioned provision of Directive 2019/1023, analysing whether the national legislation, represented by Article 487(1)(4) of the TRLC, is in accordance with the interpretation given by the Court of Justice to the concept of creditors in Article 23(1) of that directive and, consequently, whether that national provision is in accordance with or contrary to the Insolvency Directive.

21 Furthermore, full access to a procedure which could culminate in a full discharge of the debts is not possible in the case under consideration, as the application of the exception contained in Article 487(1)(4) of the TRLC prevents a debtor who is a natural person from accessing the procedure for a full discharge enshrined in Article 20 of Directive 2019/1023, as it requires him or her to be accountable to the creditors of a third party, thereby limiting or preventing the possibility of obtaining a full discharge of his or her liability in relation to his or her own creditors.

22 Is Article 487(1)(4) of the TRLC therefore compatible with Article 20 of Directive 2019/1023? Is the exception provided for in the national legislation consistent with the provisions of EU law with regard to a procedure which could culminate in a full discharge of debts?

23 Moreover, the rules for accessing a full discharge set out in the EU provision require such access to be based on the subjective circumstances of the debtor, that is, on his or her individual situation, with Article 20(2) of Directive 2019/1023 stating in that regard, by way of judicial or administrative criteria for the subjective assessment of the debtor's circumstances, that the repayment obligation should be proportionate to the seizable or disposable income and assets during the discharge period. In the case under consideration, the national provision does not take into account the debtor's individual situation, but rather the exception provided for in Article 487(1)(4) of the TRLC is objective, without any possibility of the Spanish courts being able to assess the subjective circumstances of a debtor accessing the second-chance procedure, as provided for in recital 79 of that directive.

24 So, according to the EU legislation, could the debtor be regarded as having acted dishonestly or in bad faith on account of being a person affected by the determination of culpability in respect of the insolvency of a third party, where the national legislation does not include any criteria to allow the courts to assess those actions of the debtor subjectively and where the debtor's personal insolvency has been determined to be inadvertent?

25 Bearing in mind that the courts and tribunals of the Member States may refer a question to the Court of Justice on the interpretation or validity of EU law where they consider that a decision of the Court on the question is necessary to enable them to give judgment, pursuant to the second paragraph of Article 267 TFEU, and also bearing in mind that a request for a preliminary ruling may prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts, the referring court submits this request for a preliminary ruling to the Court of Justice, in order to be able to resolve the dispute arising in the present case.