Case C-709/22

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:

17 November 2022

Referring court:

Wojewódzki Sąd Administracyjny we Wrocławiu (Poland)

Date of the decision to refer:

22 September 2022

Applicant:

Syndyk Masy Upadłości A

Defendant:

Dyrektor Izby Administracji Skarbowej we Wrocławiu (Director of the Tax Administration Chamber, Wrocław)

Subject matter of the main proceedings

Refusal by a tax authority to grant consent for the transfer, by an insolvency administrator, of funds held in the VAT account of a taxable person (split payment mechanism)

Subject matter and legal basis of the request

Compatibility with EU law of national legislation and practice concerning the transfer of funds held in the VAT account of a taxable person (split payment mechanism) in the context of insolvency law; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must the provisions of Council Implementing Decision (EU) 2019/310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system

of value added tax (OJ 2019 L 51, p. 19 et seq.; 'Council [Implementing] Decision 2019/310') [and] the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ['the VAT Directive']), in particular Articles 395 and 273 thereof, as well as the principle of proportionality and the principle of neutrality, be interpreted as precluding national legislation and practice which, in the circumstances of the case at hand, preclude the grant of consent for the transfer, by an insolvency administrator, of funds held in the VAT account of a taxable person (split payment mechanism) to a bank account which has been designated by that taxable person?

2. Must Article 17(1) of the Charter of Fundamental Rights of the European Union ([OJ 2007 C 303, p. 1 et seq].; 'the Charter') – [concerning the] right to property – in conjunction with Article 51(1) and Article 52(1) thereof, be interpreted as precluding national legislation and practice which, in the circumstances of the case at hand, by precluding the grant of consent for the transfer, by an insolvency administrator, of funds held in the VAT account of a taxable person (split payment mechanism), consequently result in the funds owned by the insolvent taxable person in that VAT account being frozen, and thus make it impossible for the insolvency administrator to carry out his or her duties in the course of the insolvency proceedings?

3. Having regard to the context and objectives of Council [Implementing] Decision 2019/310, as well as the provisions of [the VAT Directive], must the principle of the rule of law stemming from Article 2 of the Treaty on European Union ([OJ 2012 C 326, p. 13]; 'TEU') and the principle of legal certainty which implements it, the principle of sincere cooperation stemming from Article 4(3) TEU, and the principle of good administration stemming from Article 41(1) of the Charter, be interpreted as precluding national practice which, by precluding the grant of consent for the transfer, by an insolvency administrator, of funds held in the VAT account of a taxable person (split payment mechanism), seeks to frustrate the objectives of the insolvency proceedings defined by an insolvency court as falling within Polish jurisdiction for the purposes of Article 3(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (OJ 2015 L 141, p. 19), and consequently leads to a situation as a result of which, through the application of an inappropriate national measure, the State Treasury is treated preferentially as a creditor at the expense of the general body of creditors?

Provisions of European Union law relied on

TEU: Article 2, Article 4(3) and Article 6(1)

Charter of Fundamental Rights of the European Union ('the Charter'): Article 6(3), Article 17(1), Article 41(1), Article 51(1) and Article 52(1)

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'): recital 4; Article 273 and Article 395(1)

Council Implementing Decision (EU) 2019/310 of 18 February 2019 authorising Poland to introduce a special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax ('[Implementing] Decision 2019/310'): recitals 4, 7, 11 and 12; Articles 1 and 3

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast): recitals 3, 4 and 5; Article 3(1)

Provisions of national law relied on

Ustawa o podatku od towarów i usług (Law on the tax on goods and services) of 11 March 2004 (Dz. U. of 2021, item 685, as amended; 'the Law on VAT')

Article 106e(1)(18a): In the case of invoices in which the total amount due exceeds 15 000 zlotys (PLN) or its equivalent expressed in foreign currency, covering a supply, to a taxable person, of goods or services referred to in Annex 15 to this Law, the invoice shall include the expression 'split payment mechanism' […];

- Article 108a(1): Taxable persons who have received an invoice showing the amount of tax may apply the split payment mechanism when paying the amount due arising from that invoice;

- Article 108a(1a): When making payments for purchased goods or services listed in Annex 15 to this Law, specified in an invoice in which the total amount due exceeds PLN 15 000 or its equivalent expressed in foreign currency, taxable persons are required to apply the split payment mechanism. […];

- Article 108a(2): Application of the split payment mechanism shall involve the following: (1) payment of the amount corresponding to all or part of the amount of tax arising from the invoice received shall be made to a VAT account; (2) payment of all or part of the amount corresponding to the net sales value arising from the invoice received shall be made to a bank account or to an account with a cooperative savings and credit union for which a VAT account is maintained, or shall be settled in another manner;

- Article 108b(1): At the taxable person's request, the director of the tax office shall grant, by means of a decision, consent for the transfer of the funds held in the VAT account designated by the taxable person to a bank account designated by that taxable person or to an account with a cooperative savings and credit union for which that VAT account is maintained;

- Article 108b(2): In the request, the taxable person shall specify the amount of the funds held in the VAT account which is to be transferred;

- Article 108b(3): The director of the tax office shall issue a decision within 60 days of receiving the request. In the decision, the director of the tax office shall specify the amount of the funds to be transferred;

- Article 108b(5)(1): The director of the tax office shall refuse, by means of a decision, to grant consent for the transfer of the funds held in a VAT account where the taxable person has arrears by way of taxes and duties referred to in Article 62b(2)(2)(a) of the [ustawa – Prawo bankowe (Law on Banking) of 29 August 1997] in the amount corresponding to such arrears, plus default interest, […];

- Article 108e: Taxable persons who supply goods or services referred to in Annex 15 to this Law, as well as taxable persons who purchase those goods or services, are required to have a clearing account as referred to in Article 49(1)(1) of [the Law on Banking], or a personal account with a cooperative savings and credit union opened in connection with the economic activity carried out, maintained in Polish currency;

Ustawa – Prawo bankowe (Law on Banking) of 29 August 1997 (Dz. U. of 2020, item 1896, as amended; 'the Law on Banking')

- Article 62a(1): The bank shall maintain a VAT account for the clearing account.

- Article 62b(2)(2)(a): The VAT account may be debited only for the purposes of payment into the account of the tax office of: (-) the tax on goods and services […]; (-) corporation tax […]; (-) personal income tax […]; (-) excise duty […]; (-) customs duties […];

- Article 62d(1)(1): Funds held in the VAT account shall be free from seizure on the basis of a judicial or administrative enforcement order relating to the enforcement or securing of claims other than those referred to in Article 62b(2)(2);

Ustawa – Prawo upadłościowe (Law on Insolvency) of 28 February 2003 (Dz. U. of 2020, item 1228, as amended; 'the Law on Insolvency')

- Article 342(1)(2): Claims to be satisfied from the funds of the insolvency estate shall be divided into the following categories – Category Two – other claims, where they are not to be satisfied in other categories, in particular taxes and other public levies, as well as other claims by way of social security contributions;

- Article 343(1): The insolvency estate shall be used in the first instance to meet the costs of the proceedings as well as, if the funds of the insolvency estate so allow, other liabilities of the insolvency estate, […];

Succinct presentation of the facts and procedure in the main proceedings, as well as the essential arguments of the parties in those proceedings

1 The insolvency administrator asked the tax authority of first instance to transfer the funds held in the VAT account of the insolvent taxable person to the account of the insolvency estate. She stated that the funds were to be transferred to the account of a municipality in order to pay property tax.

2 The [insolvency] administrator stated that the company [in insolvency] has no outstanding liabilities to the State Treasury since the date of the declaration of insolvency. The funds in the VAT account were held during the insolvency proceedings. It is common ground that the claims declared by another tax authority relate to the situation prior to the declaration of insolvency and were included in the schedule of claims. All amounts due to public authorities have been paid, in accordance with the rules, within the second category, alongside other non-public-law claims. Public authorities are therefore treated in the same way as other creditors of the insolvent taxable person. With regard to the satisfaction of the insolvent person's creditors, the provisions of the Law on Insolvency constitute *lex specialis* in relation to the provisions of the Law on VAT and the Law on Banking. Thus, in insolvency there is no possibility of, as it were, 'automatic' satisfaction of the tax authority within the framework of a separate VAT account where the taxable person has arrears. The funds held in the VAT account are therefore the property of the taxable person. The fact that no negative conditions were satisfied, that is to say, there were no arrears of taxes and duties referred to in Article 62b(2)(2)(a) of the Law on Banking, indicated that the request was valid.

3 The tax authority of first instance refused to grant the abovementioned consent. It referred to Article 108b(1) and (5) of the Law on VAT, as well as Article 62b(2)(2)(a) of the Law on Banking, and emphasised that, since the company in insolvency [had] VAT and personal income tax arrears as at the date of the decision and they [were] higher than the amount which the [insolvency] administrator [had] requested be transferred to the bank account, the condition laid down in Article 108b(5)(1) of the Law on VAT [was] satisfied and the refusal to transfer the funds [was] justified. In the view of that authority, the legislature has specified the purpose for which the funds held in a VAT account may be used. A declaration of insolvency does not affect the tax status of a taxable person, since an insolvent company remains a taxable person. The difference is that actions on its behalf are undertaken and conducted by an [insolvency] administrator. The Law on VAT is a special rule in relation to the general rule of the Law on Insolvency.

4 The appellate authority upheld the decision of the tax authority of first instance and concurred with the arguments contained therein. It emphasised that although the funds held in a VAT account are the property of the taxable person, one of the conditions for refusing to grant the abovementioned consent is that the taxable person has tax arrears. The amount of funds held in the VAT account is, in

essence, the amount of tax resulting from VAT invoices paid by counterparties. It is therefore not possible to treat that amount and those funds on a par with an overpayment which the authority may set off against arrears.

5 In its application to the Wojewódzki Sąd Administracyjny we Wrocławiu (Regional Administrative Court, Wrocław), the applicant has requested that the decision of the appellate authority be annulled.

Reasoning in the request for a preliminary ruling

Reasons for the first question referred

6 The doubts of the Wojewódzki Sąd Administracyjny relate to the lawfulness of the introduction, and limits of the application, of a national measure – the split payment mechanism – which was adopted with the aim of combating VAT fraud.

7 The split payment mechanism is governed in the Polish legal system by the provisions of the Law on VAT and the Law on Banking. Its adoption in mandatory form was based on the provisions of [Implementing] Decision 2019/310. That mechanism introduces the necessity to split the payment of the VAT amount due and the taxable amount due. When a supplier is covered by the provisions concerning split payment, it is obliged to have, in addition to its ordinary bank account, a separate blocked VAT account. That separate account can be used only to receive VAT from customers and to pay VAT to suppliers; it can also be used to pay other public-law debts, but only to the State Treasury. In that case the purchaser pays the taxable amount to the supplier, normally to an ordinary bank account, whereas the VAT due on the supply is paid to the blocked VAT account. This method of payment is solely the result of the will of the person making the payment and does not take place automatically. The release of the funds held in the VAT account of a taxable person requires the consent of the tax authority. The national law also lays down the conditions and time limit under which the release of such funds is to be refused.

8 When applying for a derogation from Article 226 of the VAT Directive, Poland stated that a mandatory split payment mechanism would eliminate VAT fraud; the Commission agreed with this view and considered that the measure is proportionate to the objective of combating tax evasion.

9 The derogation was granted on a temporary basis until 28 February 2022 by [Implementing] Decision 2019/310. It is clear from Article 1 of that decision that the derogation relates to Article 226 of the VAT Directive. Therefore, a special requirement is placed on the invoice, that is to say, it must state ‘split payment mechanism’. This is reflected in Article 106e(1)(18a) of the Law on VAT.

10 For its part, Article 206 of the VAT Directive provides that any taxable person liable for payment of VAT must pay the net amount of the VAT when submitting the VAT return provided for in Article 250 of that directive. Member States may,

however, set a different date for payment of that amount or may require interim payments to be made.

11 The first doubt of the Wojewódzki Sąd Administracyjny is essentially whether or not the national measure adopted constitutes a derogation from Article 206 of the VAT Directive and thus required the relevant notification pursuant to Article 395 of that directive. This is important in so far as a failure to notify constitutes a procedural defect and consequently renders the regulations inapplicable with regard to individuals (see judgment of the Court of Justice of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 67).

12 It follows from Article 206 of the VAT Directive that a taxable person is obliged to pay VAT not after each taxable transaction, but on expiry of each tax period. Thus, the net amount of VAT, to which reference is made in the first sentence of that provision, is obtained by adding together the VAT payable on all input taxable transactions made during the tax period, from which the VAT paid on all output transactions made during that same period is deducted. Therefore, payments received previously from counterparties should be at the taxable person's free disposal. This is not so in the case of a VAT account. The funds are blocked before the public-law VAT liability arises in the amount of the maximum liability in that case, namely the entire VAT amounts paid in that regard. However, to use its own funds for a purpose other than the payment of the stated public-law liabilities, an undertaking requires the consent of a body governed by public law, for which the deadline is 60 days, even if there are no public-law arrears. The possibility of collecting interim payments, as provided for in the second sentence of Article 206 of the VAT Directive, allows Member States to require, in advance, a partial payment of the net amount of VAT calculated over the tax period as a whole. The term 'interim payment' in fact means the partial payment of an amount which will be payable subsequently, that is to say, the net amount of VAT calculated over the tax period as a whole. However, the amount of VAT paid to a supplier on a single transaction by a purchaser can hardly be deemed to constitute such an interim payment (see judgment of the Court of Justice of 9 September 2021, *Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Intra-Community acquisitions of diesel)*, C-855/19, EU:C:2021:714, paragraph 33, and the Opinion of Advocate General Saugmandsgaard Øe of 18 March 2021 in that case, EU:C:2021:222, points 111 and 112).

13 However, neither Poland nor the Commission has stated that the derogation also concerns Article 206 of the VAT Directive.

14 Therefore, the split payment mechanism may be classified as 'other liabilities' which the Member States deem necessary to prevent tax evasion within the meaning of Article 273 of the VAT Directive. That article does indeed afford discretion to the Member States as regards the choice of measures to be adopted in order to achieve, inter alia, the objective of combating fraud. However, they must exercise their power in accordance with EU law and its general principles and, in particular, in accordance with the principle of proportionality and the principle of

fiscal neutrality (judgments of the Court of Justice of: 17 May 2018, *Vámos*, C-566/16, EU:C:2018:321, paragraph 41; 21 November 2018, *Fontana*, C-648/16, EU:C:2018:932, paragraph 35; 8 May 2019, *EN.SA.*, C-712/17, EU:C:2019:374, paragraphs 38 and 39).

15 The evasion or avoidance of tax is inherent in the common system of VAT, thus the fight against it has become an objective recognised and encouraged by the VAT Directive ([see,] inter alia, judgment of the Court of Justice of 21 May 2021, *ALTI*, C-4/20, EU:C:2021:397). Member States have the possibility of introducing specific national measures in their legal system to attain, inter alia, such an objective. However, the measures adopted in that regard must not go beyond what is necessary to achieve the objectives pursued. In accordance with the principle of proportionality, the Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation (see judgments of the Court of Justice of: 18 December 1997, *Molenheide and Others*, C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 46; 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraph 52). Therefore, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the State Treasury as effectively as possible, they must not go further than is necessary for that purpose (see the above judgment of the Court of Justice in *Molenheide and Others*, EU:C:1997:623, paragraph 47, and the judgment of the Court of Justice of 11 May 2006, *Federation of Technological Industries and Others*, C-384/04, EU:C:2006:309, paragraph 30). In particular, those measures cannot be used in such a way that they would have the effect of undermining the neutrality of VAT (see judgments of the Court of Justice of: 19 October 2017, *Paper Consult*, C-101/16, EU:C:2017:775, paragraph 50; 21 March 2000, *Gabalfrisa and Others*, C-110/98 to C-147/98, EU:C:2000:145, paragraph 52; 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 57).

16 The split payment mechanism is an experiment aimed at combating VAT fraud. On 29 April 2021, Poland submitted the required report regarding the overall impact of the measure in question on the level of VAT fraud and on the taxable persons concerned (recital 12 and Article 2 of [Implementing] Decision 2019/310), the content of which is not known to the Wojewódzki Sąd Administracyjny. The application of that national measure was extended to 28 February 2025 by Council Implementing Decision (EU) 2022/559 of 5 April 2022 amending Implementing Decision (EU) 2019/310 as regards the authorisation granted to Poland to continue to apply the special measure derogating from Article 226 of Directive 2006/112/EC on the common system of value added tax (OJ 2022 L 108, p. 51).

17 It is not evident from any of the documents submitted to the Commission and available to the Wojewódzki Sąd Administracyjny that Poland submitted a report on the effects of the split payment mechanism under insolvency law. This is crucial as that measure may lead to negative consequences in the form of failure to

achieve the main objectives of insolvency proceedings, and thus to a systemic, real impact on entities in insolvency (taxable persons for the purposes of VAT) and their creditors, as well as to the State Treasury being favoured at the expense of the general body of creditors.

18 The Wojewódzki Sąd Administracyjny has well-founded doubts as to whether or not the above measure and the associated practice of applying it go beyond the objective of combating VAT fraud, an objective which is apparent from both Articles 273 and 395 of the VAT Directive and [Implementing] Decision 2019/310.

19 In its judgment of 11 July 1988, *Direct Cosmetics Ltd and Laughtons Photographs Ltd*, 138/86 and 139/86, EU:C:1988:383, the Court of Justice noted that the term 'tax avoidance' includes tax evasion. This involves an element of intent (paragraph 21 of that judgment). Tax evasion is a practice by which a taxable person attempts to evade his, her or its legal obligations by fraudulent means. It involves a direct and intentional infringement of tax law by fraudulently evading the assessment or payment of tax in full or in part. In the context of VAT, the taxable person's conduct is aimed at evading tax, which directly and manifestly infringes applicable tax law. This includes forms of conduct such as, for example, failing to disclose the subject of taxation and thus failing to declare tax, applying understated rates, deliberately failing to pay tax, issuing irregular invoices, and so on (see, inter alia, judgment of the Court of Justice of 7 December 2010, *R.*, C-285/09, EU:C:2010:742, paragraph 49 and the case-law cited).

20 It is doubtful whether obtaining the above consent from the tax authority falls within the bounds of the stated objective. Such a measure de facto restricts an undertaking in the disposal of its funds, actually requiring that the funds obtained from VAT be allocated to public-law liabilities chosen by the legislature even before the VAT liability arises.

21 A key doubt emerges here, namely the situation of a taxable person for the purposes of VAT who is in insolvency and the disposal by the insolvency administrator of the funds in the VAT account of the insolvent undertaking. The insolvency estate includes assets belonging to the insolvent taxable person at the date of the declaration of insolvency and those acquired by that person during the insolvency proceedings, apart from certain exceptions. The funds held in the VAT account are not among those exceptions and must therefore be included in the insolvency estate. The tax authority refused to refund the funds held in the taxable person's VAT account on the ground that there were tax arrears (which arose before the declaration of insolvency) due to the tax authority (in terms of VAT and corporation tax). However, those arrears were stated in the schedule of claims. The importance of the schedule of claims manifests itself in the fact that it authorises the creditors whose claims have been included therein to participate in the insolvency proceedings and obtain satisfaction from the distribution of the funds of the insolvency estate together with other creditors. Once proceedings

have been completed or discontinued, an extract from the schedule of claims constitutes an enforcement order against the debtor. The insolvency administrator has stated that the insolvent taxable person had no other VAT arrears (arising during insolvency) and needed the funds to pay its ongoing property tax liability to the local government budget.

22 A refusal to pay VAT funds to an insolvency administrator, acting under the supervision of a presiding judge, performing duties under the Law on Insolvency, can hardly be deemed to be effected in order to combat VAT fraud.

23 Moreover, the principle of proportionality indicates that when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of the Court of Justice of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, paragraph 81). The above refusal of consent may appear excessive. Firstly, the above arrears cannot be treated in the same way as those subject to enforcement, as they are included in the schedule of claims. Secondly, in the absence of VAT arrears, the insolvency administrator has no possibility of assigning those funds to the payment of creditors.

24 The Court of Justice has already made it clear that, while the Member States have a certain freedom in determining the conditions for refunding excess VAT, those conditions cannot undermine the principle of fiscal neutrality by making the taxable person bear the burden of the VAT in whole or in part. In particular, such conditions must enable the taxable person, in appropriate circumstances, to recover the entire amount of the credit arising from that excess VAT. This implies that the refund is to be made within a reasonable period of time by a payment in liquid funds or equivalent means, and that, in any event, the method of refund adopted must not entail any financial risk for the taxable person (judgments of the Court of Justice of: 6 July 2017, *Glencore Agriculture Hungary*, C-254/16, EU:C:2017:522, paragraph 20 and the case-law cited; 12 May 2021, *technoRent International and Others*, C-844/19, EU:C:2021:378, paragraphs 37 and 38 and the case-law cited). Since the insolvent taxable person for VAT purposes essentially carries on no economic activity and thus creates no possibility of VAT liability arising, and the [insolvency] administrator states that the insolvent person has no ongoing VAT arrears following the declaration of insolvency, the question arises as to whether or not blocking funds in the VAT account undermines the principle of VAT neutrality.

Reasons for the second question referred

25 The Wojewódzki Sąd Administracyjny has doubts as regards infringement of the right to property under Article 17(1) of the Charter.

26 It is common ground that the funds held in a VAT account are the property of a taxable person, including a taxable person in insolvency (as an element of the insolvency estate). The blocking of those funds constitutes a restriction of their

use. The taxable person, as well as the insolvency administrator, must obtain consent from the tax authority for their transfer to other purposes (including the payment of taxes to other public creditors under the law). Consent is refused automatically where there are tax arrears. However, such refusal does not have to be automatic where such claims are included in the schedule of claims and are therefore expected to be enforced during the insolvency proceedings. The interpretation is at the discretion of the tax authority. However, where consent is refused the double economic benefit obtained by the State Treasury is apparent: it declares its claims in the schedule of claims, on the one hand, and, for the same reason, blocks the funds in the VAT account, on the other. That blocking leads to a situation where the insolvency administrator is unable to use those funds to satisfy the general body of creditors (which includes the State Treasury) during insolvency proceedings conducted under the supervision of a presiding judge. As in this case, the taxable person cannot have ongoing liabilities from economic activity (which is carried out by an [insolvency] administrator on [that taxable person's] behalf), but can have liabilities from other rights which do not form part of the State budget, that is to say, property tax (local government budget). The tax authority itself cannot effect enforcement in relation to the above bank account because, pursuant to the Law on Insolvency, during insolvency proceedings all enforcement proceedings (including those relating to VAT) are discontinued by operation of law. The Law on VAT affects the performance of duties by the insolvency administrator since it decides, contrary to the Law on Insolvency, which decisions the insolvency administrator is to take in respect of the above funds belonging to the taxable person, which, by operation of law, must be included in the insolvency estate. It should be noted that a presiding judge is also unable to act in this regard. Funds blocked in a VAT account (in the absence of other funds of the insolvent person), and not transferred to the insolvency administrator, may lead to the discontinuation of insolvency proceedings and the actual satisfaction of the State Treasury alone, at the expense of other creditors, while at the same time preventing the liquidation of the undertaking of the insolvent taxable person. However, if the insolvent taxable person has financial assets which allow the general body of creditors of that taxable person to be satisfied, the exclusion of these funds from the insolvency estate may lead to a situation where there is no one to hand them over to when the undertaking is liquidated. The taxable person will be deleted from the register by a decision of the insolvency court. This will result in an unauthorised contribution to the State Treasury.

27 In EU law, the right to property is protected, in particular, under Article 17 of the Charter. Under Article 51(1) thereof, the Charter is addressed to the Member States only when they are implementing Union law. This undoubtedly applies to VAT cases (see judgment of the Court of Justice of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 25 et seq.). Under Article 52(3) thereof, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome on 4 November 1950 (ECHR), the meaning and scope of those rights are to be the same as those laid down by that

convention. As for Article 17 of the Charter, according to the Explanations relating to the Charter, that provision is based on Article 1 of Protocol No 1 to the ECHR. Accordingly, Article 17 of the Charter must be interpreted in the light of the case-law of the European Court of Human Rights (ECtHR) concerning that other provision as the minimum threshold of protection (see judgment of the Court of Justice of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72). The concept of 'possessions' referred to in Article 17(1) [of the Charter] has an autonomous meaning which is not limited to the ownership of material goods, and certain other rights and interests constituting assets can also be regarded as 'property rights' (ECtHR, 22 June 2004, *Broniowski v. Poland*, no. 31443/96, § 129). In certain circumstances, 'possessions' can be assets, including claims (see ECtHR, 28 September 2004, *Kopecký v. Slovakia*, no. 44912/98, § 35). As regards VAT, paragraph 57 of the ECtHR judgment of 22 January 2009 regarding Application no. 3991/03 ('*Bulves' AD v. Bulgaria*) held that the applicant company's right to claim a deduction of the input tax amounted to at least a 'legitimate expectation' of obtaining effective enjoyment of a property right amounting to a 'possession' within the meaning of the first sentence of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, ECtHR: 29 November 1991, *Pine Valley Developments Ltd and Others v. Ireland*, [no. 12742/87,] § 51; 16 April 2002, *S.A. Dangeville v. France*, no. 36677/97, § 48; 22 July 2003, *S.A. Cabinet Diot and S.A. Gras Savoye v. France*, nos. 49217/99 and 49218/99, § 26; 25 April 2007, *Aon Conseil and Courtage S.A. and Christian de Clarens S.A. v. France*, no. 70160/01, § 45; and 23 May 2007, *Intersplav v. Ukraine*, no. 803/02, §§ 30 to 32). Thus, the right to deduct VAT is an expectancy of a property right subject to protection under Article 17 of the Charter. There is no doubt that funds held in a separate VAT account amount to possessions within the meaning of Article 17(1) of the Charter and are subject to protection under that provision.

28 The effectiveness of a public authority is met with an insurmountable barrier in the form of the fundamental rights of citizens, any limitations on which, as Article 52(1) of the Charter stipulates, may be provided for only by law and with due respect for the essence of those rights, if those limitations are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (see judgment of the Court of Justice of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 50). It is therefore a question of a difficult balance between public policy and the freedom to possess. That 'law' must, in effect, be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – using professional advice if need be – to regulate his [or her] conduct [and] to foresee the consequences of that law for him [or her] (ECtHR, 26 March 1987, *Leander v. Sweden*, no. 9248/81, § 50). The 'law' must therefore be sufficiently clear (ECtHR, 3 July 2007, *Tan v. Turkey*, no. 9460/03, §§ 22 to 26) and foreseeable as to the meaning and nature of the applicable measures (see decision of the ECtHR of 25 September 2006 in *Coban v. Spain*, no. 17060/02), and must define with sufficient clarity both the scope of the power to interfere in the exercise of the rights guaranteed by the ECHR and the manner in which that power is to be

exercised (ECtHR, 14 September 2010, *Sanoma Uitgevers B.V. v. The Netherlands*, no. 38224/03, §§ 81 and 82). A law which confers a discretion is not in itself inconsistent with that requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (ECtHR, [25 February 1992,] *Margareta and Roger Andersson v. Sweden*, [no. 12963/87,] § 75). A law which confers a discretion must therefore indicate the scope of that discretion (ECtHR, 25 March 1983, *Silver and Others v. The United Kingdom*, nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, § 88). All of these conditions stem from the idea of the supremacy of the law (ECtHR, 25 May 1998, *Kopp v. Switzerland*, no. 23224/94, § 55). The condition that any limitation must be 'provided for by law' therefore means, according to the case-law of the ECtHR, that the actions of the public authority must observe the limits defined in advance by the rules of law, which imposes certain requirements which must be satisfied both by the rules of law themselves and by the procedures designed to impose effective observance of those rules. Lastly, the ECtHR has explained that the term 'law' should be understood in its 'substantive' sense, not only its 'formal' one, because it may include both 'written law' and 'unwritten law' – or even 'judge-made law' (ECtHR, 26 April 1979, *The Sunday Times v. The United Kingdom (No. 1)*, no. 6538/74, § 49; 13 July 1995, *Tolstoy Miloslavsky v. The United Kingdom*, no. 18139/91, § 37). 'Consistent decisions' which are published and therefore accessible and are followed by the lower courts may, in some circumstances, supplement legislative provisions and clarify them to the point of rendering them foreseeable (ECtHR, 24 May 1988, *Müller and Others v. Switzerland*, no. 10737/84, § 29). As regards the principle of proportionality, it requires that a restriction on the exercise of the right to property does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (judgment of the Court of Justice of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 46 and the case-law cited).

29 As has already been stated above, the split payment mechanism was introduced to combat VAT fraud, which in itself should be considered to be in the public interest (see ECtHR, 22 September 1994, *Hentrich v. France*, no. 13616/88, § 39). However, the legislature did not provide for the effects of such rules under the Law on Insolvency. In such a situation, it is difficult to speak of clear and precise rules which enable a professional legal entity, such as an insolvency administrator, to conduct insolvency proceedings and foresee the tax authority's actions. The competition of legal measures which has arisen has created legal uncertainty. One tax authority, applying only a literal interpretation, will refuse consent for the release of funds on grounds of nominal tax arrears, whilst another, applying a contextual and teleological interpretation, will release such funds. In addition, the current legislation mitigates in favour of the inclusion of funds from a VAT account in the insolvency estate. The unforeseeable nature of the law is also

visible at a substantive level. In the case-law of the administrative courts, it is unclear which conflict-of-law rule is considered to be key, and three are apparent: *lex superior; lex specialis derogat legi generali*; [and] *lex posterior derogat legi priori*. In that regard, the status of *lex specialis* is sometimes conferred on the Law on Insolvency, and sometimes on the Law on VAT. This state of affairs supports the argument that the rules introduced are unclear and unforeseeable and creates uncertainty on the part of the insolvency administrator.

Reasons for the third question referred

30 The European Union is a union of law, and the rule of law has been the cornerstone of the functioning of that organisation and a common Europe since its inception (see judgment of the Court of Justice of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23). Each Member State shares with all the other Member States – and recognises that they share with it – a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the European Union that implements them will be respected (see opinion of the Court of Justice of 18 December 2014, 2/13, EU:C:2014:2454, paragraph 168). It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union (see judgment of the Court of Justice of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 34). In turn, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, in particular, that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them (see judgments of the Court of Justice of: 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation*, C-362/12, EU:C:2013:834, paragraph 44; 15 February 1996, *Duff and Others*, C-63/93, EU:C:1996:51, paragraph 20; 29 April 2004, *Sudholz*, C-17/01, EU:C:2004:242, paragraph 34; 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 77). The principle of legal certainty is binding on every national authority responsible for applying EU law (see judgment of the Court of Justice of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 65 and the case-law cited). Undoubtedly, therefore, for there to be good administration within the meaning of Article 41(1) of the Charter, it must act in accordance with and within the limits of the law, including Union law.

31 Combating VAT fraud, which is one of the recognised objectives of the Union, cannot be considered solely in terms of its effectiveness. The means and methods of doing so must comply with the requirements of the rule of law. If a public authority were to be given excessively far-reaching instruments to combat VAT

fraud, there would be nothing to prevent its uncontrolled and unrestrained action from ultimately becoming detrimental to the common system of VAT and, consequently, to taxable persons.

32 Aspects of the case in the main proceedings demonstrate the inconsistency of the Polish legal system. The restriction of the use of funds held in a VAT account whose transfer is requested by an insolvency administrator following the declaration of insolvency of a taxable person for the purposes of VAT, through an interpretation of the legislation which disregards legal restrictions arising from EU law, can hardly be regarded as a measure appropriate to the intended purpose of combating VAT fraud. The actions which an [insolvency] administrator carries out under the supervision of a court cannot be equated with fraudulent actions and actions aimed at VAT fraud. The national legislature has created a system of insolvency law whose main objective is not only to pay off creditors, but also to save (if possible) the economic entity concerned. Thus, when the Polish legislature introduces a measure by which it seeks to combat VAT fraud, it cannot be assumed that its intention was simultaneously to render ineffective other provisions of national law (without providing an unequivocal statement to that effect) which are equally important for the functioning of the market (including the internal market of the Union). Therefore, the tax authorities, when interpreting provisions of law, including Union law, must not construe them in a manner which may lead to the objectives of insolvency proceedings being nullified and, consequently, to the State Treasury being privileged at the expense of the general body of creditors. In their interpretation, the tax authorities must not exacerbate the difficulties and inconsistencies between the two legal systems, that is to say, the public and the private. In a country based on the rule of law, economic operators have the right to expect the State authorities to have reasonable grounds within the limits of their interference in fundamental rights.