

Case C-331/23**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:**

25 May 2023

Referring court:Rechtbank van eerste aanleg Oost-Vlaanderen Afdeling Gent
(Belgium)**Date of the decision to refer:**

22 May 2023

Applicant:

Dranken Van Eetvelde NV

Defendant:

Belgische Staat

Subject matter of the main proceedings

The dispute in the main proceedings concerns VAT fraud involving falsified invoices.

Subject matter and legal basis of the request

In the present request for a preliminary ruling under Article 267 TFEU, the referring court essentially asks the Court of Justice to rule on Article 51*bis*(4) of the Belgische btw-wetboek (Belgian VAT Code; ‘the WBTW’) in the light of the principles of proportionality and neutrality and Article 205 of the VAT Directive. It also seeks to ascertain whether the cumulation of administrative and criminal penalties in the present case is compatible with the principle *ne bis in idem* enshrined in Article 50 of the Charter.

Questions referred for a preliminary ruling

1. Does Article 51*bis*(4) of the WBTW infringe Article 205 of Directive 2006/112 in conjunction with the principle of proportionality in so far as that provision provides for unconditional overall liability and does not allow the court to assess liability on the basis of each person's contribution to the tax fraud?
2. Does Article 51*bis*(4) of the WBTW infringe Article 205 of Directive 2006/112 on the common system of VAT, read in conjunction with the principle of VAT neutrality, if that provision is to be interpreted as meaning that a person is jointly and severally liable to pay VAT in the place of the legal debtor, without any account having to be taken of the deduction of VAT that can be claimed by the legal debtor?
3. Must Article 50 of the Charter of Fundamental Rights of the European Union be interpreted as not precluding national legislation which permits the cumulation of (administrative and criminal) penalties of a criminal nature, resulting from different proceedings, in respect of offences which are materially identical yet occurred over consecutive years (but which, in criminal law, would be regarded as a continuing offence with unity of purpose), and where the offences are subject to administrative prosecution in respect of one year and criminal prosecution in respect of another year? Are those offences not regarded as inseparable because they occurred over consecutive years?
4. Must Article 50 of the Charter of Fundamental Rights of the European Union be interpreted as not precluding national legislation under which proceedings may be brought against a person for the imposition of an administrative fine of a criminal nature in respect of an offence for which he or she has already been finally convicted under criminal law, the two sets of proceedings being conducted entirely independently of one another and the only guarantee that the gravity of the entirety of the penalties imposed is commensurate with the gravity of the offence in question consisting in the fact that the tax court may carry out a substantive review of proportionality, even though the national legislation does not lay down any rules in that regard, nor does it lay down any rules allowing the administrative authority to take account of the criminal penalty already imposed?

Provisions of European Union law relied on

Charter of Fundamental Rights of the European Union, Article 50 (*ne bis in idem*).

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Article 205 (joint and several liability for payment of VAT).

Provisions of national law relied on

Grondwet (the Constitution), Articles 10 (principle of equality), 11 (prohibition of discrimination) and 172 (principle of fiscal equality).

Btw-wetboek (VAT Code), Article 51*bis*(4) (joint and several liability for payment of VAT), Article 70(1) and (2) (fines), Article 84*ter* (mandatory notification of suspicions of tax evasion in the case of an extended limitation period), Article 85(1) (recovery).

Wetboek van strafvordering (Code of Criminal Procedure), Article 29(3) (the tax authorities must report indications of fraud to the public prosecutor's office).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is a drinks merchant. The Belgian tax authorities examined its VAT returns for the financial year 2011. Irregularities were found during this process. The applicant is alleged to have issued false invoices for the supply of drinks to private individuals. In reality, the drinks were supplied to taxable customers (hotel and restaurant operators) who resold them on the black market.
- 2 The same infringements had already been found during two previous tax inspections (for the financial years 2001 to 2002 and 2004), and the applicant had been convicted in that respect by judgments of 10 April 2008 and 17 November 2008. On each occasion, a fine was imposed on the applicant.
- 3 On 21 December 2018, the applicant lodged an objection with the referring court to an enforcement order issued on 10 December 2018 to recover VAT and fines due.

The essential arguments of the parties in the main proceedings

- 4 The applicant argues that, in accordance with the case-law of the Court of Justice, no one can be held unconditionally liable for someone else's fraud (as is nevertheless the case with Article 51*bis*(4) of the WBTW). Such strict liability goes beyond what is necessary to safeguard the public exchequer's rights and to combat tax fraud (see judgments of the Court of Justice of the European Union of 21 December 2011 and of 11 May 2006 and other case-law referred to in those judgments). This infringes the principle of proportionality.
- 5 The defendant considers that unconditional liability for the payment of the VAT debt is not contrary to the principles of proportionality and VAT neutrality and that the principle *ne bis in idem* is not infringed.

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

- 6 Since Article 51*bis*(4) of the WBTW provides for an unconditional liability for the payment of VAT, this provision could be contrary to the principle of proportionality and/or the principle of VAT neutrality.
- 7 Moreover, the principle *ne bis in idem* has also been raised. According to that principle, the same person cannot be tried a second time in criminal proceedings for the same offence, following a first definitive trial of a criminal nature. That principle would be applied differently depending on whether it relates to income tax or VAT.
- 8 Finally, the issue of the cumulation of an administrative penalty and a criminal penalty linked to the unity of intention is also an important question of law which must be assessed in the light of the general principles of EU law.
- 9 An answer to those questions is important in order to determine whether the applicant must pay the taxes evaded.