Case C-613/23 [Herdijk] [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:

6 October 2023

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

6 October 2023

Appellant:

KL

Respondent:

Staatssecretaris van Financiën

Subject matter of the main proceedings

The main proceedings concern a dispute between KL, in his capacity as the former director of a company, and the Staatssecretaris van Financiën (State Secretary for Finance; 'the Staatssecretaris'). The Staatssecretaris holds KL liable for the unpaid additional assessments in payroll tax and turnover tax imposed on that company for the periods during which KL was the director of the company.

Subject matter and legal basis of the request

This request under Article 267 TFEU concerns the question of whether the Netherlands system of holding directors of legal entities liable for the tax debts of those entities (Article 36 of the Invorderingswet 1990 (1990 Law on the collection of State taxes) ('the IW 1990')) complies with the principle of proportionality under EU law.

[i] This is a fictitious name, and does not correspond to the actual name of any party to the proceedings.

Questions referred for a preliminary ruling

1. Does the principle of proportionality provided for under EU law preclude a legal rule such as that set out in Article 36(4) of the IW 1990, which, in practice, makes it extremely difficult for a director of a legal person that has failed to comply, or has failed to comply properly, with its obligation to notify the tax collection authorities of its inability to pay, to escape liability for tax debts of that legal person, including turnover tax debts?

2. Does the answer to Question 1 depend on whether the director acted in good faith in that he or she acted with the care of a prudent business person, did everything reasonably within his or her power, and his or her involvement in abuse or fraud may be ruled out?

Provisions of national law cited

Article 36 of the IW 1990

Succinct presentation of the facts and procedure in the main proceedings

1 KL was the director and sole shareholder of a company until 29 March 2019. Additional assessments in payroll tax and turnover tax were imposed on this company for specific periods. These additional assessments went unpaid. By decision of 5 July 2019, the tax authorities held that KL was liable under Article 36 of the IW 1990 for the unpaid additional assessments, plus tax interest and costs charged. The total amount involved was EUR 142 852.

2 Under Article 36(1) of the IW 1990, each director of a legal entity is in principle jointly and severally liable for certain taxes owed by that legal entity. If the legal entity is unable to pay the taxes that it owes, it must notify the tax authorities of this inability to pay under Article 36(2) of the IW 1990. This notification must take place within two weeks after the date by which the tax ought to have been paid. If the notification has been properly made, the director will be liable only if the tax authorities prove that the non-payment of tax was due to manifestly improper management attributable to that director during the three-year period preceding the time of the notification. Improper management can be said to exist only if no right-thinking director would have acted as the liable director did. Under Article 36(4), first sentence, of the IW 1990, if the notification has not been made or has not been made properly (for instance, if it was not made in a timeous manner), there will be a presumption that the non-payment of the tax is attributable to improper management on the part of the director. The director will be allowed to rebut this presumption only if he or she proves that it was not his or her fault that the legal entity did not comply, or did not comply properly, with its notification obligation. By contrast, the former director, that is to say, the person who was no longer a director at the latest time by which the legal entity ought to

have fulfilled its notification obligation, is always permitted to rebut this presumption.

3 The court at second instance, the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands), first of all found that, in this case, the company in question had not complied with the aforementioned notification obligation. As KL had already resigned as director before the deadline for paying some of the tax debts expired, he was allowed to prove that the non-payment of those debts was not attributable to him. According to the Gerechtshof, he did so to the requisite legal standard, with the result that the tax authorities had wrongfully held him liable for that portion of the debts. However, for the period during which KL was incumbent director, there was a presumption that the non-payment of the tax debts was due to his apparent mismanagement. Under the Netherlands legal system, as described in paragraph 2 above, he cannot rebut this presumption if he does not first prove that he is not to blame in connection with the failure to notify the inability to pay. As KL was unable to do so, the Gerechtshof held that the tax authorities had acted correctly in holding him liable in the amount of EUR 92 394.

The essential arguments of the parties in the main proceedings

4 KL has in particular argued before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) ('the Hoge Raad'), that that Netherlands legislation is contrary to the principle of proportionality under EU law, a contention which the respondent disputes.

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

5 In this regard, the Hoge Raad first notes that it is only in cases of *force majeure* or if a director of a legal entity relied in good faith on the advice of a third party that he or she will be able to argue plausibly that it was not his or her fault that the legal entity did not properly comply with its notification obligation. These are such special circumstances that in the vast majority of cases a director will not be able to provide the requisite evidence. Consequently, the director will very rarely be allowed to provide counter-evidence to rebut the presumption that it is due to his or her manifestly improper management that the legal entity has failed to settle its tax debts. The Hoge Raad is therefore of the opinion that, in practice, it is extremely difficult for a director of a legal entity that has not properly fulfilled its notification obligation to escape liability for tax debts of the company.

6 With regard to the principle of proportionality under EU law, the Hoge Raad refers to the judgment of the Court of Justice of 13 October 2022, *Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika'*, C-1/21, EU:C:2022:788 ('the *Direktor na Direktsia* judgment'). In paragraph [73] of that judgment, the Court first held that it is legitimate for measures taken by Member States to seek to protect the public exchequer's rights as effectively as possible, but that they must not go beyond what is necessary to that end. It then noted in paragraph 74

that national measures leading *de facto* to a system of strict liability of directors go beyond what is necessary to protect the public exchequer's rights. Where liability for a tax debt is placed on a person other than its debtor, without giving him or her the opportunity to escape that liability by proving that he or she is completely unconnected with that debtor's actions, that is contrary to the principle of proportionality. In this regard, the Court refers in paragraph 76 of the *Direktor na Direktsia* judgment to paragraph 36 of its judgment of 20 May 2021, *ALTI*, C-4/20, EU:C:2021:397, in which it held that it is permissible for a Member State to hold a person jointly and severally liable for an unpaid tax debt and to rely on presumptions in so doing, provided that those presumptions are not formulated in such a way as to make it impossible or excessively difficult in practice for the taxpayer to rebut those presumptions and do not thereby introduce a system of strict liability. The Court further held that the circumstances that (i) a person other than the tax debtor acted in good faith by proceeding with the diligence of a prudent business person, (ii) that he or she did everything reasonably within his or her power, and (iii) that his or her involvement in abuse or fraud could be ruled out, are factors to be taken into account in deciding whether that person should be made jointly and severally liable to pay the tax due.

7 It is not clear from the foregoing case-law of the Court of Justice whether the concept of 'strict liability' also refers to a liability that is assumed without question (*de facto*) only in a certain category of cases, such as the category of directors of a legal entity that has failed to comply with its notification obligation. The question is whether using criteria to delineate such a category (in this case, the criterion that the legal entity has failed to fulfil its notification obligation) implies that liability is nevertheless conditional in nature. After all, satisfying those criteria can be seen as satisfying a condition.

8 On the other hand, if it is to be assumed that strict liability can be said to exist even where liability is limited to a particular group of persons, this is in principle contrary to the principle of proportionality provided for under EU law. It follows from the *Direktor na Direktsia* judgment that conflict with this principle arises in any event in situations where the person liable has 'nothing whatsoever to do with the acts of the person liable to pay the tax' and where the tax debts have arisen from the actions of a third party over which the person liable 'has no influence whatsoever'. However, a director of a legal entity cannot be said to have no influence whatsoever over the acts of that legal entity or to have nothing whatsoever to do with those acts. It is questionable, however, whether that suffices to make it possible to conclude that, in practice, almost strict liability of the director of a legal entity that has failed to notify, or has failed to notify properly, its inability to pay is consistent with the principle of proportionality under EU law.

9 According to the Hoge Raad, another relevant factor in the present case is that KL, as a former director for a certain period of time, did have the right to oppose the presumption that he was responsible for the tax debt in question, and that, according to the Gerechtshof, he did so successfully. Therein lies the finding that

KL acted in good faith by proceeding with the diligence of a prudent business person, that he did everything reasonably within his power and that any involvement in abuse or fraud on his part could be ruled out. These are circumstances that, as follows from paragraph 6 above, are relevant in determining whether, in accordance with the principle of proportionality under EU law, it can be assumed that the person concerned is jointly and severally liable for tax due by the legal entity. The Hoge Raad is therefore unsure whether these circumstances are relevant for the purpose of answering the first question referred to the Court of Justice.

10 In view of the foregoing considerations, it is not clear whether Article 36(4) of the IW 1990 is compliant with the principle of proportionality under EU law. For this reason, the Hoge Raad submits to the Court of Justice the questions formulated above.