Case C-305/23 [Bacigán] [1]

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:

15 May 2023

Referring court:

Juzgado de lo Mercantil No 10 de Barcelona (Spain)

Date of the decision to refer:

2 May 2023

Applicant:

Agencia Estatal de la Administración Tributaria

Defendant:

S.E.I.

Subject matter of the main proceedings

Insolvency proceedings – Application by insolvent debtor (the defendant in this case) for a grant of discharge of debt – Objection by one of the creditors (the applicant in this case) to that grant of discharge – Grounds of objection: imposition on the debtor, before he applied for discharge, of an administrative penalty for a very serious tax infringement

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

Request for a preliminary ruling on interpretation – Article 267 TFEU – Compatibility of national provisions with Directive (EU) 2019/1023 – Articles 1(4) and 23(1) and (2) of Directive 2019/1023 – Optional extension by Member States of procedures for discharge of debt to insolvent natural persons who are not entrepreneurs – Scope of and derogations from the right of discharge – Concept of dishonest behaviour

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

Questions referred for a preliminary ruling

First: Where a national legislature decides to extend the application of the procedures laid down for the discharge of debts incurred by insolvent entrepreneurs to insolvent natural persons who are not entrepreneurs, as provided for in Article 1(4) of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, is it also required to bring its legislation into line with the requirements laid down in Title III of the Directive?

If the answer to the first question is in the affirmative,

Second: Does the scope of the concept of dishonest behaviour referred to in Article 23(1) of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 include negligent or imprudent behaviour of the debtor which causes the debt to be incurred?

If the answer to the second question is in the negative,

Third: Do the cases set out in Article 23(2)(a) to (f) of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 constitute a closed list of well-defined and justified circumstances or may States introduce other well-defined and justified circumstances?

If the answer to the third question is that States may introduce other well-defined and justified circumstances that differ from the cases set out in Article 23(2)(a) to (f) of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019,

Fourth: Do the new well-defined circumstances which a State introduces have to be based in every case on dishonest behaviour or bad faith?

If the answers to the [third and fourth] questions are that States may not introduce circumstances that differ from those referred to in Article 23(2)(a) to (f) of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, or that, if they introduce other, different, well-defined conduct, that conduct must be based on dishonest behaviour or bad faith on the part of the debtor,

Fifth: Does a conforming interpretation of Article 23 of the directive entail the disapplication of a provision like Article 487(1)(2) of the consolidated text of the Ley Concursal (Law on Insolvency) where the very serious tax infringement is found to be based on behaviour of the debtor which is not dishonest or in bad faith?

Provisions of European Union law relied on

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:

Article 1(1), (2)(h) and (4)

Article 23

Provisions of national law relied on

Royal Legislative Decree 1/2020 adopting the consolidated text of the Law on Insolvency (Real Decreto Legislativo 1/2020 por el que se aprueba el texto refundido de la Ley Concursal) of 5 May 2020, as amended by Law 16/2022 amending the consolidated text of the Law on Insolvency for the purposes of the transposition of Directive (EU) 2019/1023 of 20 June 2019 (Ley 16/2022 de reforma del texto refundido de la Ley Concursal para la transposición de la Directiva (UE) 2019/1023, de 20 de junio de 2019) of 5 September 2022,:

Article 486

Article 487(1)(2)

General Law 58/2003 on Taxation (Ley 58/2003, General Tributaria) of 17 December 2003:

Article 191(1) and (4)

Succinct presentation of the facts and procedure in the main proceedings

1 In July 2016, S.E.I. (the defendant in the main proceedings and insolvent debtor in the insolvency proceedings) started, as an individual entrepreneur, a retail business selling bread and bakery products. During the first year, he was able to cover the costs of his business activities. However, from the second year, business started to slow down and, as a result, the need arose to use small loans to cover the costs associated with the business, until the situation became untenable, requiring him to close the business in October 2018, leaving a number of outstanding debts. After he ceased his entrepreneurial activity, S.E.I. worked as an employee for two undertakings and later became unemployed.

2 When he became insolvent, S.E.I. attempted to reach an out of court payment arrangement with the assistance of an insolvency mediator. It was not possible to reach such an arrangement and therefore, as a consequence, on 19 June 2020, the insolvency mediator filed an application to open insolvency proceedings in

relation to the debtor S.E.I. The debts owed by S.E.I. came to a total amount of EUR 143 021.35.

3 By order of 8 July 2020, the referring court decided to open insolvency proceedings in respect of the insolvent debtor.

4 On 13 July 2022, the insolvency practitioner (the company RCD CONCURSAL, S. L.P.) filed a final statement of clearance and settlement of accounts, in which it requested the closure of the insolvency procedure. That statement was notified to the other parties on 21 September 2022.

5 On 18 October 2022, the insolvent debtor applied for the provisional discharge of debts which could not be settled by liquidation of his assets, in respect of the following claims:

[CREDITOR]	**DEBT**	**AMOUNT NOT DISCHARGED**
FOGASA	EUR 6 701.99	**EUR 850.00**
N. C. P.	EUR 4 597.77	EUR 0.00
A.E.A.T.	EUR 9 25465	**EUR 2 127.32**
DIPUTACIÓN DE BARCELONA	EUR 374.35	EUR 0.00
T.G.S.S.	EUR 21 802.60	**EUR 10 901.30**
AGM ABOGADOS	EUR 3 750.00	EUR 0.00
AIGÜES DE MANRESA	EUR 189.95	EUR 0.00
CAIXABANK S. A.,	EUR 5 135.37	EUR 0.00
CCPP C/ COLL BAIX 34	EUR 350.00	EUR 0.00
DIR MARAGALL	EUR 85.00	EUR 0.00
ENDESA ENERGIA S. A.,	EUR 3 184.14	EUR 0.00
FECSA ENDESA (COMERCIALIZADORA GAS POWER)	EUR 159.75	EUR 0.00
GRUPO ORANGE ESPAÑA	EUR 423.38	EUR 0.00
NATURGY ENERGY GROUP	EUR 252.49	EUR 0.00
PRA IBERIA S. L., (ANTES WIZINK BANK)	EUR 1 365.55	EUR 0.00
	EUR 57 626.99	**EUR 13 878.62**

The insolvent debtor also proposed a payment plan in respect of claims against the insolvency estate and priority claims which, in his view, could not be discharged.

6 On 18 November 2022, the Agencia Estatal de Administración Tributaria (State Agency for Tax Administration; ‘A.E.A.T.’) lodged, pursuant to Article 487(1)(2) of Royal Legislative Decree 1/2020 of 5 May 2020 adopting the consolidated text of the Law on Insolvency, as amended by Law 16/2022 of 5 September 2022, a written objection to the grant of a discharge of debt. The factual circumstance on which the A.E.A.T.’s objection was based is the following: some time ago, on

20 April 2020 to be precise, the A.E.A.T. imposed on S.E.I. a penalty fine of EUR 504.99 for failure to pay on time, in 2018, a withheld amount which S.E.I. was required to apply to the rental price which S.E.I. paid for rental of his business premises. In accordance with Article 191(4) of General Law 58/2003 on Taxation, the A.E.A.T. took the view that the failure to comply with that withholding obligation constituted a very serious tax infringement, since the A.E.A.T. identified in S.E.I.'s conduct a failure to show the care required of taxpayers with regard to compliance with their tax obligations.

7 As a result of the A.E.A.T.'s objection, the referring court, by procedural decision of 24 November 2022, ordered that an insolvency proceeding be commenced and allowed to proceed and the insolvent debtor and insolvency practitioner were asked to make submissions.

8 On 16 December 2022, the insolvent debtor and the insolvency practitioner lodged their respective responses contesting the A.E.A.T.'s objection to the application for discharge.

9 Since none of the parties adduced any evidence which differed from the documentary evidence included in the proceedings, it was ruled, by a measure of procedural organisation of 9 January 2023, that the case was concluded and ready for judgment.

10 By procedural decision of 16 March 2023, the referring court informed the parties of the possibility of making a request for a preliminary ruling to the Court of Justice of the European Union, with a view to referring to the Court two questions relating to the compatibility of the rules on discharge laid down in national legislation with the rules laid down in Directive (EU) 2019/1023.

11 In the light of the applicant's submissions concerning the need to make a request for a preliminary ruling, inter alia in connection with the interpretation of the word 'dishonestly' as used in Article 23 of Directive (EU) 2019/1023, the referring court reformulated and expanded the questions referred for a preliminary ruling.

The essential arguments of the parties in the main proceedings

12 The A.E.A.T. objects to the grant of discharge of debt on the basis of the arguments set out above. The insolvent debtor and the insolvency practitioner contest the A.E.A.T.'s objection to the application for discharge.

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

13 Article 1(2) of Directive (EU) 2019/1023 defines the subjective scope of the provision in the sense that the directive is not applicable to the procedures referred to in paragraph 1 of that article that concern debtors that are natural persons who are not entrepreneurs (see Article 1(2)(h) of the directive). However, Article 1(4)

of the directive provides that Member States may extend the application of procedures leading to a discharge of debt incurred by insolvent entrepreneurs to insolvent natural persons who are not entrepreneurs.

14 In the present case, the insolvent debtor has explained in the application for an out of court payment arrangement and in the application for insolvency proceedings that he is not an entrepreneur.

15 Therefore, the first question that arises for the referring court is whether, when the national legislature decided to broaden the subjective scope of the rules on discharge to natural persons who are not entrepreneurs, it should also have brought its rules into line with the provisions of the directive governing the discharge of debts incurred by insolvent entrepreneurs.

16 In that connection, the question arises of whether the legislative technique used by the directive in Article 1(4) should be interpreted as a directive providing for minimum harmonisation in the sense that the EU legislature has laid down rules governing the mechanisms for the discharge of entrepreneurs' debts and that the Member States may lay down other, stricter conditions in regard to those mechanisms, or whether, in this case, the legislative technique used is that of the optional extension of legislative harmonisation, in the sense that Member States have been granted the right to extend the harmonised discharge mechanism to persons who are not entrepreneurs.

17 In other words, if the directive is intended to harmonise national laws as regards the discharge of entrepreneurs' debts, and the directive also provides that Member States have the right, optionally, to extend the scope of the discharge mechanisms to persons who are not entrepreneurs, must it then be understood that, if a State decides to lay down rules governing discharge mechanisms for persons who are not entrepreneurs, it is required to lay down a transposition provision which complies with Article III of the directive (Articles 20 to 24) so that the optional extension of the scope of the directive is also harmonised?

18 If the answer to that question is in the affirmative, the next question that arises concerns the interpretation and scope of the concept of dishonest behaviour referred to in Article 23 of the directive and whether the national legislation concerning derogations from the discharge of debt is compatible with the requirements of the directive.

19 As regards the circumstances which may lead to refusal of access to discharge, Article 23 of the directive provides for two groups of situations:

1. Where the insolvent debtor acted dishonestly or in bad faith under national law towards creditors or other stakeholders when becoming indebted, during the insolvency proceedings or during the payment of the debt, without prejudice to national rules on burden of proof.

2. In certain well-defined circumstances and where such derogations are duly justified; the EU legislation goes on to state '*such as where*' and then sets out six situations under (a) to (f).

20 Article 191(4) of General Law 58/2003 on Taxation refers to two types of conduct which may be classified as a very serious tax infringement. In that connection, the provision is divided into two different paragraphs:

1. An infringement will be very serious where fraudulent means have been used.

2. An infringement will also be very serious, even if fraudulent means have not been used, where there has been a failure to pay sums which have been withheld or which should have been withheld or payments on account, where the sums withheld and not paid and payments on account passed on and not paid come to more than 50% of the basic amount of the penalty.

21 In the ruling imposing the penalty, the A.E.A.T. found that the insolvent debtor committed a very serious tax infringement, identifying in the insolvent person's conduct '*a failure to display the care which was required of a taxpayer in the fulfilment of his or her tax obligations; compliance with that duty of care would have led to the acknowledgement by the taxpayer of his tax debt within the time limit by means of the appropriate self-assessment*'.

22 In the case at issue, the insolvent debtor failed to pay withheld sums as a result of a failure to display the care required of a taxpayer in the fulfilment of his or her tax obligations, but no use of fraudulent means has been identified.

23 In those circumstances, the referring court's question is whether the scope of the concept of dishonest conduct referred to in Article 23 of the directive includes negligent or imprudent conduct of the debtor which causes the debt to be incurred?

24 If the answer to the second question is in the negative, the next question which arises for the referring court concerns the scope of the phrase '*well-defined circumstances and where such derogations are duly justified, such as where*' in Article 23(2) of the directive.

25 Do the cases set out in Article 23(2)(a) to (f) of the directive constitute a closed list of well-defined and justified circumstances or may States introduce other well-defined and justified circumstances?

26 If the answer to that [third] question is that States may introduce other well-defined and justified circumstances which deny or restrict access to discharge of debt, must the justification for the introduction of the circumstances defined by the Member State be, in every case, dishonest behaviour or bad faith?

27 Whether or not it is possible to include other circumstances which differ from those listed in Article 23(2)(a) to (f) of the directive is the basis for whether or not the national legislation may provide for penalties for very serious tax infringements.

28 If the answers to the [third and fourth] questions are that States may not introduce circumstances that differ from those referred to in Article 23(2)(a) to (f) of the directive, or that, if they introduce other, different, well-defined conduct, that conduct must be based on dishonest behaviour or bad faith on the part of the debtor, the referring court asks the fifth question concerning the compatibility of Article 487(1)(2) of the consolidated text of the Law on Insolvency, as amended by Law 16/2022. In accordance with that provision, *a debtor who, in the 10 years preceding the filing date of the application for discharge, has had a penalty imposed on him or her by a final administrative ruling for very serious tax infringements will not be entitled to be discharged from his or her debts unless he or she has settled in full his or her liability in respect of that infringement.*

29 In view of the fact that that provision does not draw any distinction in respect of the type of very serious tax infringement, it operates in any event as an automatic impediment on access to discharge, without taking into account whether or not the very serious tax infringement constitutes dishonest behaviour or bad faith on the part of the debtor. That lack of differentiation between conduct raises the question of whether a conforming interpretation of Article 23 of the directive entails the disapplication of a provision like Article 487(1)(2) of the consolidated text of the Law on Insolvency, where the very serious tax infringement is found to be based on behaviour of the debtor which is not dishonest or in bad faith.