Case C-289/23 [Corván] [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:

25 April 2023

Referring court:

Juzgado de lo Mercantil n.º 1 de Alicante (Spain)

Date of the decision to refer:

25 April 2023

Applicant:

Agencia Estatal de la Administración Tributaria

Defendant:

A

Subject matter of the main proceedings

Insolvency proceedings – Application by the insolvent debtor (defendant in this case) for discharge of unpaid liabilities – Objection by one of the creditors (applicant in this case) to the grant of such discharge – Grounds of objection: (i) bad faith on the part of the debtor in applying for discharge; and (ii) limited scope of discharge of unpaid liabilities where it affects claims governed by public law

Subject matter and legal basis of the request

Request for a preliminary ruling on interpretation – Article 267 TFEU – Compatibility of national provisions with Directive (EU) 2019/1023 – Article 23(2) and (4) of Directive 2019/1023 – Access to the entitlement to discharge of debt – Scope of the entitlement to discharge

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

Questions referred for a preliminary ruling

1. Doubts as to the interpretation of Article 23(2) of Directive (EU) 2019/1023.

1.1. Must Article 23(2) of the directive be interpreted as precluding national legislation which prevents access to discharge of debt as provided for in point 2 of Article 487(1) of the Texto refundido de la Ley Concursal (Consolidated text of the Insolvency Law; 'the TRLC'), in so far as that limitation was not included in the legislation in force prior to the transposition of the directive conferring the entitlement to discharge of debt and was introduced *ex novo* by the legislature? In particular, may the national legislature, when transposing the directive, establish more stringent restrictions on access to discharge of debt than those laid down in the previous legislation, especially where that limitation does not correspond to any of the circumstances listed in Article 23(2) of the directive?

1.2. If the Court's answer to the previous question is in the negative, must Article 23(2) of the directive be interpreted as precluding national legislation which prevents access to discharge of debt *where, in the 10 years preceding the application for a discharge, [the debtor] has been penalised by final administrative decision for very serious tax offences, for social security offences or for labour offences, or where, in the same period, a final decision to enforce secondary liability has been handed down against the debtor, unless, on the date on which the application for a discharge is made, he or she has met his or her liability in full* (point 2 of Article 487(1) of the TRLC), in so far as that ground for preventing access to discharge of debt alters the rules on the classification of insolvency claims?

1.3. If the Court's answer to the previous question is in the negative, must Article 23(2) of the directive be interpreted as precluding national legislation which prevents access to discharge of debt as provided for in point 2 of Article 487(1) of the TRLC *where ... a final decision to enforce secondary liability has been handed down against the debtor, unless, on the date on which the application for a discharge is made, he or she has met his or her liability in full*, in so far as that circumstance is not such as to establish bad faith on the part of the debtor? Is it relevant in that regard that the insolvency was not found to be fault based?

1.4. If the Court's answer to the previous question is in the negative, must Article 23(2) of the directive be interpreted as precluding national legislation which prevents access to discharge of debt as provided for in point 2 of Article 487(1) of the TRLC where

decisions on offences or on enforcement of secondary liability have been handed down or issued in the 10 years preceding the application for discharge, without taking account of the date of the event giving rise to liability or the possible delay in the adoption of the decision to enforce secondary liability?

1.5. If the Court's answer to the previous questions is in the negative, must Article 23(2) of the directive be interpreted as precluding national legislation which prevents access to discharge of debt as provided for in point 2 of Article 487(1) of the TRLC in so far as the national legislature did not state proper reasons for that limitation?

2. Doubts as to the interpretation of Article 23(4) of Directive 2019/[1023].

2.1. Must Article 23(4) of the directive be interpreted as precluding a provision such as that laid down in point 2 of Article 487(1) of the TRLC establishing grounds preventing access to discharge of debt which are not included in the list set out in Article 23(4)? In particular, must the list of grounds in Article 23(4) be interpreted as a *numerus clausus* or, by contrast, is it a *numerus apertus*?

2.2. In so far as the list is a *numerus apertus* and it is open to the national legislature to establish exceptions other than those provided for in the directive, does Article 23(4) of the directive preclude national legislation which lays down a general rule that claims governed by public law are excluded from discharge except in very limited circumstances and for very limited amounts, irrespective of the nature and circumstances of specific debts governed by public law? In particular, is it relevant in the present case that the previous legislation, as interpreted by the Tribunal Supremo (Supreme Court, Spain) in its case-law, allowed the discharge of public claims to some extent and that the transposing provisions restricted the scope of discharge?

2.3. If the Court's answer to the previous question is in the negative, must Article 23(4) of the directive be interpreted as precluding a national provision such as that laid down in point 5 of Article 489(1) of the TRLC which lays down a general rule that public claims are excluded from discharge (subject to certain exceptions considered in the next question), in so far as it treats public creditors more favourably than other creditors?

2.4. In particular, and in connection with the previous question, is it relevant that the legislation makes some provision for the discharge of public claims, but only for certain debts and within

specific limits which are unrelated to the actual amount of the debt?

2.5. Finally, must Article 23(4) of Directive (EU) 2019/[1023] be interpreted as precluding a provision such as that laid down in point 5 of Article 489(1) of the TRLC, in so far as discharge (as envisaged in that article) is justified by the *particular importance of meeting those claims in achieving a fair and mutually supportive society founded on the rule of law*, and refers generally to public claims without taking account of the specific nature of the claim? In particular, is it relevant in that regard that the generic justification is used for the debts listed in Article 23(4) of the directive and for circumstances or debts which do not appear in those lists?

Provisions of European Union law and case-law relied on

1. Provisions of primary legislation

1.1. Treaty on European Union: first paragraph of Article 3(3)

1.2. Treaty on the Functioning of the European Union: Article 26

1.3. Charter of Fundamental Rights of the European Union: Articles 15 (Freedom to choose an occupation and right to engage in work), 16 (Freedom to conduct a business) and 47 (Right to an effective remedy and to a fair trial)

2. Provisions of secondary legislation

2.1. 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): Articles 21(1) and 23(2) and (4)

3. Case-law

3.1. Judgment of the Court (Seventh Chamber) of 16 March 2017, *Agenzia delle Entrate* v *Marco Identi* (C-493/15, EU:C:2017:219)

Provisions of national law and case-law relied on

4. Provisions of national law

4.1. Explanatory memorandum to Ley 16/2022, de 5 de septiembre, de reforma del texto refundido de la Ley Concursal (Law 16/2022 of 5 September 2022 amending the consolidated text of the Insolvency Law) [this Law transposed Directive 2019/1023 into Spanish law]

4.2. Real Decreto-Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Royal Legislative Decree 1/2020 of 5 May 2020 approving the consolidated text of the Insolvency Law), as amended by Law 16/2022 of 5 September 2022 ('the TRLC'): Article 487(1), points 1 to 6, and (2), Article 489(1), points 1 to 8, and (3), and Article 493(1), point 3, and (2)

4.3. Ley 58/2003, de 17 de diciembre, General Tributaria (General Taxation Law 58/2003 of 17 December 2003): Article 43(1)(a)

4.4. Código Civil (Civil Code): Article 7(1)

5. National case-law

5.1. Judgment of the Tribunal Supremo (Supreme Court, Spain), Plenary Assembly of the Civil Chamber, Section 991, of 2 July 2019 (ES:TS:2019:2253)

5.2. Judgment of the Supreme Court, Civil Chamber, Section 1, of 1 December 2022 (ES:TS:2022:4482)

5.3. Judgment of the Supreme Court, Civil Chamber, Section 1, of 10 December 2020 (ES:TS:2020:4069)

5.4. Judgment of the Supreme Court, Administrative Chamber, Section 2, of 10 July 2019 (ES:TS:2019:2694)

5.5. Judgments of the Supreme Court, Administrative Chamber, Section 2, of 18 November 2015 (ES:TS:2015:4973) and of 9 April 2015 (ES:TS:2015:1491)

5.6. Judgments of several Audiencias Provinciales (Provincial Courts, Spain) (delivered on various dates)

Succinct presentation of the facts and procedure in the main proceedings

1 On 7 July 2022, the debtor, Mr A (the defendant in the present case), petitioned for insolvency, following his earlier attempts to reach an out-of-court payment agreement. When the insolvency petition was filed, the debtor's notified debt stood at EUR 537 787.69.

2 On 26 July 2022, the referring court issued an insolvency order and terminated the insolvency proceedings on the ground that the assets available to creditors were insufficient.

3 On 28 September 2022, the debtor applied for discharge of his unpaid liabilities, seeking full discharge of the liabilities he had been unable to pay in the insolvency proceedings.

4 On 14 October 2022, the Abogacía del Estado (State Counsel, Spain), acting on behalf of the Agencia Estatal de la Administración Tributaria (State Tax Agency, Spain; 'the AEAT'), the applicant in the present case, objected to the discharge of unpaid liabilities on the ground that a number of claims governed by public law remained outstanding. Specifically, the AEAT states that, in addition to the notified claims, Mr A has debts in respect of public claims in the amount of EUR 127 170.56, of which EUR 36 108.97 correspond to preferred claims, EUR 36 108.97 to ordinary claims, and EUR 75 952.50 to subordinate claims. In parallel, the AEAT asserts that EUR 114 408.09 of the EUR 127 170.56 owed correspond to a final decision to enforce secondary liability of 13 January 2017, which was therefore adopted in the 10 years preceding the application for discharge of unpaid liabilities. The debtor also has other debts governed by public law that are not dischargeable under the general rule on non-dischargeability laid down in insolvency legislation, as amended following the transposition of Directive 2019/1023 by Law 16/2022 of 5 September 2022.

5 The AEAT's objections were admitted for consideration by the referring court on 19 October 2022.

6 On 3 November 2022, the insolvent debtor objected to the AEAT's application to have the court refuse him access to discharge.

The essential arguments of the parties in the main proceedings

7 The AEAT asks the referring court (first head of claim) to refuse the insolvent debtor, Mr A, access to the discharge he seeks on the ground that a final decision to enforce secondary tax liability was handed down against him on 13 January 2017, that is to say, in the 10 years preceding the application for discharge of unpaid liabilities, from which it follows that the debtor did not act in good faith when he applied for discharge. The final decision to enforce secondary liability handed down against Mr A came about as a result of the following events. Mr A was formerly the director of a business entity by the name of INVERSIONES MONIKAPITAL, S. L. During his directorship, the company failed (in particular, in 2010) to file a number of VAT returns as it was required to do. Two years later (in 2012), the AEAT issued INVERSIONES MONIKAPITAL, S. L. with a tax assessment with a view to having the company pay the sums owed to it. That tax assessment was not challenged. Five years later, specifically on 13 January 2017, the AEAT, pursuant to Article 43(1)(a) of General Taxation Law 58/2003 of 17 December 2003, adopted a decision to enforce secondary tax liability against

Mr A in his capacity as person with secondary liability for the tax debts and penalties payable by the company of which he had been director. That liability amounts to EUR 114 408.09. According to the AEAT, the decision to enforce secondary tax liability is final and therefore prevents access to discharge.

8 The AEAT also requests (second head of claim) that other debts governed by public law owed by Mr A (such as traffic fines) be declared non-dischargeable, except in so far as the limits set out in point 5 of Article 489(1) of the TRLC apply.

9 Those heads of claim are raised under point 2 of Article 487(1) of the TRLC (limits on access to discharge due to lack of good faith on the part of the debtor) and point 5 of Article 489(1) of the TRLC (limits on the scope of discharge), as amended by Law 16/2022 of 5 September 2022 amending the consolidated text of the Insolvency Law, which is the legal instrument by which Spain transposed Directive 2019/1023 into domestic law.

10 The insolvent debtor disputes the heads of claim raised by the AEAT. In general terms, relying on Directive 2019/1023, he argues that: (i) the purpose of that directive is to secure the full discharge of debt; (ii) the directive says nothing specific about claims governed by public law, but insists that Member States should have systems that facilitate full discharge without distinguishing between types of creditors; (iii) while it is open to Member States, under Article 23(2) of the directive, to restrict discharge in respect of certain debts, that discretionary power is regulated in great detail and as a *numerus clausus* (and the list of possible restrictions does not include claims governed by public law, although it does include, for example, maintenance debts); and (iv) finally, the protection afforded to claims governed by public law by Spanish legislation is at variance with the objective pursued by EU legislation itself.

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

ONE General background to the request for a preliminary ruling. Development in Spanish law of the entitlement to full discharge of unpaid liabilities. Similarities and differences between the questions referred for a preliminary ruling in the present case and those referred in Cases C-687/22 and C-111/23

11 As general background to this request for a preliminary ruling, the referring court points out that, in the light of Directive 2019/1023, the present case raises serious doubts as to the compatibility with that directive of the national legislation which transposed it into Spanish law. Accordingly, several questions are referred to the Court of Justice of the European Union for a preliminary ruling, which the referring court divides into two groups:

(a) questions on access to the entitlement to full discharge, in relation to the correct interpretation of Article 23(2) of Directive 2019/1023; and

(b) questions on the scope of full discharge, in relation to the correct interpretation of Article 23(4) of Directive 2019/1023.

12 The common thread is the same in both cases: the rules on public claims (or claims governed by public law) which the Spanish legislature inserted into Royal Legislative Decree 1/2020 of 5 May 2020 by means of Law 16/2022 of 5 September 2022 amending the consolidated text of the Insolvency Law, which transposed Directive 2019/1023.

13 According to the referring court, there are two different instances in which Law 16/2022 conferred enhanced protection – which is unlikely to be compatible with Directive 2019/1023 – on claims governed by public law: (i) in the transposition of Article 23(2) of Directive 2019/1023 carried out by point 2 of Article 487(1) of the TRLC, in so far as certain claims governed by public law are used to delimit in legislation the legal concept of good faith; and (ii) in the transposition of Article 23(4) of Directive 2019/1023 carried out by point 5 of Article 489(1) of the TRLC, in so far as, in general terms, public claims are not dischargeable.

14 There follows a brief overview of the development in Spanish law of the rules governing the entitlement to full discharge of unpaid liabilities as regards debts governed by public law. The entitlement to full discharge of debt (known as 'discharge of unpaid liabilities') was introduced into Spanish law in 2013 by means of an amendment to Article 178 of the Ley Concursal (Insolvency Law; 'the LC 22/2003'), in force at that time. The rules on discharge were further developed in 2015 by means of additional changes to the LC 22/2003 in the form of a new Article 178 bis. The provisions contained in that new article were interpreted in different ways by the Spanish courts. Discussions essentially concerned the scope of discharge as regards claims governed by public law, which led the Plenary Assembly of the Civil Chamber of the Supreme Court to issue a landmark judgment on 2 July 2019, ROJ: STS 2253/2019 – ES:TS:2019:2253. Under Spanish law, that judgment 'set a legal precedent' in the strict sense and therefore became a source of law. In that judgment, the Supreme Court held that, if the discharge of debt was obtained by means of immediate discharge (as opposed to discharge subject to a payment plan), a large proportion of public claims would be dischargeable. In 2020, the Government – by way of the TRLC – introduced new provisions on the entitlement to discharge of debt which established more favourable rules for claims governed by public law than those resulting from the abovementioned judgment of the Supreme Court. A number of courts and tribunals took the view that the legislative instrument chosen by the Government (a royal legislative decree, which can be used only to recast pre-existing rules, not enact new ones) infringed the principle of ultra vires and decided not to apply those new rules and to follow the rules enshrined in the case-law of the Supreme Court. Finally, in 2022, Law 16/2022 transposed Directive 2019/1023 and the TRLC was amended in consequence. In general terms, those

latest changes conferred enhanced or 'super' protection on claims governed by public law, which, according to the referring court, might not be compatible with Directive 2019/1023, in particular Article 23(2) and (4) thereof.

15 There are also similarities and differences between the questions referred for a preliminary ruling in the present case and those in Cases C-687/22 *(Agencia Estatal de la Administración Tributaria)* and C-111/23 *(Agencia Estatal de la Administración Tributaria)* submitted by the Audiencia Provincial de Alicante (Provincial Court, Alicante, Spain). Some of the questions raised in those two requests for a preliminary ruling overlap with the questions referred in the present case. The answers in those cases may, therefore, influence the answers to be given here. However, unlike Cases C-687/22 and C-111/23, the doubts expressed in the present case as to the interpretation of EU law are directly concerned with the legislation transposing Directive 2019/1023, namely Law 16/2022 of 5 September 2022 amending the consolidated text of the Insolvency Law, which entered into force on 26 September 2022. By contrast, in Cases C-687/22 and C-111/23, the Court of Justice of the European Union is asked about the interpretation of EU law in connection with the Spanish legislation in force prior to the transposition of Directive 2019/1023 which was introduced before expiry of the transposition deadline. Although that previous legislation does not transpose Directive 2019/1023, it must be pointed out that it might be contrary to EU law on the ground that it seriously compromises the result prescribed by that directive (see, inter alia, judgment of the Court of 18 December 1997, *Inter-Environnement Wallonie ASBL* v *Région wallonne* (C-129/96, EU:C:1997:628, paragraph 50).

TWO Doubts as to the interpretation of Article 23(2) of Directive 2019/1023

16 Question 1.1. The referring court draws attention to the paradox that the Spanish legislature's transposition of Directive 2019/1023 (by means of Law 16/2022) resulted in more restrictive rules on access to discharge of debt than those in place prior to transposition. Specifically, Article 487 of the TRLC as currently worded lays down limitations or exceptions to access to full discharge of unpaid liabilities. One of those exceptions – which is set out in point 2 of Article 487(1) and is triggered where, in the 10 years preceding the application for discharge, … a final decision to enforce secondary liability has been handed down against the debtor – was invoked by the AEAT in the present dispute to object to Mr A's application for discharge of his unpaid liabilities.

17 In the referring court's view, that exception is unrelated to the purely illustrative list of exceptions to access to discharge set out in Article 23(2) of Directive 2019/1023. The purely illustrative nature of the list imposes special duties of oversight to ensure that Member States do not negate the entitlement to full discharge of debt by overly circumscribing the concept of good faith. In addition, the exception at issue was introduced *ex novo* into Spanish legislation as it did not appear in pre-transposition versions and involves introducing a new requirement

circumscribing how ‘good faith on the part of the debtor’ (which is a prerequisite for entitlement to discharge of unpaid liabilities) should be construed.

18 According to the referring court, the entitlement to full discharge of debt has its origins in EU law and national legislation cannot undermine the essence of that entitlement. It must also be interpreted in the light of Articles 15 (right to engage in work) and 16 (freedom to conduct a business) of the Charter of Fundamental Rights of the European Union, as without access to full debt forgiveness, over-indebted traders will not be able to resume their business. Ultimately, the entitlement to full discharge of debt is key to ensuring that markets are dynamic and competitive, which is of particular relevance to the single market.

19 Question 1.2. This question is justified in so far as the rule introduced in point 2 of Article 487(1) of the TRLC – under which a debtor may not obtain discharge of his or her unpaid liabilities if, in the 10 years preceding the application for discharge, he or she has been penalised by final administrative decision for very serious tax offences, for social security offences or for labour offences, or if, in the same period, a final decision to enforce secondary liability has been handed down against the debtor, unless, on the date on which the application for discharge is made, he or she has met his or her liability in full – ostensibly seeks to afford greater protection to public claims than the protection they enjoy in insolvency proceedings, thus covertly altering the ranking of insolvency claims.

20 That wording creates a clear incentive: an over-indebted trader who has committed a serious or very serious tax offence or a social security or labour offence (irrespective of the seriousness), or who has been the subject of a decision to enforce secondary liability, will in all likelihood choose to meet his or her attendant liability before applying for discharge, as otherwise he or she will be prevented from accessing the entitlement to discharge in respect of any other liability. The same effect will be achieved even if an insolvency order has already been made. In short, the referring court considers that the wording of point 2 of Article 487(1) of the TRLC is not intended to identify dishonest debtors but rather to oblige traders to meet claims governed by public law which, in insolvency proceedings, would be unlikely to be met. Moreover, that wording gives rise to negative externalities in market terms, since debtors will sooner pay debts governed by public law than pay other preferred or ordinary creditors, such as their suppliers.

21 Question 1.3. This question is based on the nature and characteristics of the enforcement of secondary tax liability. The referring court does not question the sound basis of that mechanism (governed by Articles 41, 42 and 43 of the General Taxation Law), but does make the following observations: (i) the enforcement of secondary tax liability pursues a clear revenue-raising aim and takes account of the economic capacity not of the secondary obligor but of a third party, the principal obligor (here, INVERSIONES MONIKAPITAL, S. L.), which is why the rationale for secondary tax liability cannot be a generic ‘duty of solidarity’ in supporting public spending; (ii) the person with secondary liability against whom

liability is enforced fulfils the function of personal guarantor of the tax claim; (iii) negligence alone on the part of the company director is sufficient for a decision to enforce secondary liability to be taken, without it being necessary to show malicious or fraudulent intent; (iv) conduct that is merely negligent can hardly be considered to be equivalent to corporate bad faith on which Article 23(2) of Directive 2019/1023 is based; and (v) under Spanish law, an insolvency order must have been made before a debtor can obtain access to discharge and it is common ground that the insolvency of Mr A was not found to be fault based.

22 Question 1.4. Under point 2 of Article 487(1) of the TRLC, the period during which it is not possible to obtain discharge of unpaid liabilities is set at 10 years. That period runs from the date of imposition of the penalty (in respect of tax, social security or labour offences) or the date on which the final decision to enforce secondary liability is taken. It is clear that, in calculating that period, no account is taken of when the event giving rise to the penalty occurred (being the date of commission of the offence) or when the event giving rise to the enforcement decision occurred (being the date on which the debt was incurred or acknowledged). The court does not consider it reasonable that the period of time during which the debtor may be found to have acted in bad faith should be so long. In its view, that period is wholly disproportionate. Moreover, the length of time during which the debtor will not be able to access full discharge of his or her debts depends on a number of factors (including the authorities' efficiency in imposing penalties or taking decisions), which are not germane to the debtor's conduct on the market. In addition, by establishing such long periods during which the debtor is unable to obtain discharge of his or her debts, the debtor is likely to resort to operating in the underground economy. Another result of that national legislation is that it gives debtors more incentive to meet their attendant liability (penalties or enforcement decisions) as soon as possible, because, if they do not do so, they will be prevented for a much longer period from accessing the entitlement to discharge of any other liabilities. Once again, that places claims governed by public law on a much stronger footing than other claims.

23 Question 1.5. Article 23(2) of Directive 2019/1023 expressly states that any limits on or derogations from Articles 20 to 22 thereof (concerning access to full discharge of debt) must be 'duly justified'. The referring court is of the view that the explanatory memorandum to Law 16/2022 – being the law which resulted in the current wording of the articles at issue of the TRLC – does not appear to state sufficient reasons for the limits specifically laid down in point 2 of Article 487(1) of the TRLC. As a consequence of recognising the entitlement to full discharge in Article 20 of the directive, Article 23(2) thereof imposes a special obligation to state reasons for the exclusions established by the national legislature, under which reasons must be given for each specific exclusion; a purely generic statement of reasons is not enough. That is the only way to ensure that the national legislature has observed the Union concept of good faith. A specific statement of reasons is all the more necessary in systems such as the Spanish system, which has opted for a statute-based (rather than assessment-based) system of good faith that almost entirely limits the discretion of the courts. Moreover, a statute-based

system of good faith risks consolidating the pursuit of aims which differ from and conflict with recognition of the entitlement to full discharge. That is arguably even clearer when access to the entitlement to discharge is dependent on there being no prior final decision to enforce secondary liability. It has already been stated that this is an *ex novo* ground in Spanish law, not envisaged in the list of examples set out in Article 23(2) of Directive 2019/1023, for which it is not necessary to show malicious or fraudulent intent, but merely a 'dereliction of duty'. Does that correspond to the existence of bad faith, which is what that directive requires?

THREE Doubts as to the interpretation of Article 23(4) of Directive 2019/1023

24 Question 2.1. This question is very closely related to the questions submitted in Cases C-687/22 and C-111/23. As indicated above, the questions in those cases refer to the legislation in force prior to the transposition of Directive 2019/1023. After transposition and given that point 5 of Article 489(1) of the TRLC extended the categories of debt excluded from discharge, the referring court considers it necessary to resubmit this question to the Court of Justice of the European Union in the present case.

25 Question 2.2. Point 5 of Article 489(1) of the TRLC establishes the general rule that claims governed by public law are excluded from discharge. It is true that the list of exceptions is a short one whereas the maximum amounts eligible for discharge are very low. The referring court considers, however, that public claims are not claims which Directive 2019/1023 treats as non-dischargeable. Moreover, the exclusion of public claims from discharge was not the general rule prior to the transposition of the directive in Spain. The Supreme Court, taking the lead from the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency and from the preamble to Royal Decree-Law 1/2015 of 27 February 2015 on a second chance mechanism, reduction in financial burdens and other social measures, considered that the position which was most attuned to EU law was one favourable to the discharge of public claims or, at least, to not conferring blanket protection on them. As indicated above, the subsequent development of Spanish law on the matter (particularly after the transposition of the directive) took the opposite direction. The referring court has serious doubts as to the compatibility with EU law of a rule providing for the general exclusion of public claims without taking account of the specific nature of the debt or the proportion of the liabilities as a whole which it represents.

26 Question 2.3. The questions concerning possible incompatibility with Directive 2019/1023 take on increased importance if we add to the previous doubts (question 2.2.) the fact that the Spanish transposing legislation provides for the exclusion of claims governed by public law in respect of all types of public debt, without taking account of their insolvency classification. According to the referring court, point 5 of Article 489(1) of the TRLC, as currently worded, is not consistent with the general system of insolvency, gives rise to unjustified

differences in treatment, and favours ordinary and subordinate claims over other claims of equal or higher rank for no reason. That undermines the economic fabric's competitiveness and will result in unacceptable competitive differences between Member States. The referring court takes the view that the State should be treated in the same way as other creditors in order to support the insolvency system. There are no compelling reasons for considering that, if the law requires ordinary creditors to waive their legitimate claims, the State should not have to abide by the same rules. That conclusion is not called into question by the fact that some claims governed by public law are excluded from discharge (as in the case of very serious administrative penalties, in respect of which account is taken of the particular nature of the debt (punitive) and its gravity (very serious), which may reveal misconduct on the part of the debtor). What does not seem reasonable, however, is a general rule that public claims are excluded from discharge.

27 Question 2.4. Reference was made above (question 2.2.) to the fact that the general rule that public claims are excluded from discharge is subject to certain exceptions, but only for a short list of claims governed by public law and for limited amounts. For the referring court, those limited amounts appear to be arbitrary. The limits are unrelated to the total amount of the debt and are not justified in the transposing provisions. No rule of proportionality is complied with. Those amounts also do not ensure that the debtor is afforded a second chance. In the referring court's view, the foregoing negates the entitlement to full discharge of debt.

28 Question 2.5. Returning to the justification for the limits on and exclusions from the entitlement to full discharge, the referring court recalls that the only justification is to be found in the explanatory memorandum to the transposing legislation: Law 16/2022. However, that justification is concerned only with the exclusions provided for in Article 489 of the TRLC, not the limits set out in Article 487 thereof. The referring court provides an overview of the main features of the justification contained in the abovementioned explanatory memorandum. (a) The justification cites general principles (the particular importance of meeting certain debts in achieving a fair and mutually supportive society founded on the rule of law, such as maintenance debts, debts governed by public law, debts arising from criminal offences and debts arising from tortious liability). (b) The exceptions to discharge are set out in a purely illustrative list, thus providing a blanket justification for all scenarios without taking account of the different nature of each of them. (c) Public claims are intermingled with maintenance debts, debts arising from criminal offences and debts arising from tortious liability. Those three categories are expressly listed in Article 23(4) of Directive 2019/1023, but debts or claims governed by public law are not.

29 In the light of the foregoing, the referring court asks whether: (1) it is open to the national legislature to provide a blanket justification rather than a case-by-case justification for each exemption from discharge; (2) a type of debt not listed in Article 23(4) of Directive 2019/1023, such as debts governed by public law, requires a specific statement of reasons; and (3) reliance on the particular

importance of meeting certain debts in achieving a fair and mutually supportive society founded on the rule of law is sufficient justification for the purposes of Article 23(4) of the directive.