



# Reports of Cases

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 2 June 2022<sup>1</sup>

**Case C-1/21**

**MC**

**v**

**Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Veliko Tarnovo pri  
Tsentralno upravljenie na Natsionalnata agentsia za prihodite**

(Request for a preliminary ruling from the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria))

(Request for a preliminary ruling – Tax law – Value added tax (VAT) – Directive 2006/112/EC – National legislation which provides for the joint and several liability of a company's executive board where the latter, acting in bad faith, deprived the company of assets, with the result that it could not pay its tax debts (including VAT debts) – Liability also for the interest payable by the company – Scope of EU law – Principle of proportionality)

## I. Introduction

1. This request for a preliminary ruling once again raises a well-known competence issue in a new guise. Does the joint and several liability of a natural person (who is not subject to value added tax (VAT) himself or herself) for tax debts and interest owed by another person, as provided for in general tax law, constitute an implementation of EU law, in respect of which the VAT Directive or other EU law might contain requirements? Or is the joint and several liability of a person who has causally contributed to the fact that another person could not meet his or her tax payment obligation in due time a purely national, procedural regime for safeguarding tax revenue, which is not affected by EU law?

2. This is somewhat reminiscent of the situation in the much-discussed<sup>2</sup> decision in *Åkerberg Fransson*,<sup>3</sup> in which the criminal conviction of a taxable person for VAT evasion was assessed as constituting an implementation of EU law. However, the question to be ruled on in the present case goes beyond that.

<sup>1</sup> Original language: German.

<sup>2</sup> See, for example, the statements of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), judgment of 24 April 2013, *Antiterrordatei* (1 BVR 1215/07, BVerfGE 133, 277, ECLI:DE:BVerfG:2013:rs20130424.1bvr121507, paragraph 91). Strong criticism can also be found in Widmann, W., 'Geltung der EU-Grundrechte-Charta bei der Sanktion mehrwertsteuerlicher Verfehlungen', *Umsatzsteuer-Rundschau*, 2014, p. 5 (pp. 6 and 7).

<sup>3</sup> Judgment of 26 February 2013 (C-617/10, EU:C:2013:105).

3. That is because it concerns not the liability of a taxable person within the meaning of the VAT Directive, but the liability of a person not taxable for VAT purposes who, moreover, has not evaded VAT, but, rather, as an executive director, has apparently inappropriately increased his salary at the company and thereby deprived that company of assets. As a result, the company has since been unable to pay its debts (including VAT debts and interest thereon) in full or on time.

4. Does the general joint and several liability of an executive body for conduct causing harm to the company (a kind of breach of trust) come within the scope of the VAT Directive and therefore within that of EU law for the sole reason that, as a result of that conduct, the company was unable to pay, inter alia, its VAT debts and the interest thereon on time or in full? In other words, where do the boundaries of the scope of EU law lie in cases with a merely indirect link with the collection of VAT?

## II. Legal framework

### A. *European Union law*

5. The framework of the case in EU law is formed by Directive 2006/112/EC on the common system of value added tax<sup>4</sup> (‘the VAT Directive’), the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests, signed in Brussels on 26 July 1995 (‘the PFI Convention’),<sup>5</sup> and Article 325 TFEU.

#### 1. *Primary law*

6. According to Article 325(1) TFEU, ‘the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union’s institutions, bodies, offices and agencies’.

7. According to Article 325(2) TFEU, Member States are to take ‘the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests’.

#### 2. *The PFI Convention*

8. Article 1 of the PFI Convention, entitled ‘General provisions’, states in paragraph 1:

‘For the purposes of this Convention, fraud affecting the [Union’s] financial interests shall consist of:

...

(b) in respect of revenue, any intentional act or omission relating to:

<sup>4</sup> Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1), in the version applicable in the year at issue (2014).

<sup>5</sup> OJ 1995 C 316, p. 48 et seq.

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the [Union] or budgets managed by, or on behalf of, the [Union],
- non-disclosure of information in violation of a specific obligation, with the same effect,
- misapplication of a legally obtained benefit, with the same effect.’

9. Article 2 of the PFI Convention, entitled ‘Penalties’, provides in paragraph 1:

‘Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1(1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding [EUR] 50 000.’

10. Article 9 of that convention, entitled ‘Internal provisions’, states:

‘No provision in this Convention shall prevent Member States from adopting internal legal provisions which go beyond the obligations deriving from this Convention.’

### 3. *The VAT Directive*

11. Article 205 of the VAT Directive contains the following provision:

‘In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.’

12. The abovementioned articles in Title XI (Chapter 1) regulate the payment obligation or tax liability of ‘taxable persons and certain non-taxable persons’. Those articles do not refer to executive directors of companies or the case where an inappropriate salary is paid.

13. Article 273 of the VAT Directive provides:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3.’

## ***B. Bulgarian law***

14. The Danachno-osiguriteln protsesualen kodeks (Tax and Social Security Code of Procedure; ‘the DOPK’) provides as follows:

15. Article 14 of the DOPK concerns the debtor:

‘Debtors are natural and legal persons who:

1. are obliged to pay taxes or statutory social security contributions; ...’

16. Article 19(2) of the DOPK regulates the liability of an executive body for a reduction in the assets of the company and reads as follows:

‘A manager or member of an executive body who, in bad faith, makes payments in kind or in cash from the assets of a legal entity which is a debtor pursuant to Article 14(1) and (2) constituting a hidden distribution of profits or dividends, or transfers assets of the debtor free of charge or at prices significantly lower than market prices, with the result that the assets of the debtor are reduced and therefore taxes or statutory social security contributions have not been paid, shall be liable for the debt up to the amount of the payments made or, respectively, of the reduction in the assets.’

17. Article 20 of the DOPK concerns the order in which enforcement takes place, and provides as follows:

‘In the cases provided for in Article 19, protective measures and enforcement shall be directed first against the assets of the debtor for whose tax or social security debt the liability is incurred.’

18. Article 21(3) of the DOPK contains statements regarding the ancillary nature of the secondary liability in relation to the principal debt, and reads as follows:

‘The liability of third parties shall cease when the debt for which that liability was established by a final act is extinguished. In this case, amounts paid shall be reimbursed in accordance with the procedure set out in Chapter 16, Section 1.’

19. The Zakon za danaka varhu dobavenata stoynost (Law on value added tax) defines ‘taxable person’ in Article 3(1):

“‘Taxable person’ means any person who carries on an independent economic activity, whatever the purposes and results of that activity.’

20. Article 89(1) of the Law on value added tax governs the time at which the tax debt must be paid:

‘Where there is a result for the period, in the form of tax to be paid, the registered person shall be obliged to pay the tax to the State budget by paying it into the account of the competent Teritorialna direktsia na Natsionalnata agentsia za prihodite [(Regional Directorate of the National Revenue Agency)] within the time limit for filing the VAT return for that tax period.’

21. The Zakon za lihvite varhu danatsi, taksi i drugi podobni darzhavni vzemania (Law on interest charged on taxes, fees and other similar receivables governed by public law) provides for an obligation to apply interest, in Article 1(1):

‘The recovery of taxes, fees, deductions from profits, contributions to the budget and other similar receivables governed by public law which have not been paid within the period prescribed for voluntary payment, have not been withheld or have been withheld but not paid on time shall be subject to interest at the statutory rate.’

22. According to the referring court, Article 19(2) of the DOPK, in conjunction with Article 1 of the Law on interest charged on taxes, fees and other similar receivables governed by public law, is not interpreted uniformly in the Bulgarian case-law. In some cases, the liability of the executive body which acted in bad faith should also include interest, while, in other cases, only the principal claim should.

### **III. The dispute in the main proceedings**

23. The subject matter of the proceedings before the national court is the action brought by MC (‘the applicant’) challenging the lawfulness of a notice establishing liability. The notice established the applicant’s personal liability for third-party debts for the December 2014 tax period. This secondary liability is apparently based on outstanding VAT debts (plus interest) owed by another taxable entity, namely the company ZZ AD (‘the company’), of which the applicant was an executive director in the relevant period.

24. Enforcement proceedings were initiated with a view to recovering the amounts owed by the company. Requests for voluntary payment were sent to the company on several occasions, but such payment was never made. Therefore, the company’s debt to the State, which includes the abovementioned interest on VAT not paid in due time, was classified as difficult to enforce by the enforcement officer.

25. The claims brought against the applicant are based on the fact that he increased his remuneration several times without being able to produce valid documentary evidence for that increase. Moreover, the manner in which the increased remuneration was paid did not comply with the statutory requirements. The amounts were transferred to the lawyer acting on behalf of the company, who in turn transferred them to the account of the applicant’s wife, to which the applicant also had access.

26. The applicant contests the claim. His main argument is that there is no causal link between the remuneration received by him in his capacity as the executive body of the taxable person and the lack of funds to settle the claims governed by public law. The tax administration argues, in essence, that, as the executive body of the taxable person (within the meaning of the VAT Directive), the applicant has acted in bad faith because he received, during the relevant tax period, remuneration the amount of which has not been shown to have been duly determined.

27. For the purposes of the request, the referring court assumes that the applicant ordered – or at least had knowledge of – the transfer by a third party of a sum from the company’s assets to a natural person associated with him and, in so doing, he acted in bad faith under national law.

Due to the reduction in the company’s assets by the amount of that sum, the interest due on VAT, accrued as of December 2014, was not paid. In the light of the question referred for a preliminary ruling, I assume that the VAT debts were also not paid for that reason.

28. Moreover, the referring court states that liability for unpaid tax under Article 19(2) of the DOPK is joint and several in nature, since, although it arises after the taxable person’s tax debt has arisen, it continues to exist until the tax debt has been extinguished. In that respect, that liability is in no way based on fraudulent or abusive acts in the context of the taxable person’s (that is to say, the company’s) independent economic activity.

#### **IV. The request for a preliminary ruling and the procedure before the Court**

29. By order of 18 November 2020, the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria), before which the action against the notice establishing liability was brought, referred the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is Article 9 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests, read in conjunction with Article 273 of [Directive 2006/112], to be interpreted as meaning that it does not preclude, in the harmonised field of value added tax, a national legal instrument such as that provided for in Article 19(2) of the DOPK, the application of which has the effect of triggering *post factum* the joint and several liability of a non-taxable natural person who is not liable for payment of VAT but whose conduct in bad faith led to non-payment of VAT by the taxable legal person which is liable for that payment?
- (2) Do the interpretation of those provisions and the application of the principle of proportionality preclude the national legal instrument provided for in Article 19(2) of the DOPK also in respect of interest on VAT not paid in due time by the taxable person liable for that payment?
- (3) Is the national legal instrument provided for in Article 19(2) of the DOPK contrary to the principle of proportionality in a case where the late payment of VAT, which led to interest being charged on the VAT debt, is attributable not to the conduct of the non-taxable natural person, but to the conduct of another person or to the manifestation of objective circumstances?’

30. The applicant, the Republic of Bulgaria, the Kingdom of Spain and the European Commission submitted written observations in the proceedings before the Court. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court did not consider it necessary to hold a hearing.

#### **V. Legal assessment**

31. The referring court’s questions all seek to ascertain whether EU law precludes national legislation which provides for the joint and several liability of a natural person (a non-taxable person) where his or her conduct as an executive body of a legal person has led to that legal person not being able to pay its tax debts, including VAT debts, in due time or in full. Those questions presuppose that such liability of a non-taxable person comes within the scope of EU law.

## A. Jurisdiction of the Court

32. In its observations, the Republic of Bulgaria expresses doubts in this regard. In the context of a request for a preliminary ruling under Article 267 TFEU, the Court may interpret EU law only within the limits of the powers conferred upon it.<sup>6</sup> Where, therefore, a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it.<sup>7</sup>

33. The Court therefore has jurisdiction to answer the questions referred only if the liability which was established in respect of the applicant in accordance with Article 19(2) of the DOPK, and which is the subject matter of the main proceedings, arises from implementation of EU law.

34. The present case does not involve implementation of EU law in the form of transposition of the VAT Directive. National law provides for general accessory liability where an executive body of a company deprives the latter of assets with the result that the company is no longer able to pay its tax debts on time. That is detached from both the type of tax for which liability is incurred and the fact of whether the liable party is a taxable person; it is therefore independent of the VAT Directive.

35. However, as the Court has already held, there is also implementation of EU law where the application of national law is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.<sup>8</sup>

36. It must therefore be examined whether the applicant’s liability under Article 19(2) of the DOPK is intended to implement such an obligation under EU law. It may arise from Article 325 TFEU (see Section 1), the PFI Convention (see Section 2), Article 205 (see Section 3) or Article 273 (See section 4) of the VAT Directive.

### 1. Article 325 TFEU

37. In accordance with Article 325 TFEU, Member States are required to counter illegal activities affecting the financial interests of the Union through effective deterrent measures. In particular, they are required to take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.<sup>9</sup> Member States are required to ensure effective collection of the Union’s own resources. On that basis, they are obliged to collect sums corresponding to the own resources which, because of fraud, have been withheld from the Union budget.<sup>10</sup>

<sup>6</sup> Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 77), and of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 40).

<sup>7</sup> Judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 22); see also order of 12 July 2012, *Curra and Others* (C-466/11, EU:C:2012:465, paragraph 26).

<sup>8</sup> Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 28).

<sup>9</sup> Judgments of 8 March 2022, *Commission v United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 208 et seq.); of 14 October 2021, *Ministerul Lucrărilor Publice, Dezvoltării și Administrației* (C-360/20, EU:C:2021:856, paragraph 36); and of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 26).

<sup>10</sup> Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 32); see, to that effect, judgment of 7 April 2016, *Degano Trasporti* (C-546/14, EU:C:2016:206, paragraph 21).

38. In the context of customs law, the Court<sup>11</sup> extended the scope of Article 325 TFEU to the obligation of Member States to ‘adopt the measures necessary to guarantee the effective and comprehensive collection of customs duties’. However, that decision concerned the failure to carry out effective customs controls despite a known customs fraud scheme. There is no VAT fraud scheme in the present case, however. Nor is it apparent that there was a failure to carry out effective VAT controls in the present case. Moreover, Article 19(2) of the DOPK does not constitute a VAT control.

39. Nor does the liability under Article 19(2) of the DOPK constitute a measure intended to counter any other illegal activity affecting the financial interests of the Union. Rather, it is liability for an inappropriate reduction in the assets of a company, which, as a result, can no longer pay certain (tax) debts in full. In that context, the company itself does not act unlawfully, but is merely no longer able to pay the taxes.

40. The executive body, as a natural person, acts in bad faith (it being somewhat questionable whether that can already be said to constitute unlawful activity), and, moreover, does so ‘only’ in relation to the financial interests of the company, because it has granted itself inappropriate remuneration out of the company’s assets. In any event, it is not acting unlawfully in relation to the financial interests of the Union at this stage. It is only indirectly, in further circumstances – the company is subsequently no longer able to pay its taxes – that such conduct can have an impact on tax revenue (and thus indirectly also on VAT revenue), which then triggers the consequences of liability. It is at most indirectly that such liability can also counteract a threat to VAT revenue.

41. This distinguishes the present situation from that underlying the judgment in *Åkerberg Fransson*.<sup>12</sup> The legal consequence adopted by the Court in that case – that tax penalties and criminal proceedings for tax evasion due to the provision of false information concerning VAT constitute implementation of Article 325 TFEU<sup>13</sup> – related to the direct fight against VAT fraud. In the present case, however, it is not VAT fraud that is being penalised, but rather conduct in bad faith to the detriment of the company (possibly a kind of breach of trust). By contrast, the secondary liability of a company’s executive body which has acted in bad faith under Article 19(2) of the DOPK has nothing to do with the obligation of the Member States under Article 325 TFEU.

## 2. The PFI Convention

42. The PFI Convention does not apply, for similar reasons. This is because it, too, is linked to the effective combating of fraud. Thus, Article 1 of that convention expressly refers to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the Union or budgets managed by, or on behalf of, the Union. Accordingly, the term ‘fraud affecting the ... financial interests’

<sup>11</sup> Judgment of 8 March 2022, *Commission v United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 211).

<sup>12</sup> Judgment of 26 February 2013 (C-617/10, EU:C:2013:105).

<sup>13</sup> Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 27), confirmed by judgments of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 39 et seq.), and of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 32 et seq.).

within the meaning of Article 1(1) of the PFI Convention must necessarily be interpreted as including the intentional use of false or incorrect statements submitted after the implementation of the project for which financing is granted.<sup>14</sup>

43. That has not taken place in the present case. As already stated above, the applicant did not submit any such statements and thereby bring about an illegal diminution of the resources of the budget of the Union. The fact that he, as an executive body of a company, gave himself an inappropriate salary and thereby harmed the financial interests or assets of the company is not the subject of the PFI Convention.

### *3. Article 205 of the VAT Directive*

44. At first glance, however, the secondary liability provided for in Article 19(2) of the DOPK could be based on Article 205 of the VAT Directive. That article provides that, in certain situations (namely those in Articles 193 to 200 and Articles 202, 203 and 204), Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.

45. That provision thereby seeks to ensure for the public exchequer the efficient collection of VAT from the most appropriate person in the light of the specific situation, particularly where the parties to the contract are not in the same Member State or where the transaction subject to VAT relates to supplies the specific nature of which makes it necessary to identify a person other than that referred to in Article 193 of that directive.<sup>15</sup>

46. There is no such situation in the present case. This is also rightly emphasised by the Commission and the Kingdom of Spain.

47. Article 204 of the VAT Directive concerns the appointment of an (external) tax representative where the taxable person is not established in the Member State of the place of supply in which he or she has carried out transactions. However, the applicant is not an appointed tax representative. Article 203 of the VAT Directive covers the tax liability that results from the unfounded mention of VAT in an invoice. Neither the applicant nor the company issued such an invoice in the present case. Article 202 of the VAT Directive covers goods which are in customs warehouses or are being dispatched between them. That is not the case here.

48. By contrast, Articles 193 to 200 cover certain transactions (supplies of goods and services) which give rise to tax liability on the part of a taxable person or certain non-taxable persons. In the case of such a transaction, a person other than the tax debtor can then also be identified as the liable party. However, the granting of an inappropriate salary is not a taxable and taxed supply of goods or services giving rise to tax liability on the part of a person. Without such tax liability, there is no tax debtor. Nor can a person other than the tax debtor then be held liable for it.

49. The conditions of Article 205 of the VAT Directive, which relates only to the situations described in Articles 193 to 204 of that directive, are therefore not met. The secondary liability provided for in Article 19(2) of the DOPK is not based on Article 205 of the VAT Directive.

<sup>14</sup> Judgment of 14 October 2021, *Ministerul Lucrărilor Publice, Dezvoltării și Administrației* (C-360/20, EU:C:2021:856, paragraph 29).

<sup>15</sup> See, to that effect, judgment of 20 May 2021, *ALTI* (C-4/20, EU:C:2021:397, paragraph 28).

#### 4. Article 273 of the VAT Directive

50. That leaves Article 273 of the VAT Directive. According to that provision, Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

51. Therefore, the decisive factors are, first, whether the secondary liability of a company’s executive body laid down in Article 19(2) of the DOPK ensures the ‘correct collection of VAT’ within the meaning of Article 273 of the VAT Directive in order to prevent evasion (see Section (b)) and, second, whether the other obligations referred to in Article 273 of the VAT Directive can also apply to a non-taxable person – who has not yet been required to fulfil any obligations under the VAT Directive (see Section (a)).

##### *(a) Other obligations of a non-taxable person?*

52. As follows from the very wording of Article 273 of the VAT Directive, the possible extension of obligations relates to obligations of taxable persons within the meaning of the VAT Directive. This is because the proviso of ‘equal treatment [of] taxable persons’ only makes sense if the additional obligations relate to a (different) taxable person. Additional obligations of a non-taxable person who is not involved in a transaction could not per se constitute a difference in treatment between domestic and intra-Community transactions.

53. Therefore, Article 273 of the VAT Directive does not allow the Member States to lay down additional obligations for just any persons (employees, family members, neighbours, and so forth) who have any indirect connection to the VAT liability of a third party and thereby to extend the scope of the VAT Directive to those persons as well.

54. The wording ‘other obligations’ (or also ‘further obligations’ in other language versions) also seems to me to presuppose already existing obligations within the meaning of the VAT Directive, which can be supplemented on certain grounds via Article 273 of the VAT Directive. Therefore, it is my view that that wording does not allow for the creation of new, first-time obligations for persons not previously covered by the VAT Directive.

55. That outcome is in line with the scheme and purpose of the VAT Directive. This is because that directive regulates (substantive) VAT law, that is to say the incurrance of the VAT debt by a person taxable for VAT purposes. Therefore, the constituent element (Article 2(1) of the VAT Directive) requires supplies of goods or services by *a taxable person*. Article 9 of the VAT Directive then defines who is a taxable person. Such persons are only persons who carry out an economic activity independently. In principle, that does not include employed executive bodies of a company.<sup>16</sup>

<sup>16</sup> See, even in relation to a non-employee supervisory board: judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)* (C-420/18, EU:C:2019:490).

56. Likewise, Article 273 appears in Chapter 7 (Miscellaneous provisions) of Title XI, entitled ‘Obligations of taxable persons and certain non-taxable persons’. Whereas Article 272 allows certain taxable persons to be released from certain obligations under Chapters 2 to 6, Article 273 extends the obligations to include further/other obligations. From a schematic viewpoint, this can only mean the obligations of taxable persons and certain non-taxable persons covered by Title XI.

57. If the scope of the VAT Directive does not in principle<sup>17</sup> cover persons who are not subject to VAT, Article 273 of the VAT Directive can hardly allow the Member States to lay down special (further/other) obligations for persons previously not covered by the VAT Directive, just because doing so also serves to safeguard VAT revenue and prevent tax evasion. Accordingly, the requests for a preliminary ruling answered by the Court in connection with Article 273 of the VAT Directive have always concerned cases in which additional obligations or penalties were imposed on a taxable person.<sup>18</sup>

58. An extension of the obligations on the basis of Article 273 of the VAT Directive is at most possible in respect of persons who – although not taxable persons – are nevertheless already covered by the VAT Directive. One example is non-taxable legal persons who are identified for VAT purposes and can therefore also become liable for payment of VAT (see Article 197(1)(b) of the VAT Directive).

59. This is also made clear by Article 273(2) of the VAT Directive. This is because the option under the first paragraph may nevertheless ‘not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3 [(“Invoicing”) of Title XI (“Obligations of taxable persons and certain non-taxable persons”)]’. The obligations referred to therein also relate only to taxable persons and certain non-taxable persons already covered by the directive.

60. This is true in particular when Article 205 of the VAT Directive is taken into account. Since that provision expressly covers only certain situations, an extension to other situations can hardly be justified on the basis of Article 273 of the VAT Directive. Accordingly, it is true that parallel secondary liability of a customer for the VAT debt of a supplying undertaking would also be beneficial in safeguarding tax revenue and preventing tax evasion. The same applies to the liability of any thief whose theft results in the victim being unable to pay his or her VAT debts. However, the wording of Article 273 of the VAT Directive does not allow for that liability of such non-taxable persons.

*(b) Secondary liability necessary for the correct collection of VAT and to prevent evasion?*

61. Moreover, the question arises, from the outset, as to whether the secondary liability under Article 19(2) of the DOPK is suitable in the first place for ensuring the correct collection of VAT and preventing evasion.

<sup>17</sup> There are exceptions, for example for non-taxable legal persons, as they can, for example, also make intra-Community acquisitions (see Article 2(1)(b), Article 20(2) of the VAT Directive) or become liable for payment of VAT (see Article 197(1)(b) of the VAT Directive).

<sup>18</sup> See order of 21 October 2021, *EuroChem Agro Hungary* (C-583/20, not published, paragraph 25); judgments of 15 April 2021, *Grupa Warzywna* (C-935/19, EU:C:2021:287, paragraph 24); of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374); of 26 October 2017, *BB construct* (C-534/16, EU:C:2017:820, paragraph 22 concerned the provision of a guarantee by new taxable persons); of 19 October 2017, *Paper Consult* (C-101/16, EU:C:2017:775, paragraph 55); of 5 October 2016, *Maya Marinova* (C-576/15, EU:C:2016:740, paragraph 42); and of 21 June 2012, *Mahagében and Dávid* (C-80/11 and C-142/11, EU:C:2012:373, paragraph 54 refers to traders, paragraph 61 to taxable persons).

62. This is because it remains a general secondary liability – even of a non-taxable person, as in the present case – for another person’s tax. Therefore, the amount owed by the applicant is not VAT. That is still owed by the taxable person. This is shown by Article 21(3) of the DOPK. Under that provision, the secondary liability ceases as soon as the tax debt is extinguished and amounts already paid are reimbursed to the liable party. Consequently, payment by the liable party does not even extinguish the tax debt.

63. However, if the applicant does not owe VAT, the secondary liability under Article 19(2) of the DOPK also cannot ensure the correct collection of VAT. What that secondary liability seeks to penalise or prevent is a reduction of assets in bad faith to the detriment of the company, which, as a result, is unable to pay its debts (in the present case, tax debts). Thus, the liability under Article 19(2) of the DOPK neither hinders nor facilitates the correct collection of VAT. This is because the VAT continues to be collected in exactly the same amount from the person taxable for VAT purposes.

64. Moreover, that liability of a non-taxable person does not prevent evasion by the taxable person. The liability is linked solely to the failure to pay tax due to the taxable person’s lack of assets. However, the mere non-payment of duly declared tax does not constitute tax evasion.<sup>19</sup> The conditions for the application of Article 273 of the VAT Directive are not met in that regard either.

### ***B. Interim conclusion***

65. Therefore, as the Republic of Bulgaria emphasised, Article 19(2) of the DOPK does not implement EU law. It does not penalise an infringement of the provisions of the VAT Directive, but a breach of fiduciary duties towards the company. Such a breach has, at best, an indirect effect on the payment of VAT by a third party.

66. However, as I have previously stated elsewhere, it is not the case that any indirect links with VAT law are sufficient to substantiate the applicability of EU law.<sup>20</sup> That approach is in line with the Court’s case-law as it pertains to the determination of the scope of the Charter of Fundamental Rights of the European Union (‘the Charter’).<sup>21</sup> The applicability of the Charter also presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other.

67. Consequently, the Court does not have jurisdiction to answer the questions asked in the present case. The general joint and several liability of a company’s executive body (non-taxable person within the meaning of the VAT Directive) for conduct causing harm to the company (*in casu*: granting a salary at an unreasonable level), which causes the non-payment of tax debts owed by the company, is not the subject of the VAT Directive and does not come within the scope of EU law. The same applies where some of the company’s tax debts which have not been paid or were paid late are VAT debts or interest on VAT debts which were paid late.

<sup>19</sup> Judgment of 2 May 2018, *Scialdone* (C-574/15, EU:C:2018:295, paragraphs 39 and 40); see also in detail in that regard my Opinion in *HA.EN.* (C-227/21, EU:C:2022:364, point 35 et seq.).

<sup>20</sup> See my Opinion in Joined Cases *IN and JM* (C-469/18 and C-470/18, EU:C:2019:597, point 65). See also, in that regard, judgment of 24 October 2019, *Belgische Staat* (C-469/18 and C-470/18, EU:C:2019:895, paragraph 18).

<sup>21</sup> Judgments of 6 October 2016, *Paoletti and Others* (C-218/15, EU:C:2016:748, paragraph 14); of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 34); and of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 24).

***C. In the alternative: does EU law preclude joint and several liability for VAT debts, including interest thereon?***

68. If, by contrast, the Court considers that it does have jurisdiction to answer the questions referred, because it interprets the secondary liability under Article 19(2) of the DOPK as implementing the VAT Directive, the three questions referred by the referring court can be answered as follows: EU law does not require such secondary liability, but does not preclude it either.

69. According to the Court, in the context of liability under Article 205 of the VAT Directive, there can be no objection to that liability extending not only to the tax debt, but also to default interest of a third party.<sup>22</sup> Even if, according to the wording of Article 205 of Directive 2006/112, the joint and several liability provided for in that article relates only to the payment of VAT, that wording does not preclude Member States from being able to impose on the joint and several debtor all the elements relating to that tax. They include default interest owed by the person liable for payment on account of his or her failure to pay the tax.<sup>23</sup>

70. In my opinion – in line with the view taken by the Commission and the Kingdom of Spain – the same applies to the present case, in so far as the additional secondary liability can be based on Article 273 of the VAT Directive. If the company’s executive body, through its own actions (granting an unreasonable salary), has caused the company to be unable to pay its VAT debt in due time, liability for those unpaid taxes and the ensuing enrichment of a third party (advantage in the form of interest) serves a legitimate objective (safeguarding the company’s assets through liability for the taxes to be paid and for the associated harm caused by the delay in payment).

71. Such liability also fulfils the other requirements of the principle of proportionality.<sup>24</sup> It is appropriate and necessary for achieving the abovementioned objective. A less severe but equally appropriate means is not apparent. In so far as it affects the person responsible – who has enriched himself or herself by impoverishing the company, thereby causing the non-payment of the tax debt, including the interest debt – such liability is also a proportionate means.

## **VI. Conclusion**

72. I therefore propose that the Court answer the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria) as follows:

The general joint and several liability of a company’s executive body (non-taxable person within the meaning of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘the VAT Directive’) for conduct causing harm to the company (*in casu*: granting a salary at an unreasonable level), which causes the non-payment of tax debts owed by the company, is not the subject of the VAT Directive and does not come within the scope of EU law. The Court therefore does not have jurisdiction to answer the questions asked.

<sup>22</sup> Judgment of 20 May 2021, *ALTI* (C-4/20, EU:C:2021:397, paragraph 40 et seq.).

<sup>23</sup> Judgment of 20 May 2021, *ALTI* (C-4/20, EU:C:2021:397, paragraph 42); the Court did not adopt the narrower interpretation of Article 205 of the VAT Directive that I had proposed – see my Opinion in *ALTI* (C-4/20, EU:C:2021:12, point 31 et seq.).

<sup>24</sup> By way of example: judgments of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 57), and of 27 January 2009, *Persche* (C-318/07, EU:C:2009:33, paragraph 52).